Bird&Bird&IAB and Privacy

Key pointers for advertisers

Agenda

- Key laws
- Key developments



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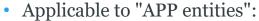
The Privacy Act







Australian Privacy Principles Schedule 1 to Privacy Act



- o Organisations; or
- o Agencies.
- "Organisation" defined as:
 - o individual (including sole trader)
 - body corporate
 - o partnership
 - o other unincorporated association
 - o trust

unless it is a:

- o small business operator (s 6D)
- o registered political party (s 6(1))
- State or Territory authority (s 6C)
- o prescribed instrumentality of a State (s 6C)



- "Agency" includes:
 - Australian Government agencies (but not State/Territory agencies)
 - Minister
 - o Department
 - body (whether incorporated or not) or tribunal established or appointed for a public purpose by or under a Commonwealth enactment
 - o a federal court
 - o 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: courtenforceable 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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