

NEW PRIVACY LAW TO COME INTO EFFECT ON 21 DECEMBER 2001

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On 21 December 2001, the *Privacy Amendment (Private Sector) Act 2000* ('the new legislation') will come into effect. The new legislation establishes a national scheme for the handling of personal information by private sector organisations. The legislation will impact on many aspects of the relationship between an employer and its employees.

BACKGROUND

The new legislation reflects the Government's desire to develop a system for the fair handling of personal information in the private sector. The new legislation amends the *Commonwealth Privacy Act 1988* by setting out a legislative framework for the handling of personal information by private sector organisations.

The new legislation establishes a number of National Privacy Principles ('the NPPs') as the minimum privacy standards for the private sector. The NPPs regulate the collection, use, disclosure and transfer overseas of personal information. The NPPs require organisations to ensure that the personal information they hold is accurate, up to date, complete and secure.

In addition, the NPPs require organisations to be open about how they manage personal information, to provide access and correction rights to individuals and to allow people to deal with the organisation anonymously if that is lawful in a particular instance. The NPPs are based on the National Principles for the Fair Handling of Personal Information developed by the Privacy Commissioner in 1997-1998 following extensive consultation with business and consumers.

SUMMARY OF THE MAJOR CHANGES PURSUANT TO THE NEW LEGISLATION

Pursuant to the new legislation, the following changes will come into effect on 21 December 2001:

1. organisations will only be entitled to collect personal information where that information is necessary for one or more of their functions or activities;
2. organisations must only collect information by lawful and fair means and not in an unreasonably intrusive way;
3. organisations will only be able to use or disclose information for a purpose related to the initial purpose for which the information was collected unless the individual concerned has consented to disclosure, or it is necessary to disclose the information to prevent a serious and imminent threat to an individual's health;
4. organisations will be obliged to keep personal information *secure* and to *provide* individuals with access to information concerning them;
5. individuals will be entitled to request that personal information held about them that is not accurate, complete or up to date be made so;
6. organisations will have to establish policies on the management of personal information held about individuals;
7. organisations may develop their own privacy code so long as it is consistent with the NPPs;
8. an organisation may be ordered to pay compensation or perform a certain act if a complaint can be substantiated that the organisation did not comply with the NPPs.

EXEMPTIONS

Small business operators are exempted from the new legislation due to the Government's desire to minimise regulatory burdens on small business. A small business is defined as a business with an annual turnover of \$3 million or less. In general, a business's annual turnover equates to the total of the instalment income the business notifies to the Commissioner of Taxation on its Business Activity Statement over the course of a financial year. As noted above, the new legislation will take effect on 21 December 2001. However, most small businesses will have an additional 12 months to comply with the new legislation. Small businesses that provide health services (for example, medical practices, pharmacies and health clubs) will not have the benefit of the additional 12 months because of the sensitive nature of the information that such businesses hold. After the new legislation comes into effect, all small businesses will continue to be exempt from the legislation unless they:

- provide a health service to another individual;
- disclose personal information about another individual to a third party for a benefit, service or advantage without the consent of the individual;
- collect personal information about another individual from a third party by providing a benefit, service or advantage without the consent of the individual;
- are contracted to provide a service to the Commonwealth; or
- are prescribed by regulation as being covered by the legislation.

Acts done and practices engaged in by media organisations 'in the course of journalism' (not

defined in the new legislation) are exempt. However, in order to take advantage of the exemption, a media organisation must be able to show that it has publicly committed itself to observing the new privacy standards.

APPLICATION OF THE NEW LEGISLATION TO EMPLOYEE RECORDS

The legislation defines an employee record broadly as 'a record relating to the employment of an employee' and includes the types of records held by employers in personnel files. An act engaged in by a current or former employer of an employee is exempt from the legislation if the act is related to the current or former employment relationship. Thus employers cannot use employee records for any commercial or other purpose that is unrelated to the employment context. The exemption does not apply if the employee's records are disclosed by the employer to another organisation. For example, if records containing personal information in relation to an employee are disclosed to the employer's insurer for the purposes of a claim made against the employer, then the records do not retain their exempt status.

PRACTICAL IMPLICATIONS FOR EMPLOYERS

In order to protect against complaints that information has been collected in an unfair manner or in breach of the NPPs, organisations that have not already done so, should develop:

- a policy concerning the collection, use and disclosure of personal information about employees; and
- a policy relating to monitoring of internet and e-mail use by employees.

For the same reason, organizations should provide training sessions to directors, employees and agents so that they will be aware of their obligations under the new legislation.

IMPACT ON INTERNET AND EMAIL USAGE BY EMPLOYEES

A recent study has found that 75% of companies monitor email and web browsing activities of their employees. This type of surveillance may breach the NPPs.

If an employers computer use policy allows some personal use, then any personal computer usage by an employee will probably be protected by the NPPs.

The Federal Privacy Commissioner has stated that private e-mails and web browsing may not be exempted from the new legislation. Given this degree of uncertainty employers should review their computer use policies.

Employers should amend their policy so that it clearly states what type of use is forbidden and what use will be permitted by an employee for private purposes.

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