SQUIRE SANDERS

WORKPLACE VIEW

April 2014

Beware the Australian Privacy Commissioner – No Longer a "Toothless Tiger"

We analyse the key areas of privacy law reform which took effect on 12 March 2014 and provide some practical steps to help your organisation achieve compliance.

The Australian Privacy Commissioner (**Privacy Commissioner**) has made it clear he will not shy away from using his expanded enforcement powers, which include the ability to seek penalties of up to AU$1.7 million for corporations and AU$340,000 for individuals, for breaches of the amended *Privacy Act 1988* (Cth) (**the Act**)

Why the Amendments?

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (**Amendment Act**) made substantial changes to the Act to bring it in line with modern expectations about privacy regulation.

In August 2008, after a 28-month inquiry, the Australian Law Reform Commission tabled a report on the extent to which the Act provided an effective framework for the protection of personal information (**ALRC Report**).

The ALRC Report made 295 recommendations for reform. These recommendations formed the basis for the first phase of reforms, which came into force on 12 March 2014.

What Has Changed?

APPs replace NPPs and IPPs

Under the original Act, the "National Privacy Principles" (**NPPs**) applied to private sector organisations and the "Information Privacy Principles" (**IPPs**) applied to federal and ACT government agencies. The amendments to the Act amalgamated the NPPs and IPPs into 13 "Australian Privacy Principles" (**APPs**) which apply to all entities which are covered by the Act, being private sector organisations, the commonwealth public sector, businesses that deal in personal information and organisations registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth).

Small businesses with an annual turnover of less than AU$3 million are not covered, unless they are health service providers.

We briefly examine the most significant APPs:

APP1	Imposes an obligation on entities to take reasonable steps to implement procedures and systems which ensure the entity complies with the APPs. Entities must have systems in place to enable them to deal with privacy inquiries or complaints. APP entities must have a clearly expressed and up to date privacy policy which deals with management of personal information.
APP4	Requires entities which receive unsolicited personal information to assess whether they could have lawfully collected that information under the Act. If not, they must de-identify or destroy the information.
APP5	Expands the obligation on entities to notify individuals about the personal information it collects about them.
APP7	Restrains organisations from using personal information held about an individual for the purpose of direct marketing. There are several exceptions to this prohibition.
APP8	Regulates the cross border disclosure of personal information. APP 8 requires entities which disclose personal information to an overseas recipient to take reasonable steps to ensure the recipient does not breach the APPs in dealing with that information. APP 8 is also subject to exceptions, including that the individual expressly consents to the cross-border transfer.

What Should Employers Do?

- The employee records exemption still applies, meaning employee records are exempt from the operation of the Act. Employers should remember the exemption does not extend to information collected about job applicants who are not ultimately employed or to independent contractors.
- Consider how and when your organisation collects personal information and examine your practices and systems to ensure compliance with the Act to identify areas of "privacy risk".
- Prepare/update your Privacy Policy – it is likely that it will need amendments to ensure your organisation is compliant with APP 1.

- Implement a process and nominate a person within your organisation to deal with complaints or inquiries about privacy. Remember the Privacy Commissioner can now investigate, audit and prosecute your business on his own accord – there is no need for a complaint to have been made to 'trigger' an investigation.

Author: Elizabeth McLean, Associate

Employer Reminder

Most of you will be aware that employees are entitled under the *Fair Work Act* 2009 (**FW Act)** to have a support person present during investigation and disciplinary proceedings which may result in dismissal. What can often be unclear is what role the support person plays and whether an employer can object to someone being a support person. The Full Bench in the case of *Victorian Association for the Teaching of English Inc v Debra de Laps* [2014] FWCFB 613 has recently clarified that the role of the support person is to simply provide emotional support and take notes on behalf of the employee, not to be an advocate. Unlike circumstances involving a union representative who may be permitted to speak on behalf of an employee, a support person cannot act as an advocate unless the employee is unable to effectively communicate due to disability issues.

What about where an employee nominates a colleague as their support person, but that colleague is also involved in the material event (i.e. a witness in relation to an allegation)? It would be reasonable in these circumstances to direct the employee to select someone else who is not involved in the event, to prevent collusion and any contamination of evidence.

Did You Know?

A failure to follow lawful and reasonable directions by an employer to attend a medical assessment may provide legitimate grounds for disciplinary action including termination.

In a recent case, the Fair Work Commission (**FWC**) found a boilermaker had not been unfairly dismissed, after his employer terminated his employment for refusing to follow lawful and reasonable directions to attend a medical assessment and to participate in a disciplinary investigation.

When the boilermaker stated he was fit to return to his pre-injury duties after a lengthy injury-related absence, the employer requested evidence of his medical clearance beyond a medical certificate declaring him "fit to return to normal duties". The employer requested the employee attend a medical specialist of its choosing for an independent assessment. The boilermaker refused to attend the scheduled appointments, even when warned disciplinary action would follow if he continued to be uncooperative.

The FWC found that in the circumstances, the concerns of the employer were reasonable. Without medical advice or information provided regarding the specific nature of the boilermaker's medical condition and given the inherently dangerous nature of the workplace (a coal mine), the employer acted in accordance with its duty of care and obligation to ensure a safe workplace.

Mr Darrin Grant v BHP Coal Pty Ltd [2014] FWC 1712 (14 March 2014)

Client Quiz

The new anti-bullying regime came into effect on 1 January 2014. Under that regime, an employee can make an application to the Fair Work Commission for an order to "stop workplace bullying". If an employer/principal receives such an application, within which timeframe must the employer/principal complete its response?

Is it:

(a) 7 days

(b) 14 days

(c) 21 days

(d) 28 days

The first correct entry emailed to isla.rollason@squiresanders.com will win a West Australian Good Food Guide (delivery within Australia only)

Legislation Update

Legislative Instrument

Fair Work Amendment Bill 2014 (Cth)

Status

Introduced into Parliament in Feb 2014; currently before the House of Representatives; will have to overcome a hostile Senate to be passed before 1 July 2014

Key Proposed Changes

Right of Entry

- A union official may enter a workplace to hold discussions without an invitation if there is an enterprise agreement (**EA**) in place and the union is covered by the EA. Otherwise the union must be "invited" to visit by a member or prospective member. An alternative is for the union to apply to the Fair Work Commission (**FWC**) for an "invitation certificate" that would apply to the workplace for a fixed period.
- A number of other amendments repeal the changes made by the *Fair Work Amendment Act 2013 (Cth)*. This includes removing the lunch room as the default meeting room.

Greenfields Agreements

- The concept of bargaining representatives (and therefore the good faith bargaining requirements), is extended to include the parties to a proposed single-enterprise agreement that is a greenfields agreement.
- Unions will only be a bargaining representative for a greenfields agreement if the employer agrees to bargain with them – meaning some other unions with coverage could be excluded.
- A new expedited process for the making of a greenfields agreement means that after three months, the employer can apply to the FWC for approval even if the union/s does not agree.

Protected Action Ballots

- Applications for a protected action ballot order cannot be made until bargaining has commenced (i.e. protected action cannot be taken to force an employer to bargain).

Leave

- An employer is required to give an employee the opportunity to discuss a request for an extended period of unpaid parental leave before refusing.
- On termination of employment any untaken annual leave is paid out at the employee's base rate of pay (i.e. annual leave loading is not required to be paid unless specified under an award or EA).
- Employees do not accrue nor can they take leave under the national employment standards while absent from work and receiving workers' compensation.

IFAs

- Non-monetary benefits may be taken into account in assessing whether an employee would be better off working under an IFA (i.e. flexible working hours).
- The minimum notice period to terminate an IFA made under both awards and EAs is to be 13 weeks (instead of 4 weeks).

Transfer of Business

- The transfer of business rules will no longer apply to an employee transferring between associated entities where the employee has sought the transfer on their own initiative.

Unfair Dismissal

- The FWC has new broader powers to dismiss applications.

Contacts

Kylie Groves
Partner
T +61 8 9429 7475
E kylie.groves@
squiresanders.com

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

Felicity Clarke
Senior Associate
T +61 8 9429 7684
E felicity.clarke@
squiresanders.com

Dominique Hartfield
Senior Associate
T +61 2 8248 7804
E dominique.hartfield@
squiresanders.com