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Gaming & Leisure Industry Update

December 2013

Privacy Law Update

Reforms to the *Privacy Act 1988* (**Privacy Act**) will take effect on 12 March 2014. The changes introduce 13 new 'Australian Privacy Principles' (**APPs**) which will replace the 'National Privacy Principles' (**NPPs**). Clubs which are subject to the Privacy Act will need to be ready to comply with the new regime from 12 March 2014. The APPs cover some familiar territory, however, they expand on the NPPs in key areas. This update flags some of the important issues, but the amendments are significant and Clubs should develop a good working knowledge of the APPs by 12 March 2014.

Openness and transparency

A Club **must** have an up to date privacy policy that covers:

- The kinds of personal information the Club collects and holds.
- How the Club collects and holds that information.
- The purposes for which the Club collects, holds, uses & discloses that information.
- How a person may access and ask for correction of their personal information.
- How a person may complain about a breach, and how the Club will deal with complaints.
- Whether personal information is likely to be disclosed overseas, and if so, where.

The policy should be in plain language and must be available free of charge. The Club must also take reasonable steps to make the policy available in an appropriate format on request.

Making the policy available

A Club's privacy policy should normally be displayed on its website, and it should be easy to find and download. It may also be displayed within the Club's premises. It is important that the policy is accessible, so Clubs with a multi-lingual membership base may consider making the policy available in languages other than English.

Systems and procedures

A Club will be required to take reasonable steps to implement practices, procedures & systems to ensure it complies with the APPs, and appropriately deal with any privacy enquiries or complaints.

Updating procedures

It is recommended that Clubs review their privacy procedures for collection, use, and disclosure of personal information, and, their procedures for destruction or de-identification of personal information once it is no longer required. Data security systems and procedures should also be reviewed for compliance as outlined below. All procedures should be updated and compliant with the APPs by 12 March 2014.

Staff training

Club staff should be trained on any changes to the Club's privacy policy and procedures, to reduce the risk of privacy breaches occurring for which the Club may be held legally responsible.

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Anonymity and pseudonyms

A Club must allow individuals to deal with it anonymously, as long as this is practical and there is no legal requirement or authorisation to identify the person. Under the APPs a Club will also need to allow a person to use a pseudonym, unless that is impracticable or the Club is legally authorised or required to identify the person. Clubs will need to determine when it will be appropriate to allow a person to use a pseudonym. For example, a membership application cannot be processed anonymously or using a pseudonym as the Club is legally required to identify members by name in the membership register.

Unsolicited personal information

If a Club receives 'unsolicited' personal information, then it must decide whether the Club would have been entitled to collect that information on request. If not, then the Club must promptly destroy or de-identify that information, as long as it is lawful and reasonable to do so. If the Club would have been entitled to collect the information on request, then it may keep the information but must treat it in accordance with the APPs.

Direct marketing

The APPs introduce new rules about direct marketing. Using or disclosing an individual's personal information for the purpose of direct marketing will be prohibited except as set out in the APPs.

Generally, the use of a person's personal information for direct marketing will be permitted if:

- the personal information was collected by the Club from the person concerned;
- the person would reasonably expect the Club to use or disclose it for direct marketing to them;
- a straightforward 'opt-out' mechanism is provided so the person can request the Club to stop sending direct marketing material; and
- the person has not made a request to the Club to stop sending the direct marketing material.

If the person would not reasonably expect their personal information to be used for direct marketing (or the Club obtained that information from someone other than the person concerned), then use or disclosure of that personal information for direct marketing is only permitted if:

- the person has given their consent, or it is impracticable to obtain their consent;
- a straightforward 'opt-out' mechanism is provided so the person can request the Club to stop sending direct marketing material;
- each direct marketing communication to that person includes a prominent statement that the person may 'opt-out' or otherwise draws the person's attention to the 'opt-out' mechanism; and
- the person has not made a request to the Club to stop sending that direct marketing material.

A Club must promptly stop sending direct marketing material to a person, if the person makes such a request.

Sensitive information

Personal information which is 'sensitive information' can only be used for direct marketing with the consent of the person concerned. Clubs are reminded that separate rules apply to the collection, use and disclosure of sensitive information under the APPs.

Obtaining consent

It is recommended that Clubs obtain written consent from a person where possible, before using or disclosing that individual's personal information for direct marketing. However, if a Club requests a person to give a 'blanket consent' for many types of use and disclosure of their personal information all at once (without allowing the person to choose whether they agree to some uses or disclosures but not others), this can cast doubt on whether a person has validly and voluntarily given consent in some circumstances.

Other laws

Clubs should take into account that other direct marketing laws such as the *Spam Act 2003* (Cth) and *Do Not Call Register Act 2006* (Cth) may apply in addition to the APPs. Clubs are also reminded that strict requirements apply to gaming machine advertising under the *Gaming Machines Act 2001* (NSW).

Data security

The APPs will require a Club to take reasonable steps to protect personal information from:

- misuse, interference and loss; and
- unauthorised access, modification or disclosure.

The steps that should be taken will depend on the circumstances, including the type of information, how the information is held, and, the potential impacts on the

person that may result from a privacy breach.

Procedures and systems

Clubs should review how information is held, stored, and accessed on the Club's premises and elsewhere. For example, if it is stored off-site, or it is taken off-site (e.g. by a Club employee working from home), or it can be accessed externally (e.g. by IT contractors), then additional procedures to address the risk of privacy breaches will most likely be needed.

Requests for access

If a person requests access to their personal information, the Club must respond within a reasonable time. A Club may only refuse such a request on the grounds set out in the APPs. If a Club refuses a request it must give the person written notice of its reasons (except where it would be unreasonable to do so in the circumstances), and, the options for that person to make a complaint about the Club's decision.

Don't get it wrong!

There will be new penalties for privacy breaches and the Australian Information Commissioner will have substantial enforcement powers from 12 March 2014. The Commissioner will be able to carry out investigations in response to a complaint, or on the Commissioner's own initiative.

A conciliation procedure may be adopted in some cases and non-monetary measures such as written court enforceable undertakings can be accepted where appropriate. However, **civil penalties of up to $340,000 for individuals and $1.7 million for corporations** can be imposed under the new regime.

Registered Clubs Amendment (Governing Body) Regulation 2013

Amendments to the *Registered Clubs Regulation 2009* (NSW) regarding the appointment of directors and the size of Club Boards will commence on 1 December 2013.

The Regulations will allow the elected members of the Board to appoint up to 2 other directors who are Ordinary Members of the Club for a term of up to 3 years. After their term of office expires, the appointed directors are not eligible for re-appointment by the Board, although they could be elected to the Board by the members in future. A prescribed notice must be placed on the Club's noticeboard and website if a director is appointed under this regulation.

From 1 July 2016, a Club's Board must not include (at any one time) any more than 9 directors.

Clubs should review their Constitution and determine whether it is necessary to put special resolutions to the members to amend The Constitution for consistency with the Regulations. Clubs with a Board exceeding 9 Directors should consider putting in place a strategy to reduce The Board size prior to the election of The Board that will hold office as at 1 July 2016.

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