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Office of the Privacy Commissioner

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Retail NZ submission: draft Biometric Processing Privacy Code

Overview

1. Retail NZ is a membership organisation that represents the views and interests of New Zealand's retail sector. We are the peak body representing retailers across Aotearoa, with our membership accounting for nearly 70% of all domestic retail turnover. New Zealand's retail sector comprises approximately 27,000 businesses and employs around 220,000 Kiwis.
2. Retail NZ consulted our membership in the preparation of this submission. The Farmers Trading Company Limited has co-signed this submission.
3. Retail NZ strongly supports the introduction of new technologies to proactively combat retail crime, such as the use of biometric data to identify repeat offenders. Accordingly, our comments in this submission are focused on the use of biometrics to combat crime. We note the potential of biometrics, including facial recognition technology, to be utilised for marketing. Our position is that it is critical that this is done in a transparent and appropriate manner at all times, to protect the privacy of individuals and ensure they are not being targeted with unwanted marketing approaches.
4. Retail crime is a significant issue for Retail NZ's members. Crime presents an increasing health and safety risk to employees and customers, and to the financial sustainability of retail businesses. The \$2.6 billion annual cost of retail crime flows through from retailers to customers and the New Zealand economy.
5. Every day, retailers are dealing with threatening, violent or simply unpleasant customers, who are trying to steal or damage their property. Almost every retail worker has been affected by crime and aggression which is traumatic for those directly involved, their colleagues and whanau.
6. It is important that retail employees feel safe at work. Biometric processing of individuals entering retail premises has been shown to reassure employees that they can go about their day as safely as possible.
7. Retail NZ considers there are significant benefits this technology can provide when used with the right controls. There is a real opportunity to benefit both business and public safety. The Foodstuffs North Island trial of facial recognition technology has been valuable to the wider retail sector, to demonstrate its value in mitigating crime and the processes for its use.
8. We accept there are risks in the collection of biometric information and agree that businesses must do this responsibly, meeting the requirements of the Privacy Act. This will become even more important as the technology improves and the opportunities grow to adapt biometric data for other purposes.

9. Retail NZ acknowledges the Privacy Commissioner’s objectives in establishing a Biometric Processing Privacy Code to ensure the privacy of individuals is adequately protected while also allowing businesses the ability to protect themselves, their staff and customers.
10. The Code and supporting guidelines will ensure retailers are being transparent and using best practice, thereby building trust with the public on the use of biometrics. Building trust with the public around this technology is paramount, as individuals want to feel safe, not that they are under surveillance.
11. However, care must be taken to ensure that the Biometric Processing Privacy Code does not hinder innovation and place excessive burdens on businesses. In establishing the Code, the Privacy Commissioner must also take account of wider societal issues like crime, and its impacts on the physical and mental wellbeing of retailers, staff and customers.
12. In particular, all employers have a duty of care to their staff and others on their premises under the Health and Safety at Work Act. Facial recognition technology enables retailers to exercise more control over who enters their stores and put in place appropriate measures, whether that is asking them to leave, monitoring them while in the store or calling Police. The use of these technologies will increasingly be required if employers are to show they have taken all practicable steps to protect their staff and customers from harm.
13. The set up and ongoing costs of collecting and processing biometrics, including staff training time, will mean it is only used when retailers are confident that the benefits are worth the investment and that customers will not be unduly inconvenienced.
14. We understand the concerns about accuracy and bias. However, the technology is improving all the time and the learnings from the Foodstuffs North Island trial will help to alleviate these concerns. For example, we are aware that Foodstuffs North Island instituted a very high (90%) minimum match before staff were alerted to authenticate the image through human checks by two trained team members.

Retail NZ responses to consultation questions

Questions about who the Code applies to

1. ***Do you agree that the Code should apply to any organisation using biometric processing (as opposed to a specific sector or type of organisation)?***
Retail NZ agrees that the Code should apply to all organisations using biometrics, irrespective of when they start doing biometric processing.
2. ***Do you agree with the exclusion for health agencies?***
Retail NZ has no comment on this point, as health agencies are outside our mandate.
3. ***Do you have any comments or questions about the interaction between the Code and other laws with biometrics provisions?***
Retail NZ would ask that all legislation with biometric provisions is reviewed and where necessary, updated to ensure it aligns with the Biometric Processing Privacy Code.
4. ***Do you have any feedback on the guidance on who the Code applies to? (See pages 11-13)***
Retail NZ has no concerns about the listed exclusions.

Questions about when the Code would apply

5. ***Do you agree that the rules in the Code should apply immediately to any organisation that starts using biometrics after the Code comes into force?***

Retail NZ is aware that more retailers are looking to introduce the use of biometrics into their operations in the short to medium term. We recommend a grace period 12 months after the Code becomes active for all users of biometrics to comply with it. This aligns with our proposal in response to Q6 below.

6. ***Do you agree that there should be a longer commencement period of nine months for organisations already using biometrics to bring their activities and systems into alignment with the rules in the Code?***

Feedback from Retail NZ members suggests that a minimum period of at least 12 months will be needed for retailers to transition to the rules in the Code. Nine months is insufficient time for necessary changes to policies, processes, privacy impact assessments, notification procedures, technology updates and integration, and training.

More clarity is needed for large retailers who are already using biometrics in one or more stores. If they wish to extend the use of biometrics to more of their stores, it is not clear whether they would be considered as new users (and therefore the Code would apply immediately) or as existing users. All stores under a single brand are not the same, serving different communities and with differing security needs. In addition, these multi-store retailers operate under a range of ownership structures, including corporate, co-operatives, owner-operators or franchises.

Retail NZ recommends that new stores under a brand that is already using biometrics should be given the nine-month deadline as existing systems within their group may need to be adjusted to meet the needs of the individual store.

Questions about what the Code applies to

7. ***Do you agree with the definition of biometric information and related terms (biometric characteristic, sample, feature and template and result)?***

Retail NZ has no concerns with the definitions listed in the draft Code.

8. ***Do you agree with the definition of biometric processing and related definitions (biometric verification, identification and categorisation)?***

Retail NZ has no concerns with the definitions listed in the draft Code.

9. ***Do you agree with the information types excluded from biometric information (biological, genetic, brain and nervous system material)?***

Retail NZ has no concerns about the exclusions.

10. ***Do you agree with the processes excluded from biometric categorisation and the way they are described (readily apparent expression and analytical process integrated in a commercial service)?***

Retail NZ has no concerns about the exclusions.

11. ***Do you have any feedback on the guidance on what the Code applies to? (See pages 5-13)***

Retail NZ has no additional feedback on the overall guidance in the Code.

Questions about rule 1

12. Do you agree that as part of assessing whether using biometrics is necessary, the organisation must examine its effectiveness and check if there are alternatives?

Retail NZ agrees that every organisation that wishes to make use of individuals' biometric information should complete its own assessment on effectiveness. We also contend that the requirement for organisations to check for alternatives is not necessary. In the retail sector, biometric identification will be used in conjunction with other methods to prevent and detect crime, such as CCTV, security guards and anti-theft technologies. Due to its cost and the requirements around its use, biometric technology will be used to complement other methods.

Given the cost of the technology required, Retail NZ believes that retailers will carefully assess whether it is the best solution for them before they make a decision to invest in it. As noted above, the use of such technology is likely to be increasingly required to demonstrate that employers have taken all practicable steps to protect the safety of their staff and customers under the Health and Safety at Work Act.

The wording of the Code currently does not provide sufficient definitions of 'alternative means' which could imply any other means. As noted, biometric information is likely to be used alongside other solutions. It is not an and/or situation where biometric information completely replaces existing technology or processes.

13. Do you agree that organisations must consider whether the processing is proportionate to the impacts? Do you agree with the factors that go into this assessment (degree of privacy risk, the benefits, any cultural impacts on Māori)?

Retail NZ agrees that organisations must consider proportionality. As mentioned previously, the cost of the technology, training and ongoing staff requirements will mean that retailers will carefully assess its value before they decide to use it.

It is also important that the Privacy Commissioner considers whether the use of biometrics technology is proportionate to the problem it is trying to solve. Privacy is important but it is only one aspect of what retailers will consider. They will also look at the impact of crimes and assaults on their staff; whether the use of biometrics will reduce physical and psychological risks to their staff and customers; the costs of other crime prevention methods including security guards; whether it will reduce the financial impacts of crime on their businesses; and how it will influence the customer experience in the store.

We are concerned that the draft code of practice places too much onus on businesses to demonstrate in detail that the collection of biometric information is proportionate to the risks to privacy and will place unnecessary barriers in the way of using biometrics.

The proportionality test must not be too prescriptive. It needs to be flexible enough to cover a range of technologies, uses and situations. As the technology improves, new uses for it will emerge. For example, we are aware that in future biometrics could be used to automate proof of a purchaser's age when they are buying age-restricted products like alcohol and tobacco.

Where a retailer is installing biometrics technology in multiple stores, a separate proportionality assessment should not be required for each individual store. While the security risks for individual stores might differ from others in the same group, it should be enough for the retailer to show that they have assessed proportionality across their organisation.

We understand the concerns about accuracy and bias in the use of biometric screening. However, the technology is improving all the time and we believe the results from the Foodstuffs North Island trial will help alleviate these concerns. Research has well established that humans are not good at recognising unfamiliar faces. Accuracy ratings improve with

training but are still plagued by cognitive bias. The technology has been shown to be able to effectively recognise past offenders in real time, as long as it is backed up by human authentication.

We agree that the best industry standards must be implemented when choosing a biometric supplier or product, and evaluation rates of algorithm accuracy provided to customers.

We also have concerns about the requirement to consult Māori. While we strongly agree that the cultural implications of biometrics use must be considered, it would seem to place an onerous burden on both businesses and Māori organisations for such consultation to be carried out every time biometric uses are introduced. We suggest a centralised solution or a national agency with the expertise and resource to assess such applications.

14. Do you agree with the requirement to adopt reasonable safeguards? Do you agree with our decision to list safeguards in guidance as opposed to the Code? Or is helpful / clearer to provide examples in the Code itself?

Retail NZ supports the use of reasonable and practicable safeguards to protect privacy information. We support extensive measures to safeguard individual's biometric information with the use of restricted access to the technology.

The safeguard measures must not be too prescriptive as each retailer will be operating in different circumstances. The retailer must be able to demonstrate that they are taking appropriate steps to protect individuals' privacy but they should not be required to undertake any particular measure.

We agree that the safeguards should be listed in the guidance rather than the Code, as it is more likely that users will look to the guidance document for support as it is more accessible and easy to understand than the Code.

15. Do you agree with the new trial provision? Can you see any risks or benefits of this provision? Do you agree that the rest of the rules should apply while a trial is being conducted?

Retail NZ recommends that the requirement to conduct a trial is not mandatory.

Aspects of the provision for a trial to assess effectiveness are problematic for retailers.

As noted above, retailers will already be using other crime prevention methods. They will not be able to prove that biometric technology will have a proportionate benefit in preventing crime until the technology is in use. Given the level of investment required to install biometric processing in a store, a requirement to have a trial period before being permitted to use the technology would deter some retailers from making the initial outlay.

Therefore, better alignment is needed between the effectiveness and proportionality requirements. There should be an ability for both proportionality and effectiveness to be established at the end of the trial. Having both these assessments in the Code with different timing requirements will make compliance more challenging in most retail settings.

Clarification is needed over whether a trial would be required for each store where retailers have multiple shopfronts across Aotearoa New Zealand, each serving different communities, with different security needs. Where a national retailer has demonstrated that they have established the effectiveness of biometric use in one or more stores, Retail NZ recommends that they should be allowed to use the technology in other stores without the need for a trial each time.

- 16. Do you have any feedback on the guidance for rule 1? (See pages 21-63). In particular, do you have feedback on our example use cases? We envisage developing a decision tree for rule 1, would this be useful? Do you have any feedback on section on the cultural impacts on Māori? For Māori individuals or organisations, are there any other impacts we should discuss?**

Overall, it will be valuable to include more retail scenarios in the guidance, to support retailers in deciding whether the use of biometrics is right for them. It would also be useful to include the specific clauses from the Code that the guidance refers to or ensure there are clear links to the Code and instructions that the guidance must be read in conjunction with the Code.

A decision tree would be useful to support users in deciding whether to use biometrics, but its use should not be mandatory.

At pg. 40 of the draft Guidance, we note that there is a list of points to consider when assessing whether the use of biometric information is consistent with tikanga. This includes 'ensuring that biometric data of living individuals is not stored with biometric data of deceased individuals' and 'ensuring Māori biometric information remains in New Zealand'. Aligning with these points would be highly problematic for the use of biometrics in a retail setting, as stores will not be capturing information based on race. Storage of all Māori data in New Zealand would essentially mean that all biometrics data must be stored in New Zealand because there is no way to differentiate the data based on race. Our recommendation is that the Code recommends data is stored in New Zealand but this is not mandatory. All data storage would still have to meet Privacy Act requirements.

Questions about rule 2

- 17. Do you agree with the modification to the rule 2 exception to make it stricter?**

Retail NZ has no concerns about the modification.

- 18. Do you have any feedback on the guidance for rule 2? (See pages 63-74)**

It would be valuable to include more retail scenarios in the guidance, to support retailers in their use of biometrics.

Questions about the notification obligations in rule 3

- 19. Do you agree with the new minimum notification rule, that requires, at minimum, clear and conspicuous notice of a few key matters?**

Retail NZ has no concerns about the minimum notification rule.

- 20. Do you agree with the additional matters for notification? Do they require organisations to provide useful information? Are they workable?**

Retail NZ has no concerns about the additional matters for notification. We suggest that organisations provide a website reference or email address in their notification material, where people can find the information they want.

- 21. Do you agree with the removal of two notification exceptions?**

Retail NZ has no concerns about this.

- 22. Do you have any feedback on our rule 3 guidance? (See pages 74-87)**

The guidance appears adequate for retailers' needs.

Questions about rule 6

23. Do you agree that an organisation should have to tell the individual what form of biometric information they hold about them?

In many retail situations, it may not be possible or practicable to comply with this rule, as the individual's name is not linked to their biometric information. It would require a time-consuming manual process to go through potentially hundreds of images to identify if an individual's image is there. This process could only be done by those trained staff who are authorised to have access to the technology, likely only two or three in each store.

24. Do you have any feedback on our rule 6 guidance? (See pages 87-92)

It would be useful to include a retail scenario in the guidance for rule 6.

Questions about rule 10(1) and (2)

25. Do you agree with the intent of this modification? Do you have any comments about these provisions?

Retail NZ has no concerns about this modification.

26. Do you agree with the exceptions provided for using biometric information for different purposes in rule 10(9)? Do you think there should be more exceptions or fewer?

Retail NZ has no comment on this point.

Questions on limits on uses of biometrics in rule 10

27. Do you agree there should be a restriction on the use of biometric information to collect or generate health information outside of a health context? Do you agree with the exception where the individual has given their express consent? Do you anticipate risks or beneficial uses?

Retail NZ has no comment on this point.

28. Do you agree there should be limits around using biometric emotion recognition? Are you aware of high-risk or beneficial use cases?

Retail NZ has no concerns about the limits around the use of biometric emotion recognition.

29. Do you agree there should be limits on using biometrics to categorise people into certain sensitive groups? Are you aware of any high-risk or beneficial use cases?

It is unlikely that retailers would want or need to use biometrics to categorise people. Data shows that retail crime can be committed by people from any demographic or socio-economic background.

30. Do you think any other uses of biometric information should be restricted?

Retail NZ has no comment on this point.

31. Do you agree with the general exceptions to the limits (the exceptions for accessibility, preventing a serious threat to health or safety, and research purposes)? Do you think there needs to be other exceptions, and if so, why?

Retail NZ has no comment on this point.

- 32. Do you agree with the exceptions provided for using biometric information for different purposes in rule 10(9)? Do you think there should be more exceptions or fewer?**

Retail NZ has no comment on this point.

- 33. Do you have any feedback on our rule 10(5) guidance? (See pages 93-98)**

This rule seems to have little relevance to retail crime prevention uses so we have no comment on this guidance.

Questions about rule 12

- 34. Do you agree that organisations should ensure that adequate safeguards, reflecting those in the biometrics Code, are in place if sending biometric information overseas?**

Retail NZ agrees that organisations sharing biometric information offshore must ensure that the information will be treated with the same rigour as it would be in New Zealand. There may be situations where retailers, particularly those with trans-Tasman operations, international head offices or support services, want to centralise their biometric processing with an offshore team but they would have to meet New Zealand standards as a minimum.

Questions about rule 13

- 35. Do you agree with the intent of the reference to biometric features and templates in rule 13? Does this change help provide clarity on how rule 13 would apply?**

Retail NZ would like more clarity in the guidance on how rule 13 would apply.

There are occasions where an individual may use several different identities and in these cases, a unique identifier will be needed.

It is also unclear whether the unique identifier could be shared among stores in the same organisation - for example where an individual has been trespassed from several stores - or if the rule limits the identifier to an individual store.

Other questions

- 36. Do you have any other questions, comments or suggestions about the Code or guidance?**

Retail NZ has no further comments.

Conclusion

Thank you for the opportunity to make a submission. Retail NZ is happy to discuss any aspect of this submission further.

No part of this submission should be withheld under the OIA.

Sincerely,



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