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Privacy and Data Protection in Australia

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Australian Governmental Structure

It is a Federation (Commonwealth) with

- A Federal Government
[powers defined by a Constitution]
- Six states and two territories
[their powers are what is not granted to the federal government].

Potential in this area for overlap

Legislative structure

- Privacy Act 1988 (Federal legislation)
- This Act covers
 - Australian Commonwealth and Australian Capital Territory government and its agencies; and (since December 2001)
 - Large private sector organisations;
 - All private sector health agencies;
 - Some small businesses;
 - Credit reporting agencies;
 - Credit providers;
 - Any organisation or individual who uses Australian Tax Office numbers

Federal Privacy Commissioner

- Oversees the privacy legislation
- Investigates complaints
- Initiates own motion complaints for breaches
- Reviews and recommends alterations to law
- Also has functions under other legislation

Regulation of private sector

Covers

- individuals; corporate bodies; partnerships; trusts, unincorporated associations.

Exempt groups

- media; political parties, small business (turnover of \$3M or less and not health related provider) and employee records

National Privacy Principles[“NPP’s”]

- Private sector is required to comply with 10 Privacy Principles
- The Principles regulate how personal information may be:
 - Collected
 - Kept
 - Used
 - Disclosed

Content of NPP’s

1. Collection
2. Use and disclosure
3. Data quality
4. Data Security
5. Openness
6. Access and correction of information
7. Identifiers
8. Anonymity
9. Transborder data flows
10. Sensitive information

Regulation of the Government

- The NPPS do not apply to the Commonwealth Government or its agencies
- Instead:
 - 11 Information Privacy Principles (IPPs) apply
 - Based on 1980 OECD guidelines re privacy and transborder personal data flows
 - Government agencies must maintain annual Personal Information Digests
 - “Public interest breaches” – agency may apply to Commissioner for permission to breach.

Content of IPPs

IPPs ensure that the government and its agencies:

1. only collect personal information for lawful purposes and by lawful and fair means;
2. inform individuals when personal information is being collected and disclose the purpose for which the information is being collected;
3. take reasonable steps to ensure that the personal information is relevant to the purpose for which it was collected and is up to date and complete;
4. employ security safeguards to protect personal information against loss, unauthorised access, misuse etc.
5. use and disclose personal information only for the purposes for which it was collected

Must require its contractors to similarly comply

Duties on particular bodies

Health service

Credit providers

International use of information

Privacy Act applies to organisations outside Australia: where the information:

- is **about an Australian entity**
- where the collector has an **organisational link** with Australia

Personal information may be transferred overseas where:

- the organisation **reasonably believes** that an **equivalent law**, binding scheme or contract which would provide substantially similar privacy standards to the NPPs **exists at the destination**;
- the **individual consents** to the transfer;
- the **transfer is for the benefit of the individual** and it is impractical to obtain that individual's consent. It must be likely that consent would be given by the individual;

Sanctions for breach

- Commissioner can:
 - order reimbursement for expenses in bringing a complaint;
 - make a declaration that an organisation has breached the NPPs;
 - order compensation for loss or damage suffered by a complainant;
 - order correction of any record;
 - issue up to \$30,000 for individuals and \$150,000 for companies.

Spam

The Spam Act (2004) (Cth).

The key factors :-

- opt in regime (based on consent) for commercial electronic messaging (spam);
- spam must contain a functioning unsubscribe facility;
- there is a prohibition on electronic address harvesting.

Freedom of Information

- Enacted by all 9 governments
- General right of access to information in documentary form in the possession of Ministers, departments and public authorities,
- Exceptions and exemptions if refusal of access is necessary for the protection of:
 1. essential public interests; or
 2. the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities

