

The Privacy Act and the Australian Federal Privacy Commissioner's functions

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Introduction

Australia has a federal system of government, with individual government structures governing the six states and two territories. Since 1988, privacy protection has been addressed at the federal level with the *Privacy Act 1988* applying to the information handling practices of federal Government bodies. Since that time, the jurisdiction of the Act has broadened to include the public sector of the Australian Capital Territory and the private sector in relation to the handling of personal tax file numbers and consumer credit information. More detail about the jurisdiction of the Privacy Act is below. Only one other state, New South Wales, has legislated for its own public sector, with Victoria intending to re-introduce a Privacy Bill this year which had lapsed due to election processes in late 1999.

One of the Australian Federal Government's policies is a commitment to secure Australia's position as a centre for global financial services in the Asia-Pacific region. Another is to take a leading position in the information economy. Addressing concerns about privacy has been recognised as an important pre-requisite for meeting these policy objectives. In this context, the Government has committed to extending privacy protections to apply to the private sector. A Bill to implement a "light touch" legislative regime is to be introduced into the Parliament in the first sitting this year. The Government's aim is to provide a privacy scheme that recognises the implications of globalisation – in particular the rapidly developing information economy – and which achieves a result of privacy protection without prohibitive cost. More detail about the nature of this scheme and the anticipated role of the Federal Privacy Commissioner is included below.

Current Jurisdiction of the Privacy Commissioner

The Privacy Act

The *Privacy Act 1988* gives effect to Article 17 of the International Covenant on Civil and Political Rights and to the *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. The

latter was produced by the Organisation for Economic Cooperation and Development (OECD). The guidelines set out the way personal information about individuals should be collected, stored, used and disclosed. They also set out mechanisms by which individuals can gain access to, and have amended, information about them held by others.

The Privacy Act provides protection to individuals in three areas:

- The Information Privacy Principles (IPPs), which are based on the OECD guidelines, set out strict safeguards for any personal information that is handled by federal government and ACT government agencies. These rules cover the collection, storage, use and disclosure of this information. They also provide for individual access to, and correction of, their own personal information.
- The Act provides protection for individuals' tax file numbers (TFNs), preventing them from being used as a national identification system, and giving individuals the right to withhold this information. Where a TFN is provided, its use is limited to tax related, assistance agency and superannuation purposes. Under the Act, the Privacy Commissioner issues and enforces legally binding guidelines.
- Part IIIA of the Act places strict safeguards on the handling of individuals' consumer credit information by the credit industry, particularly credit reporting agencies and credit providers. These provisions recognise the sensitivity of credit worthiness information and the implications for individuals should it be mishandled. Strict penalties apply where these provisions are knowingly breached.

Functions of the Federal Privacy Commissioner

The Privacy Commissioner has a range of functions that are set out in sections 27, 28 and 28A of the Privacy Act. These responsibilities include:

- Handling and resolving complaints from individuals concerning breaches of the IPPs, TFN guidelines and credit reporting rules
- Conducting audits of record keeping practices
- Publishing guidelines relating to compliance with the IPPs, TFN guidelines and credit reporting rules
- Promoting understanding and acceptance of the IPPs
- Undertaking educational programs to promote privacy protection
- Encouraging corporations to adopt programs consistent with the OECD Guidelines
- Providing advice to Ministers and the Parliament on the operation of the Act
- Examining data matching or data linkage proposals, at the request of a Minister or agency
- Monitoring and conducting research into data handling developments
- Publishing a record of the personal information holdings of agencies, known as the Personal Information Digest
- Issuing a code of conduct for credit reporting

The Commissioner also performs functions under the following legislation:

- Part VIIC of the *Crimes Act 1914*, the Commonwealth ‘Spent Convictions Scheme’, which provides protection for individuals with old minor convictions in certain circumstances (the Privacy Commissioner has the power to investigate breaches of the legislation, and is also required to provide advice to the Attorney-General in relation to exemptions under the scheme);
- the *Data-matching Program (Assistance and Tax) Act 1990*, which regulates data-matching between the Tax Office and four assistance agencies to detect overpayments and ineligibility for assistance (under the Act, the Commissioner is responsible for issuing guidelines for protecting privacy, investigating complaints and monitoring agency compliance);
- the *National Health Act 1953*, under which the Commissioner is required to issue guidelines covering the storage, use, disclosure and retention of individuals’ claims information under the Pharmaceutical Benefits Scheme and the Medicare program; and
- the *Telecommunications Act 1997*, under which the Commissioner has some monitoring and compliance functions.

Powers of the Federal Privacy Commissioner

In order to carry out these responsibilities, the Commissioner’s powers are as follows. In conducting investigations, the Commissioner may:

- Require information and examine witness
- Enter premises to examine documents
- Report to Ministers or Parliament

In relation to complaints, the Commissioner may:

- Make determinations to enforce the IPPs or TFN Guidelines
- Award compensation. There is no limit to the amount that may be awarded.

The Commissioner has the power to exempt certain practices from the IPPs through issuing a Public Interest Determination (PID). A PID must be tabled in Parliament.

The Privacy Commissioner may also approve guidelines issued by the National Health and Medical Research Council for the protection of privacy in the conduct of medical research.

The new jurisdiction – privacy protection in the private sector

On 15 December 1998 the Federal Government announced that it would develop a light touch legislative regime to support and strengthen privacy protection in the private sector.

The proposed legislation will be based on the Privacy Commissioner’s *National Principles for the Fair Handling of Personal Information (National Principles)* that set out standards for the collection, use, disclosure, quality and security of personal information, as well as access to and correction of such information by the individuals concerned. The *National Principles* are also based on the OECD guidelines.

The coverage of the proposed legislation includes protection of personal health information. This element of the legislation is based on recommendations from the Privacy Commissioner. The

recommendations respond to a request for advice from the Attorney-General on how to adapt the *National Principles* to protect personal health information held by the health sector.

A copy of the *National Principles*, together with a brief history of their development, can be accessed from the Privacy Commissioner's website: <http://www.privacy.gov.au/private/index.html#4.1>. A copy of the Commissioner's recommendations on the coverage of personal health information can be found at <http://www.privacy.gov.au/news/health.html>.

Under the Government's proposals, the legislation will allow for the recognition of self-regulatory privacy codes to replace the *National Principles*. The latter will apply as the default legislative principles. The self-regulatory codes and the default legislative regime will provide alternatives that are intended to meet minimum standards of protection for individuals in their dealings with the private sector. In order to achieve this, the Federal Privacy Commissioner will be required to approve such codes and will be allowed to do so only after they have been subject to public consultation and only if they are considered to be as least as good as the *National Principles*.

The Privacy Commissioner will have a major role in the scheme. He or she will have an overall promotion and oversight role in relation to the private sector, whether covered by a code or not. The Privacy Commissioner will be responsible for approving and revoking privacy codes, providing assistance and advice to organisations, handling complaints, and generally promoting an awareness and understanding of the scheme.

The legislation will also allow for privacy codes to set up their own complaint handling schemes with their own code complaint bodies. The Privacy Commissioner will be required to approve any such complaint handling bodies. The Privacy Commissioner will handle complaints about breaches of the default regime where there is no applicable privacy code or where a privacy code does not have its own approved complaint handling arrangements.

As is currently the case in the Privacy Commissioner's limited private sector coverage, a determination of a complaint by the Privacy Commissioner or by a code complaint body will be enforceable in the Federal Court of Australia.

For an update on developments with the proposed legislation see the Privacy Commissioner's website at <http://www.privacy.gov.au/>.