



Hong Kong Retail Management Association
Comments on the Amendments on the Personal Data (Privacy)
(Amendment) Bill 2011 (“the Bill”)

24 November 2011

The Hong Kong Retail Management Association (“HKRMA”) wishes to present our views on the proposed amendments:

1. Sale of Personal Data

(a) The definition of “sell” means to provide data to a person for “gain in money or other property”. We are concerned that the inclusion of the words “other property” in the definition of “sell” makes the definition too broad and that it may inadvertently prevent standard business practices. For example, many promotions involve many parties (such as retailers/banks), and such promotions are designed to provide some “gain” or benefits to the participants.

(b) It is not clear how section 35B (sale of personal data) can be distinguished from section 35N provision (otherwise than by sale) of personal data to persons for use in direct marketing. For example section 35N provides that “a data user who intends to provide, otherwise than by sale, any personal data of a data subject to a person for use in direct marketing for that person’s own purposes must take the action specified in subsection (3).” What is the meaning of “for that person’s own purposes” and is for “gain in money or other property” relevant? We recommend that this should be clarified.

(c) Section 35F allows the Chief Executive to grant exemptions conditionally or unconditionally to any class of data user or any kind of personal data. We recommend that criteria should be set out to make it clear in what circumstances the powers should be exercised.



2. Sanctions

(a) The new sanctions that are imposed are severe – up to \$1,000,000 in fines and 5 years imprisonment. The highest level of fine at the Magistrates Courts is level 6 with a fine of \$100,000. The maximum term of imprisonment under District Court is 7 years. Criminal penalties should be proportionate to the offence, including the seriousness of the damage suffered by the data subject. We understand the reasons for increasing the level of fines, but we do not agree with the proposal to impose custodial penalties. It is very disappointing that the Government has not provided any justification in the explanatory memorandum explaining the reasons for the proposed level of fines and imprisonment.

(b) There is a heavier penalty for repeated contravention of enforcement notices. We suggest that guidelines should be provided on specific steps required to remedy contravention in compliance with the enforcement notices.

3. Use of Personal Data in Direct Marketing

(a) We understand the requirement that Personal Information Collection Statements (PICS) should contain specific information and be understandable and readable. However a balance needs to be struck between requiring more detailed descriptions of intended marketing activities and classes of persons to whom data may be transferred, and the objective of making the PICS understandable and user-friendly. A requirement for too much detail may be counterproductive and discourage the general public from actually reading the PICS statement! Clear guidelines need to be issued on this point and should be made available for further public consultation to ensure it strikes the right balance.

(b) We are concerned about the implications of section 35H (4) which seems to require data users to give data subjects the option to agree to some elements of data usage, but not others (e.g. in relation to specific kind of data or specific class



of data subjects). This will be unworkable in practice as businesses would have to provide tailor-made marketing programmes for each customer's requirements.

4. Data Processors

Further clarification is needed on what types of "other means" are envisaged to ensure that data processors comply with the PDPO. For example, it would not be realistic to expect that data users should continuously monitor every aspect of data processors' operations, since this would undermine the efficiency benefits of outsourcing / sub-contracting to data processors in the first place.

5. Procedural Amendments

(a) The Commissioner can grant legal assistance to a data subject – the new sections 66A & 66B are added. At the same time, it is proposed to amend section 73F of the District Court Ordinance to preempt a cost order against the Commissioner unless "the proceedings are brought maliciously or frivolously" and to dispose of the rules of evidence. As these are exceptions to the normal rules, the Government needs to explain why this is justified. We are disappointed that there is no mention of these amendments in the explanatory memorandum, nor is any justification provided.

(b) Time limit for laying of information – a new section 64A is added to extend section 26 of the Magistrates Ordinance from 6 months to 2 years from the date of the commission of the offence. As this is an exception to the normal rules, the Commissioner needs to explain why this is justified. We are disappointed that there is no mention of this amendment in the explanatory memorandum, nor is any justification provided.

(c) The Commissioner can verify the accuracy of data user returns. A new section 14A provides that the Commissioner may require a data user to provide any document, record, information or thing specified in the notice and to respond in writing to any question specified in the notice for this purpose. Clear rules of



engagement are required so that data users can have a reasonable chance to comply. This requires clarity and guidelines on the type of document, record, information or thing that may be included. e.g. “Optional Information” proposed in the Consultation Document.

6. Regulatory Impact Assessment (RIA)

In view of the burden on business in compliance with the proposed amendments, we recommend that a RIA should be conducted to assess the impact on relevant stakeholders, including businesses.

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About HKRMA

The Hong Kong Retail Management Association (HKRMA) was founded in 1983 by a group of visionary retailers with a long-term mission to promote Hong Kong’s retail industry and to present a unified voice on issues that affect all retailers. Established for 28 years, the Association has been playing a vital role in representing the trade, and raising the status and professionalism of retailing through awards, education and training.

Today, HKRMA is the leading retail association in Hong Kong with membership covering more than 6,000 retail outlets including SME retailers, and employing about half of the local retail workforce. HKRMA is one of the founding members of the Federation of Asia-Pacific Retailers Associations (FAPRA) and is the only representing organization from Hong Kong. FAPRA members cover 17 Asian Pacific countries and regions.