

# Bird & Bird & IAB and Privacy

Key pointers for advertisers

# Agenda

- **Key laws**
- **Key developments**



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# The Privacy Act



# Australian Privacy Principles

## *Schedule 1 to Privacy Act*



- Applicable to "APP entities":
  - Organisations; or
  - Agencies.
- "Organisation" defined as:
  - individual (including sole trader)
  - body corporate
  - partnership
  - other unincorporated association
  - trustunless it is a:
  - small business operator (s 6D)
  - registered political party (s 6(1))
  - State or Territory authority (s 6C)
  - prescribed instrumentality of a State (s 6C)
- "Agency" includes:
  - Australian Government agencies (but not State/Territory agencies)
  - Minister
  - Department
  - body (whether incorporated or not) or tribunal established or appointed for a public purpose by or under a Commonwealth enactment
  - a federal court
  - AFP

# Extraterritorial operation

- **Section 5B of the Privacy Act**
- The Privacy Act applies to acts and practices conducted outside Australia if it has an "Australian link".
- An organisation or small business operator has an "Australian link" where it is:
  - An Australian citizen or a person whose continued presence in Australia is not subject to a legal time limitation.
  - A partnership formed, or a trust created, in Australia or an external Territory.
  - A body corporate incorporated in Australia or an external Territory, or
  - An unincorporated associated that has its central management and control in Australia or an external Territory; or
  - **Carrying on a business in Australia** and it collected or held personal information in Australia or an external Territory, either before or at the time of the act or practice.



# Australian Privacy Principles

1. APP 1 – Open and transparent management of personal information
2. APP 2 – Anonymity and pseudonymity
3. APP 3 – Collection of solicited personal information
4. APP 4 – Dealing with unsolicited personal information
5. APP 5 – Notification of the collection of personal information
6. APP 6 – Use or disclosure of personal information
7. APP 7 – Direct marketing
8. APP 8 – Cross-border disclosure of personal information
9. APP 9 – Adoption, use or disclosure of government related identifiers
10. APP 10 – Quality of personal information
11. APP 11 – Security of personal information
12. APP 12 – Access to personal information
13. APP 13 – Correction of personal information



# Other Key Laws

- **Spam Act 2003 (Cth)**
- **Do Not Call Register Act 2006 (Cth)**
- **Part 13 Telecommunications Act 1997 (Cth)**
- **Surveillance laws**





# Surveillance Laws

- **Types of surveillance**
  - Audio
  - Tracking
  - Video
  - Computer
- **Layers of regulation**
  - Commonwealth
  - State and Territory
    - General
    - Workplace specific



# ACCC Digital Platforms Report



# Overview of recommendations

## *Recommendation 16*



# Is the current definition of personal information problematic?

- *Privacy Commissioner v Telstra Corporation Limited* – Full Federal Court found information must be "about" an individual and that certain metadata is not.
- GDPR defines personal information as:

*"any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person"*

# Impact

- IP addresses, cookies and other online identifiers may become "personal information" where individuals can be identified

# Overview of recommendations

## *Recommendation 16*



# Overview of recommendations

## *Recommendation 16*



# Higher penalties for breach of the Privacy Act

- The higher of:
  - \$10million
  - 3 times the benefit received
  - 10% of annual turnover in the last 12 months (if court cannot determine the benefit obtained)



# Growing enforcement focus

- Privacy Commissioner proceedings against Facebook over Cambridge Analytica matter
- Facebook may carry on business in Australia so may be subject to Australian Privacy Act
- Location data case against Google



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# Recent enforcement developments

## *Spam Act: ACMA enforcement activities*

- Over the past 18 months, over \$2,100,000 paid by businesses in relation to ACMA-issued infringement notices for breaking spam and telemarketing laws.
- nine court-enforceable undertakings.
- Kogan Australia Pty Ltd: court-enforceable undertaking and \$310,800 infringement notice.
- ACMA found Kogan unsubscribe facilities insufficient because had to take extra steps including logging in to a Kogan account to unsubscribe.



# Digital Advertising Services Inquiry: ACCC

- **Report to be delivered to the Treasurer by 31 August 2021**
- **Key messages interim report:**
  - Adtech services are critical to the Australian adtech economy: \$3.4b
  - Google market leading position
  - New CCA unfair trading practices provisions
  - New ombudsman scheme



# Thank you & Bird & Bird

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