

## Privacy Law Client Alert

20 October 2009

### Government's proposed amendments to the Privacy Act

On 14 October 2009, the Commonwealth Government released its first substantive response to the report produced by the Australian Law Reform Commission ("ALRC") concerning reforms to Australia's information privacy regime. The Government intends to release an exposure draft of the legislation implementing the Government's proposed amendments in early 2010.

The Government has deferred its response to the ALRC's recommendations to:

- remove the so-called "small business exemption" and the employee records exemption;
- introduce a statutory cause of action for a serious invasion of privacy; and
- introduce the so-called "data breach notification".

At this stage, the Government has not set a timeframe on when it will publicly release its response to these recommendations.

It is clear, however, that the Government will make important changes to the *Privacy Act 1988* (Cth) ("**Act**") in the next 12 months. Businesses who collect, handle, use and disclose personal information need to plan to implement the changes to their own policies and procedures when they become law.

The Government will amend the *Act* to make it "more user-friendly for individuals, organisations and agencies". In particular, the Government will revise the definitions of "personal information", "sensitive information" and "health information" and will consolidate the current National Privacy Principles and Information Privacy Principles into a single set of privacy principles that apply to both private sector organisations and public sector agencies. The single set of principles are intended to be simple, clear and easy to understand and apply, impose reasonable obligations on organisations and agencies and be technology neutral.

The Government indicates that under the "openness" principle, businesses would need to set out a privacy policy that is freely available to all individuals which explains how personal information is handled at each stage of the "information cycle" and incorporates significant information handling practices (including, for example, specific document retention or destruction policies) where appropriate and identifies whether personal information is likely to be transferred overseas and, if so, to which countries. Further, the "openness" principle will require businesses to take reasonable steps to develop and implement internal policies and practices which facilitate their compliance with the unified principles.

As part of the implementation of internal policies and practices, businesses may need to:

- train staff on compliance with the principles;
- establish procedures to receive and respond to public complaints dealing with the handling of personal information; and
- establish and implement procedures to identify and manage privacy risks and compliance issues.

Under the "collection" principle, personal information should only be collected about an individual from that individual where "reasonable and practicable" and it should not be collected unless it is

necessary for one or more of the business' functions. Where personal information is received on an unsolicited basis, the receiving organisation should either:

- if lawful and reasonable to do so, destroy the information as soon as practicable without disclosing or using the information; or
- comply with all relevant principles that apply to the information in question as though the organisation had actively collected the information.

The Government will introduce a new principle of "direct marketing". The principle will apply to the private sector and to Government agencies operating in the commercial sphere. The principle differentiates between direct marketing to existing customers and to new customers.

A business may use and disclose personal information for the purpose of direct marketing to an existing customer where the individual would reasonably expect the business to use and disclose the information for such purpose and the organisation provides a simple and functional means for the individual to "opt out" of receiving any direct marketing communications.

A business may use and disclose personal information for the purpose of direct marketing to a new customer only where:

- the individual has consented or the information is not sensitive information and it is impracticable for the organisation to obtain the individual's consent before the particular use or disclosure;
- in each direct marketing communication, the organisation draws to the individual's attention, or prominently displays, a notice advising the individual that he/she may express a wish not to receive any direct marketing communications; and
- the organisation provides a simple and functional means for the individual to "opt out" of receiving any direct marketing communications.

Further, under this principle, individuals will have the right to be told the specific source from which their personal information was obtained where they do not have a customer relationship with the organisation engaging in direct marketing.

The Government accepts the ALRC's recommendation that the new set of principles should include a principle that requires businesses and public sector agencies to give to individuals the clear option to interact anonymously or pseudonymously, where lawful and practicable in the circumstances, with the organisation or agency.

The Government will redraft the statutory provisions to implement a more user-friendly regulation of credit reporting. "Credit reporting information" will be defined as a particular subset of personal information which is maintained by credit reporting agencies and disclosed to credit providers for the purpose of assessing an individual's eligibility for credit.

The Government will introduce comprehensive credit reporting, subject to sufficient privacy considerations being enacted. Credit reporting information will likely include:

- the type of each credit account opened (mortgage, personal loan, credit card);
- when the account was opened;
- the current limit of each open credit account;
- when each credit account was closed; and
- details of an individual's repayment history.

The Government will also require industry participants to prepare a mandatory and binding credit reporting code. Other amendments to the credit reporting provisions include a revision of the limits on disclosure of credit reporting information, the introduction of an external dispute resolution mechanism and a prohibition on direct marketing using or involving the use of credit reporting information.

## Conclusion

The Government's response to the ALRC report will form the foundation of the Government's first draft of the bill to amend the *Act*. It seems clear that the Government is determined to keep to its previously announced timetable of enacting the first substantive stage of legislative reform by the end of 2010. Many businesses who collect, hold, use and disclose an individual's personal information should start planning to review and, if necessary, amend their privacy policies and practices to take effect when the amending legislation is enacted.

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