fact sheet

May 2013

NUMBER 30

Proposed Australian Privacy Principles 3 to 5 – collection of personal information and notification

This fact sheet provides an overview of the changes in the law concerning collection of information under the *Privacy Act 1988* and the enhanced requirements to notify individuals when collecting personal information about them.

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Reform Act) passed through Parliament on 29 November 2012 and received royal assent on 12 December 2012. The reforms introduced by the Reform Act are due to commence on 12 March 2014.

The Reform Act is the Government's first-stage response to the Australian Law Reform Commission (ALRC) report *For your information: Australian privacy law and practice*.[1]

How does the Privacy Act currently apply to the collection of personal information?

The Privacy Act currently contains 11 Information Privacy Principles (IPPs) which apply to Commonwealth and ACT agencies in relation to their handling of 'personal information' (defined in s 6 of the Privacy Act).

In particular, IPPs 1 to 3 concern the collection of personal information. A distinction is drawn between collection and solicitation of personal information and the Privacy Commissioner's *Plain English Guidelines to Information Privacy Principles 1–3* make it clear that information is solicited when an agency 'asks for' or 'encourages other organisations or people to give it particular information'.[2]

— IPP 1 states that personal information can only be collected for a lawful purpose that is directly related to, or necessary for, a function or activity of the collector. Personal information should not be collected unnecessarily or by means that are unlawful or unfair.

— IPP 2 requires agencies to take reasonable steps, upon collection or as soon as reasonably practicable after collection, to ensure that individuals generally are aware of the purpose for which the information is being sought, any law requiring the collection of the information and any usual disclosure practices.

— IPP 3 requires agencies to ensure, as far as possible, that the personal information they collect is relevant to the purpose for which it is collected, up-to-date and complete, and that the collection of the information does not intrude to an unreasonable extent on the personal affairs of the individual concerned.

Amendments to the Privacy Act relating to the collection of personal information

The Reform Act will repeal the IPPs as well as the National Privacy Principles (NPPs) that apply to the private sector and replace them with the Australian Privacy Principles (APPs) – a single set of privacy

1 See http://www.alrc.gov.au/publications/report–108

2 Privacy Commissioner, October 1994, available at www.privacy.gov.au (at page 4).

principles applying to both Commonwealth agencies and private sector organisations (which will be collectively referred to as 'APP entities').

Solicited personal information

APP 3 will apply to collection of personal information by an APP entity. APP 3 distinguishes between personal information and 'sensitive information'. Sensitive information is defined in s 6 of the Privacy Act and includes information about an individual's race or ethnic origin, political opinions, religious beliefs or affiliations, sexual orientation or practices, criminal record, philosophical beliefs and health or genetic information. From 12 March 2014 it will also include biometric information.

APP 3.1 provides that an APP entity that is an agency must not collect personal information unless the information is reasonably necessary for, or directly related to, 1 or more of the entity's functions or activities.[3]

APP 3.3(a)(i) deals with sensitive information and provides that an APP entity that is an agency must not collect sensitive information unless the individual consents *and* the information is reasonably necessary for, or directly related to, 1 or more of the agency's functions or activities.

APP 3.4 contains a series of exceptions to the prohibition against collection of sensitive information. They include:

— where the collection is required or authorised by or under an Australian law or a court/tribunal order

— if a permitted general situation exists (defined in s 16A of the Reform Act[4])

— where the APP entity is an enforcement body and it reasonably believes that collection of the information is reasonably necessary for, or directly related to, 1 or more enforcement-related activities.

The presumption in favour of direct collection

APP 3.5 requires that an APP entity must collect personal information only by lawful and fair means and APP 3.6 provides that an APP entity must collect personal information from the individual about whom the information relates. However, there are 2 exceptions to this general rule which apply to agencies:

APP 3.6(a) – the individual consents to the collection; or where the agency is required or authorised by or under law or a court/tribunal order to collect the information from a third party.

The Explanatory Memorandum (EM) to the Reform Act provides that the exception in APP 3.6(a) is designed to minimise the need for an individual to provide the same personal information to a number of different agencies and give effect to Government's 'tell us once' service delivery reform.[5]

APP 3.6(b) – it is unreasonable or impracticable to collect the information directly from the individual.

The exception in IPP 3.6(b) to the presumption in favour of direct collection is particularly important for agencies with an enforcement function where collection directly from an individual who may be under investigation could prejudice that investigation. This exception will allow such activity to continue without breaching APP 3.

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3 The test for the private sector (an APP entity that is an organisation) in APP 3.2 is slightly different in that it does not allow for collection where the information is 'directly related' to the functions or activities of that entity.

4 Including, for example, where collection is:
- necessary to lessen or prevent a serious threat to the life, health or safety of an individual or the public
- reasonably necessary for the establishment, exercise or defence of a legal or equitable claim or for the purposes of a confidential alternative dispute resolution process
- reasonably necessary for diplomatic or consular functions or activities
- reasonably necessary for war or warlike operations, peacekeeping, peace enforcement, civil aid, humanitarian assistance, medical or civil emergency or disaster relief.

5 At page 77, 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#search=%22legislation/ems/r4813_ems_00948d06-092b-447e-9191-5706fdfa0728%22

Unsolicited information

APP 4 deals with the assessment, retention, destruction and de-identification of unsolicited personal information received by APP entities. It will cover situations where personal information that was not sought by the agency is delivered or sent to it by either the individual concerned or a third party. It is a new requirement for government agencies and covers a gap in the current IPPs, which do not specify what to do when an agency collects unsolicited information that it has no need for.

Where unsolicited personal information is received by an APP entity, the entity must, within a reasonable period, determine whether it could have collected the information under APP 3 as if it had solicited the information. If the personal information could have been collected by the entity under APP 3 then the remaining APPs will apply to the unsolicited information in the usual way.[6]

However, APP 4.3 provides that the APP entity must, as soon as practicable, destroy or de-identify the information if:

— the APP entity could not have otherwise collected the information

— the information is not contained in a Commonwealth record

— it is lawful and reasonable to destroy or de-identify the information.

APP 4.3 will likely have a greater impact on the private sector than on Commonwealth agencies because most information held by agencies is held in Commonwealth records. A property-based test applies here. The reference to information 'contained in a Commonwealth record' ensures that the requirements on agencies to retain information under the *Archives Act 1983* will override the APP 4 destruction or de-identification requirements.

Notification

APP 5 draws from IPP 2 and NPP 1 but expands the scope of the notification that is required to be given to individuals when an agency collects personal information. APP 5 requires that, where information is being, or has been, collected about an individual, that individual must be notified of certain matters, including how and why personal information is, or will be, collected and how the entity will deal with that personal information.

APP 5.1 creates the general requirement for notification, which must occur either before or at the time of collection of personal information (or, if that is not possible, as soon as practicable after collection). This is the case whether or not the information is collected from the individual themselves. Previously, agencies have only been required to notify individuals about the collection of personal information when it has been provided by the individual themselves.

The obligation to notify an individual is an obligation to take such steps (if any) as 'are reasonable in the circumstances'. The EM outlines that this is an objective test, designed to ensure that the specific circumstances of each case are considered.

The EM also makes clear that notification will not be reasonable in some circumstances. This phrase was included to build in some flexibility to the provision in light of the different types of APP entities and functions/activities that are regulated under the APPs.[7] For example, where an enforcement agency is investigating an individual for a criminal offence and is undertaking covert surveillance of that individual, it would not be reasonable for the agency to notify the individual concerned about the collection of their personal information.

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6 APP 4.2 enables the entity to use or disclose the personal information for the limited purpose of determining whether it could have collected the information.

7 At page 79.

The matters that an APP entity is required to notify an individual about if their personal information is collected are outlined in APP 5.2. These include:

— the identity and contact details of the APP entity

— in circumstances where the personal information is collected from a third party, or the individual concerned may not be aware of the collection of their personal information, the fact the entity has collected the information

— whether the collection is required or authorised by or under an Australian law or a court/tribunal order

— the purposes of collection

— the main consequences if the personal information is not collected

— any other entity, person or body to which the APP entity usually discloses personal information of that kind, including whether the APP entity is likely to disclose the personal information to overseas recipients (and, if so, the countries in which such overseas recipients are likely to be located).

APP 5.2 also requires an APP entity to refer the individual to its privacy policy on access and/or correction of their personal information or to enable a complaint to be made about a possible breach of an APP in the handling of their personal information.

How we can assist

While the amendments to the Privacy Act do not commence until 12 March 2014, agencies should act now to ensure they will be ready to meet their new obligations under the Reform Act. AGS has a team of experienced privacy lawyers who can provide more detailed guidance on what the Reform Act will mean for your agency. We are offering training on the changes to the Privacy Act[8] and can also provide practical, focused legal advice to assist your agency in preparing for the reforms.

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8 See http://www.ags.gov.au/training/index.html