

Employers to be aware and prepare - Privacy Act amendments

Caitlin Cook, Associate

The much anticipated privacy legislation passed through Federal Parliament late last year. Employers now need to be extra careful in the way they handle the pre-employment records and personal information of unsuccessful candidates that comes into their hands during recruitment drives.

Privacy legislation - 12 months to prepare

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) (**Amendment Act**) will amend the *Privacy Act 1988* (Cth) (**Privacy Act**) with effect from 12 March 2014. Employers now have 12 months up their sleeves to prepare for the changes by ensuring their systems comply with the Amendment Act.

Some of the key changes are:

- the introduction of a single set of privacy principles called the 'Australian Privacy Principles' (**APPs**). The APPs will replace both the existing National Privacy Principles (**NPPs**) and the International Privacy Principles (**IPPs**), which apply to private organisations and government agencies respectively – examples of the APPs include open and transparent management of personal information, notification of the collection of personal information and use or disclosure of personal information;
- the requirement for all private organisations (except small businesses) to have a privacy policy; and
- new penalties of up to \$1.7 million for a body corporate which engages in a serious or repeated interference with the privacy of an individual.

Exemptions under the Privacy Act

In what is considered to be good news for employers, the 'employment records' and 'small business' exemptions that currently exist under the Privacy Act will be unaffected by the introduction of the Amendment Act.

Therefore there will be no change to the exempt status of 'employment records', meaning that private sector employers can continue to handle records of personal information relating to the employment of an individual (e.g. terms and conditions of employment, an employee's personal and emergency contact details, details relating to an employee's performance or conduct) free from the application of the NPPs

Further, small business employers (those with an annual turnover of \$3 million or less) will continue to be exempt from the Privacy Act.

Recruitment activities and unsuccessful applicants

There is no exemption under the Privacy Act, however, when it comes to information relating to unsuccessful applicants that is collected by private sector employers during their recruitment activities. The way in which employers (excluding small businesses) handle this type of information is subject to the scrutiny of the Privacy Act and, with a more onerous penalty regime due to take effect from March next year, employers should take steps now to ensure they comply with the Amendment Act.

What should employers be doing?

Employers should have in place a privacy policy (this will be a requirement from 12 March 2014) which complies with the APPs and provides practical procedures relating to the gathering and holding of personal information in any pre-employment/recruitment context.

For example, the privacy policy should outline:

- the kinds of personal information that the employer collects and holds;
- how the employer collects and holds personal information;
- the purposes for which the employer collects, holds, uses and discloses personal information;
- how an individual may access personal information about the individual that is held by the employer and seek the correction of such information; and
- whether the employer is likely to disclose personal information to overseas recipients and, if so, the countries in which such recipients are likely to be located if it is practicable to specify those countries in the policy.

The employer must make the privacy policy accessible and publicly available. The Amendment Act recommends that private organisations make the privacy policy available on the organisation's website.

Did you know? ...

The right under the *Fair Work Act 2009* (Cth) to request flexible work practices for employees with children under school age, or under 18 with a disability, has met with limited use.

In a recent Fair Work Commission report it was found only 4.6% of employers received written requests for flexible work arrangements in the 3 years from January 2010 (this excludes requests made under a written agreement/enterprise agreement), with the most common requests being a change to finishing times and reduction of total hours.

The federal government has recently announced it will extend the right to request flexible working arrangements to carers, employees over 55, employees with a disability and workers experiencing domestic violence, as well as providing an express right to request to return to work on a part-time basis after taking unpaid parental leave.

Client Corner

**Faye Turner, Corporate HR Manager
Lycopodium Minerals Pty Ltd**



1. What occupation would you have taken up if you had not done your current job?
I enjoy a good debate so I would either get into politics or law.

2. What has been your best professional moment?
I think my best professional moment is still to come as I still have so much I want to do. However, to date I would say being promoted to Corporate HR Manager at Lycopodium Ltd has been a highlight. It has given me exposure to employment legislation across many regions (North America, Africa, Asia) and I have been able to travel to various sites and offices, meeting with internal and external stakeholders to assist in the establishment of new businesses/projects.

3. What do you do for fun and at the weekends?
My passion is music and theatre, so I still love to go see live bands and shows. Although I am getting too old for the festivals.

4. As business becomes ever more global, what employee issues are becoming increasingly relevant in Lycopodium's industry?
Managing different cultural norms and adapting management/leadership styles that engage all of our employees irrespective of their various backgrounds. We rely a lot on intercompany transfers when setting up new offices so there are legislative and mobility issues that need considering.

5. What are two rules you try to live by?
Be part of the solution and not the problem. Be firm, but fair.

Employer Reminder

The Fair Work Building Commission will be conducting a national audit of approximately 400 employers across Australia in the building and construction industry in the coming months, to check compliance with record keeping and payslip requirements and that employees are being paid the correct base rates of pay.

Irrespective of industry, we would recommend all businesses check on a regular basis that they are complying with the record keeping and payslip requirements under section 535 and 536 of the *Fair Work Act 2009* (Cth) and Division 3 of Part 3-6 of the *Fair Work Regulations 2009* (Cth), as well as ensuring the correct rates are being paid in accordance with any applicable awards, industrial instruments or individual agreements.

Events

- Squire Sanders Webinar Series **7 March 2013** - Confidentiality Restrictive Covenants Around the Globe (featured countries Australia and Japan) - please [click here](#) to register.
- Perth **18-19 March 2013** – IES Conferences Australia: 18th Annual National Employment Law Conference
- Perth **20 March 2013** - Squire Sanders CPD Day
- Perth **21 March 2013** - Law Society of Western Australia Employment Law Seminar
- Melbourne, Sydney, Brisbane, Perth, Adelaide **18-22 March 2013** – Akolade's 4th Workplace Law Fundamentals

Legislation update

Legislative instrument	Stage of legislation	Key proposed change
Human Rights and Anti-Discrimination Bill 2012	Referred for enquiry and report. Reporting date is 21 February 2013.	To consolidate the five current anti-discrimination acts and introduces federal protection against discrimination on the basis of sexual orientation and gender identity.
Fair Work (Registered Organisations) Amendment Bill 2012	Introduced into Parliament for first reading May 2012	For unions to provide greater disclosure of remuneration and pecuniary interests of members.
Migration Act Amendment Bill 2012	Second Reading Debate February 2013	To impose restrictions on enterprise migration agreements.



Andrew Burnett
Partner
+61 8 9429 7414
andrew.burnett@
squiresanders.com



Bruno Di Girolami
Partner
+61 8 9429 7644
bruno.digirolami@
squiresanders.com



Felicity Clarke
Senior Associate
+61 8 9429 7627
felicity.clarke@
squiresanders.com



Dominique Hartfield
Senior Associate
+61 8 9429 7500
dominique.hartfield@
squiresanders.com