



fact sheet

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Understanding and complying with the new Australian Privacy Principle 8 – Cross-border disclosure of personal information

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (the Privacy Amendment Act) will come into force on 12 March 2014. It replaces the Information Privacy Principles (IPPs) and the National Privacy Principles (NPPs) with one set of Australian Privacy Principles (APPs).

What is APP 8?

APP 8 regulates disclosure of personal information outside of Australia. APP 8 aims to permit cross-border disclosure of information whilst ensuring that personal information is still treated in accordance with the Privacy Amendment Act.

Although the current NPP 9 already creates similar obligations for private sector organisations, APP 8 creates new obligations for Commonwealth government agencies.

When does APP 8 apply?

APP 8 applies whenever a Commonwealth government agency (as an APP entity) discloses personal information to a person who:

- is not in Australia or an Australian external territory, and
- is not the entity or individual that the information relates to.

What is a disclosure?

The term 'disclosure' is not defined in relation to APP 8. However, the Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012¹ (the Explanatory Memorandum) provides agencies with some guidance about what is considered to be a disclosure. For example, a disclosure of personal information occurs where:

- an APP entity engages an overseas entity in compliance with APP 8 and that entity engages a subcontractor – the agency as an APP entity remains accountable under APP 8 for any disclosures to a subcontractor
- an APP entity sends personal information to a 'related body corporate' located outside of Australia.

A disclosure of personal information does not occur where:

- overseas movement of personal information occurs for internal use by an agency – this would include, for example, disclosures between the Department of Immigration and Citizenship (DIAC) and DIAC overseas posts

¹ Available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4813_ems_00948d06-092b-447e-9191-5706fdfa0728/upload_pdf/368711.pdf;fileType=application%2Fpdf

- personal information is routed through overseas servers. However, if third parties access that information, this will be a disclosure to which APP 8 applies.

From these examples, 'disclosure' appears to generally encompass situations where information is disclosed to any external entity abroad, even if it is disclosed indirectly through a third party or is unauthorised.

What obligations does APP 8 create? (APP 8.1)

APP 8.1 requires Commonwealth government agencies to take **such steps as are reasonable in the circumstances** to ensure that, when personal information is disclosed, the overseas recipient does not breach the APPs (other than APP 1, which deals with management of personal information, including requirement of a privacy policy).

What steps are reasonable to ensure compliance with the APPs?

Normally, to take reasonable steps to ensure that the overseas entity observes the APPs, an agency will need to enter into a contract or memorandum of understanding that requires overseas recipients and any subcontractors to comply with the APPs in relation to the disclosed information.

Other reasonable steps might include evaluating the security measures of both the agency and the overseas recipient to minimise the risk of unauthorised disclosure.

However, agencies should be careful to consider the circumstances of each case when deciding what measures might be reasonable to ensure that an overseas entity complies with the APPs.

Exceptions to the requirement to comply with APP 8.1

The requirement to take reasonable steps to ensure compliance does not apply where:

- another enforceable law affords the same protection as APP 8
- the individual has given informed consent to disclosure
- Australian law or court orders authorise or require disclosure
- a permitted general situation applies
- disclosure occurs under an international information-sharing agreement to which Australia is a party
- disclosure is to an overseas enforcement body for enforcement-related purposes.

Exception 1 – Is there another enforceable law that affords substantially similar protections to the APPs?

There are 2 aspects to this exception. First, an agency must reasonably believe that the recipient of information is bound by another scheme that protects information in a way that is **substantially similar to the APPs**. Second, the recipient must be able to **enforce breaches** of the equivalent law.

Reasonable belief that a scheme is substantially similar

Agencies will need to demonstrate how they obtained a reasonable belief that an overseas scheme was similar to the APPs. The Office of the Australian Information Commissioner (OAIC) Guidelines to NPP 9, which contains a similar exception and will be replaced by APP 8, suggest that agencies:

may need to be in a position to give evidence about the basis on which it decided that it has met the requirement of 'reasonable belief' ... Getting a legal opinion would be a good way for an organisation to get such evidence.

Is the scheme enforceable?

According to the Explanatory Memorandum, an enforceable similar scheme does not require an overseas equivalent of the OAIC. A range of dispute resolution mechanisms will satisfy this requirement. For example, a cross-border enforcement arrangement between the OAIC and overseas regulatory authority will be satisfactory.

Exception 2 – Has there been informed consent to disclosure?

APP 8.1 will not apply if the individual consents to the cross-border disclosure after the agency has expressly informed them that the consequence of their consent is that APP 8.1 will not apply.

Have you adequately informed the individual?

Agencies must notify individuals about their responsibilities when disclosing data overseas under APP 8 and that giving consent to cross-border disclosure means that the agency will not be bound by APP 8.1.

The Explanatory Memorandum explains that consent is not required before every proposed cross-border disclosure. Instead, the exception will apply where the individual has the explicit option of not consenting to certain disclosures which may include cross-border disclosures.

It is important to understand that, under **APP 5**, individuals must also be notified about a number of other aspects concerning the way in which their personal information may be used or disclosed.

Exception 3 – Does Australian law or a court order authorise or require disclosure?

APP 8.1 does not apply where another Australian law authorises or requires an agency to disclose personal information overseas.

Some examples of Commonwealth legislation that requires or authorises disclosure of personal information outside of Australia are the *National Health Security Act 2007*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Communications Legislation Amendment (Information Sharing and Datacasting) Act 2007*, the *Australian Federal Police Act 1979*, the *International Tax Agreements Act 1953* and the *Social Security (Administration) Act 1999*.

Exception 4 – Does a permitted general situation apply?

An agency need not comply with APP 8.1 where the agency reasonably believes that disclosure is necessary:

- to lessen or prevent a serious threat to life, health or safety of any individual or to public health or safety and it is unreasonable or impracticable to obtain the individual's consent
- to take appropriate action against suspected unlawful activity or misconduct in relation to an agency's functions
- to assist anyone to locate a person who is reported as missing and any relevant delegated legislation has been complied with
- for the agency's diplomatic or consular functions or activities.

Additionally, the Department of Defence may disclose information that it reasonably believes is necessary for war or warlike operations; peacekeeping or peace enforcement; or civil aid, humanitarian assistance, medical or civil emergency or disaster relief.²

² Section 16A, which will be inserted into the Privacy Act by the Privacy Amendment Act, includes a table containing the 'permitted general situations.'

Exception 5 – Is disclosure authorised under an international agreement about information-sharing to which Australia is a party?

Agencies do not need to comply with APP 8.1 if disclosure is authorised or required under an international information-sharing agreement to which Australia is a party – for example, if the Australian Taxation Office enters into double tax agreements with its international counterparts in relation to the disclosure and exchange of taxpayer information.

Exception 6 – Is the disclosure for enforcement-related activities?

This exception enables Australian enforcement bodies to cooperate with international counterparts for enforcement-related activities.

APP 8.1 does not apply if an agency reasonably believes that disclosure is necessary for enforcement-related activities conducted by or on behalf of an enforcement body. Additionally, the overseas recipient of the information must be a body that performs functions that are similar to those exercised by an enforcement body. An example would be the disclosure by the Australian Federal Police to an equivalent body overseas.

Next steps

Agency procedures may require significant adjustments before 12 March 2014, when the new APPs come into force. Agencies should, for example:

- review contracts with service providers and ensure that APP 8-compliant security mechanisms are engaged
- take measures to avoid the risk of third parties accessing personal information that is routed overseas
- revise website content, terms of use, forms and collection statements
- update internal security arrangements to take account of the new requirements.

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