NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry of Justice

on the

Consultation on cross-border disclosure regulations under section 214 of the Privacy Act 2020

4 December 2020

NEW ZEALAND BANKERS ASSOCIATION
Level 15, 80 The Terrace, PO Box 3043, Wellington 6140, New Zealand
TELEPHONE +64 4 802 3358 EMAIL nzba@nzba.org.nz WEB www.nzba.org.nz

About NZBA

1. The New Zealand Bankers' Association (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following seventeen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of China (NZ) Limited
   - Bank of New Zealand
   - China Construction Bank
   - Citibank N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - Industrial and Commercial Bank of China (New Zealand) Limited
   - JPMorgan Chase Bank N.A.
   - Kiwibank Limited
   - MUFG Bank Ltd
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited

Introduction

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Justice (**MOJ**) on its consultation on the proposed cross-border disclosure regulations under 214 of the Privacy Act 2020. NZBA commends the work that has gone into developing this consultation.

Summary

4. We understand that the criteria for prioritising countries for assessment as "prescribed countries", is as follows:

   (a) the likelihood of meeting key privacy standards, as MOJ does not want to prioritise countries that are unlikely to be prescribed;

   (b) the size of the economic relationship, which will allow MOJ to prioritise countries that will be the most beneficial for New Zealand businesses and stakeholders; and

(c) New Zealand business and stakeholder views, to assist MOJ in understanding which countries would be most valuable to prioritise and why.

5. We propose the European Union (including the United Kingdom) (**EU**) and Australia receive priority consideration to be assessed as prescribed under the Privacy Act 2020 on the basis set out below.

EU and Australia likely to meet key privacy standards

6. The EU has recently enacted the General Data Protection Regulation (**GDPR**), which is widely considered to be the high bar of privacy legislation internationally.

7. Australia has the Privacy Act 1988, which informed the design of New Zealand's existing Privacy Act 1993 and is structurally very similar to the Privacy Act 2020. It is acknowledged that Australia also has privacy legislation operating at the state level and that it is not as comprehensive, but this is less relevant to determining whether a country should be a "prescribed country".

8. Both the GDPR and Australian Privacy Act 1988 share the principles-based approach to privacy with the Privacy Act 2020, with principles addressing collection, use, disclosure, correction, access, security and transparency.

9. The GDPR, Australian Privacy Act 1988 and Privacy Act 2020 also share the same conceptual origin of the 1980 OECD Privacy Guidelines, which has strongly influenced their similarity today.

10. Both the EU and Australia have functional judicial systems.

11. While the Australian Privacy Act 1988 is very similar to the Privacy Act 2020, the Privacy Act 1988 has carve-outs for employee data and for businesses with less than AUD$3 million revenue. This may mean that Australia's status as a prescribed country would have to be limited in its application to non-employee data and organisations with more than AUD$3 million revenue.

12. The Australian Attorney-General is reviewing the Privacy Act 1988. In particular, whether the exemptions should be removed. Early discussions in the market suggest the carve-outs may be removed (due to Australia wanting to be found to provide "adequate protection" – see below).

13. The GDPR has a number of privacy protections that go above and beyond the Privacy Act 2020 such as the right to an explanation of automated decisions, right to data portability, right to erasure, much larger fines, and extra protections for special categories of data.

Size of the economic relationship, and business and stakeholder views

14. The Ministry for Foreign Affairs and Trade has listed Australia as our biggest services trade partner here and the Closer Economic Relations Trade Agreement is particularly comprehensive. In addition, the EU is one of our largest markets by volume of trade.

15. We also note that the GDPR has a regime which looks at whether countries provide "adequate protection" (which has been found to mean "essentially equivalent" protection) compared to the high standard of the GDPR. This is conceptually similar to the "prescribed countries" regime that MOJ is now consulting on, and should mean international disclosures to countries providing "adequate protection" are aligned to disclosures that occur within the EU.

16. New Zealand has been found to provide adequate protection by the European Commission (as has Argentina, Canada (commercial organisations), Israel, Japan, Switzerland, Uruguay, and discussions with South Korea are ongoing). In addition to finding EU countries as providing 'comparable safeguards', MOJ could form a view that the European Economic Area, and any country which the European Commission has found to provide "adequate protection", all provide 'comparable safeguards' and hence could be added to the NZ "prescribed countries" list.

17. Essentially MOJ could rely on the comprehensive review the European Commission carries out in determining 'adequate protection' in an EU context, and add those countries to the NZ "prescribed countries" list. Including all countries (i) subject to the GDPR, or (ii) found to provide "adequate protection" (essentially equivalent protection) to the GDPR, would greatly expand the relevant amount of trade impacted.

Contact details

18. If you would like to discuss any aspect of this submission, please contact:

Antony Buick-Constable
Deputy Chief Executive & General Counsel
antony.buick-constable@nzba.org.nz

Olivia Bouchier
Policy Director & Legal Counsel
olivia.bouchier@nzba.org.nz