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Health Alert

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Privacy made easy? The Commonwealth Government proposes changes to privacy laws

What are the proposed changes to the Privacy Act 1998 (Cth) (the Act), and what effect will they have on the way you do business?

On 23 May 2012 the P*rivacy Amendment (Enhancing Protection) Bill* 2012 (**the Bill**) was introduced to the House of Representatives. The Bill is the first phase of the Government's response to the 2008 Australian Law Reform Commission report, *"For Your Information: Australian Privacy Law and Practice"* (**ALRC Report**).

The Bill proposes significant reforms to the existing Commonwealth privacy regime. These amendments include the creation of a single set of Australian Privacy Principles, the introduction of a more comprehensive consumer credit reporting system, and new provisions governing privacy codes. The Bill also clarifies the functions and expands the powers of the Privacy Commissioner.

The Australian Privacy Principles (APPs)

The Bill creates a consolidated set of principles called the Australian Privacy Principles (**APPs**), which will replace the existing National Privacy Principles (**NPPs**) and the Information Privacy Principles (**IPPs**). The NPPs currently apply to certain private sector organisations, and the IPPs currently apply to Commonwealth agencies.

The APPs will apply to both Commonwealth agencies and private sector organisations (although there is some differential treatment in the Bill between agencies and organisations). As is currently the case with NPPs and IPPS, the APPs will set out standards, rights and obligations in relation to the handling of personal information.

The new APPs are grouped into five parts:

- **Part 1 Principles require APP entities to consider the privacy of personal information (APP 1 & 2)**

  APP 1 requires entities to maintain policies about management of personal information. APP 2 provides that individuals must have the option of dealing with an agency or organisation with anonymity or through the use of a pseudonym. There are exceptions to this, for example, where this approach is impractical.

- **Part 2 Principles deal with the collection of personal information, including unsolicited personal information (APP 3, 4 & 5)**

  APP 3 generally provides that an agency or an organisation must not collect personal information unless it is 'reasonably necessary' or 'directly related' to one or more of the entities functions. APP 4 ensures that in circumstances where an entity receives personal information, even where it has done nothing to solicit the information, the information will still be afforded

privacy protection. APP 5 sets out the obligations for an entity to ensure an individual is aware of certain matters when it collects personal information.

- **Part 3 Principles deal with the use and disclosure of personal information (APP 6, 7, 8 & 9)**

  As with IPPs 10 & 11 and NPPs 2 & 10, APP 6 provides that entities may use and disclose information for the primary purpose for which it was collected only, unless the individual consents, or other specific exceptions apply. Further detail on changes to personal information in respect of cross-boarder disclosure and direct marketing are set out below.

- **Part 4 Principles deal with integrity, quality and security of personal information (APP 10 & 11)**

  APP 10 obligates entities to take reasonable steps to ensure the personal information it collects meets certain quality requirements. APP 11 sets out obligations relating to the protection of personal information from misuse and disclosure. Once information held by an entity is no longer held for any permitted purpose, and it is not contained on a Commonwealth record, or legally required to be retained, the entity must destroy the information.

- **Part 5 Principles deal with requests for personal information and corrections to personal information (APP 12 and 13)**

  APP 12 requires an entity to provide an individual with access to personal information held about them, subject to some exceptions. This will reflect responsibilities that agencies already have under the Freedom of Information Act 1982 (Cth). APP 13 requires entities to take reasonable steps to ensure information held about an individual is accurate.

Direct Marketing

Direct marketing is specifically addressed in the Bill through a discrete principle - APP 7.

Generally an entity must not disclose personal information for the purpose of direct marketing unless:

- the entity collected the information from the individual;
- there is a reasonable expectation by the individual that the organisation would use the information for direct marketing;
- the organisation has provided an easy way for the individual to request not to have their information used;
- the individual has not made a request that their information not be used; and
- the information is not sensitive information (express consent must be given for disclosure of sensitive information – APP 7.4).

Individuals will have greater rights in that they will be able to ask an organisation to disclose the source of their information. Organisations must provide this disclosure free of charge unless it is unreasonable to do so (APP 7.6). Individuals will also be able to ask organisations that hold their personal information to stop sending them direct marketing.

Disclosure of Personal Information to Overseas Recipients

A new APP 8 establishes an accountability measure for Australian organisations in that they may be liable for breach of the APPs by overseas recipients of personal information. An APP entity that discloses personal information to overseas recipients must take steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the APPs.

The government has foreshadowed that reasonable steps will usually require an organisation to enter into a contractual relationship with the overseas recipient. The government also notes that the chain of accountability for privacy will not be broken if an entity engages a sub-contractor.

Exceptions for 'Permitted Health Situations'

The Bill creates the concept of a 'permitted health situation' where the collection, use or disclosure of certain health or genetic information by an organisation in certain circumstances will be permitted (section 16B). For example, collection, use and disclosure will be permitted when information is necessary to provide health services to an individual, or for the purpose of research.

The section is intended to replicate the exceptions that presently apply for health information under the NPPs.

Changes to Credit Reporting

The credit reporting provisions of the Act have been completely revised. Individuals will have improved access to their credit information, and will have an improved ability to change their personal information which is held by credit agencies.

There will also be new categories of information that will be made available to Credit Providers to better assess the credit worthiness of an individual being:

- The date the credit account opened and closed;
- The type of credit account opened, and the current limit of each open account; and
- Repayment performance of the individual.

Revised Powers of the Information Commissioner

The Bill enhances the functions and powers of the Privacy Commissioner. Some of the new powers include the ability to:

- Seek penalties from the Federal Court of up to $1.1 million for serious and repeated interferences with privacy;
- Accept written undertakings by entities to ensure compliance with the Act;
- Conduct an assessment of an entities maintenance of personal information; and
- Deal with the conciliation of complaints, and recognise alternative dispute resolution schemes.

What Will These Amendments to the Act Mean For Your Business

The majority of the new provisions have a deferred commencement date of 9 months after the date the Bill receives Royal Assent. This will allow agencies and organisations sufficient time to prepare for the introduction of the new regime.

It is expected that the Privacy Commissioner will publish guidance on new terminology used, and what is required of entities to comply with the amendments.

Some matters to consider are:

- Reviewing existing privacy policies, notices and practices to ensure compliance – while the APPs cover the same subject matter as the present NPPs and IPPs, there will be changes to the obligations of entities holding personal information;
- Making sure records are up to date, particularly in relation to information sources; and
- If necessary, put in place procedures and contracts dealing with the disclosure of personal information to overseas recipients.

As mentioned at the start of this article, this Bill represents the first phase response of the Commonwealth Government to the ALRC Report. Further actions are likely to follow once this Bill is progressed. For example, the Commonwealth Government has foreshadowed a response regarding the remainder of the ALRC Report and also regarding privacy considerations specific to health services and research.

State-based legislated and policy-based privacy regimes will continue to apply, for example, the *Health Records and Information Privacy Act 2002* (NSW) regarding the collection, use and disclosure of health information which applies to both the public and private sector in NSW.

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Health practitioners national law - changes to complaints process

The *Health Legislation Amendment Bill 2012* (**Bill**) was introduced to the NSW parliament on 9 May 2012. The Bill was referred to the Legislative Review Committee due to concerns about the disclosure of genetic material to third parties and concerns that the provisions trespassed on personal rights and liberties (s 8A(1)(b)(i) of the *Legislative Review Act 1987* (NSW)).

On 22 May, the Legislative Review Committee reviewed the legislation and found that the impacts on privacy that this provision potentially creates are outweighed by the broader public interest. The Bill was passed by the legislative assembly on 23 May 2012 without amendment. The first reading in the legislative Council occurred on 23 May 2012.

In the second reading speech for this Bill, the Minister for Health said that in implementing the National Registration and Accreditation Scheme, New South Wales agreed to adopt national registration for health practitioners, but elected to retain its own State-based complaints scheme involving health professional councils and tribunals and the independent Health Care Complaints Commission. Other than the clarification of the role of the Impaired Registrants Panel, the amendments in this Bill are largely to ensure that the New South Wales specific provisions of the national law and the complaints management scheme operate smoothly and, where relevant, are aligned with the national approach.

The Bill proposes to amend the *Health Practitioner Regulation National Law (NSW) Act 2009* (**NSW National Law**) to:

- provide that an Impaired Registrants Panel is not an ***adjudication body*** for the purposes of the NSW National Law because it can only make recommendations and is unable to take any action;
- provide that a mandatory notification of certain conduct by a registered health practitioner is taken to be a complaint for the purposes of the NSW National Law and the *Health Care Complaints Act 1993*;
- clarify which bodies which may recommend a health practitioner or student undergo psychological counselling;
- amend the provisions relating to the composition of a Professional Standards Committee, an Assessment Committee and a Performance Review Panel to provide that those bodies must include one person who is not, and never has been, a registered health practitioner or student in the same profession as the health practitioner who is the subject of the proceedings concerned;
- remove the requirements of the Chairperson of a Professional Standards Committee to give notice of certain inquiries to be conducted by the Committee into complaints about health practitioners to the Director-General of the Ministry of Health;
- amend the *Health Records and Information Privacy Act 2002* No 71 to provide that:
  - genetic information may be used for a purpose other than the primary purpose of collection on the condition that it is used in accordance with guidelines issued by the Privacy Commissioner appointed under the *Privacy and Personal Information Protection Act 1998* and that it is reasonably believed to be necessary to lessen or prevent a serious threat to the life, health or safety of a genetic relative;
  - genetic information may be disclosed to their genetic relatives for a purpose other than the primary purpose of collection on the condition that it is disclosed in accordance with guidelines issued by the Privacy Commissioner appointed under the *Privacy and Personal Information Protection Act 1998* and that it is reasonably believed to be necessary to lessen or prevent a serious threat to the life, health or safety of a genetic relative; and
- amend the *Poisons and Therapeutic Goods Act 1966* No 31 to apply the same exemptions and restrictions to registered podiatrists in relation to the possession, use, supply or prescription of certain restricted substances as those applying to other registered health practitioners as there had been an inadvertent omission in respect of podiatrists.

Click here to view the Bill.

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Emerging gene patent law set to shape research environment

Issues arising from the potential to patent genetic material have long been controversial, both internationally and in Australia. The outcome of cases currently being considered by Courts in both the United States and Australia, and proposed legislative reform in Australia, could ultimately have a significant impact on the ability of researchers to conduct research using genetic material and could possibly alter the commercial drivers of biotechnology investment.

The 2011 decision of the United States Court of Appeals for the Federal Circuit (**CAFC**) in *Molecular Pathology v. Myriad Genetics Inc* declared that the composition of matter claims covering isolated DNA of the BRCA 1 and BRCA 2 genes (which are associated with increased risk of cancer) are patent-eligible under the United States Patent Act.

However, in March this year, the US Supreme Court set aside the 2011 ruling in *Myriad* and sent it back to the CAFC for reconsideration. This followed the US Supreme Court's decision in *Mayo Collaborative Services v. Prometheus Labs. Inc* that a process for determining dosages of thiopurine drugs used to treat auto-immune disease was un-patentable because it was an attempt to patent the underlying laws of nature.

Meanwhile, the Australian Federal Court is considering the validity of the Australian patents of the BRCA 1 and BRCA 2 genes in *Cancer Voices Australia & Anor v Myriad Genetics Inc & Ors*. This is the first time the issue has been considered by an Australian Court.

Attempts at legislative reform in Australia began with the *Patent Amendment (Human Genes and Biological Materials) Bill 2010* (Cth). This Bill sought to exclude from patentability biological materials (including DNA, RNA, proteins, cells and fluids) which are identical or substantially identical to such materials as they exist in nature. This Bill was introduced into Parliament in 2010 but failed amid claims it was too broad.

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The *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*, which was assented to on 15 April 2012, subsequently introduced exemptions to patent infringement for certain research and experimental activities. The Hon Melissa Parke MP (ALP Member for Fremantle) is now set to introduce a new Private Members Bill which proposes to go much further by banning gene patents altogether.

We will keep you updated with further developments as they arise.

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Legislation update

Disability Amendment Act 2012 No. 22 (VIC)

This Act was assented to on 8 May 2012 and will amend the *Disability Act 2006* (Vic). The Act makes a number of amendments that will:

- clarify the requirements for Councils in relation to Disability Action Plans;
- provide additional procedural matters in relation to possession orders and warrants of possession;
- provide for complaints made in relation to contracted service providers and funded service providers, including by giving the Disability Services Commissioner jurisdiction over those complaints; and
- provide for VCAT to review an assessment order and make a determination in relation the expiry of a supervised treatment order.

Click here to view the Bill.

Amendment by the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth)

The Bill has been introduced on 23 May 2012 into the House of Representatives and will amend the *Privacy Act 1998* (Cth). Please see our article on this Bill in this edition of the Health Alert.

Click here to view the Bill.

Health Legislation Amendment Bill 2012 (NSW)

The Bill has been introduced into the Legislative Assembly on 9 May 2012 and will amend the *Health Records and Information Privacy Act 2002* (NSW). Please see our article on this Bill in this edition of the Health Alert.

Click here to view the Bill.

Amendment to the Health Services Bill 1997 No. 154 (NSW)

This Bill has been introduced on 23 May 2012 into the Legislative Assembly and will amend the *Health Services Act 1997* (NSW). If assented to, the Bill will establish the New South Wales State Pool Account as part of the National Health Funding Pool. The object of the Bill is to make provision for the funding of health services in accordance with the *National Health Reform Agreement*.

The Bill provides for the appointment of an administrator of the National Health Funding Pool. The functions of the administrator include:

- keeping proper records of all payments made into the account;
- providing monthly reports to the Commonwealth and each State;
- providing annual and financial reports to the relevant Ministers; and
- making payments from each State Pool Accounts in accordance with the directions of each State.

Click here to view the Bill.

Health (Commonwealth State Funding Arrangements) Bill 2012 (Vic)

The Bill was introduced into the Legislative Assembly on 22 May 2012. According to the Bill's Explanatory Memorandum the Bill provides for the implementation of the funding, payment, accountability and transparency arrangements under the *National Health Reform Agreement*.

The Bill provides for the establishment of the Victorian State Pool Account through which the Commonwealth will allocate funds to health services in Victoria. The Bill also provides for the appointment of an administrator of the National Health Funding Pool who will be responsible for

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advising the Commonwealth Treasurer on amounts to be paid into the State Pool Accounts, overseeing payments of Commonwealth and State funding and publicly reporting on funding paid out of the State Pool and State Managed Fund accounts.

Click here to view the Bill.

Health and Hospitals Network and Other Legislation Amendment Bill 2012 (Qld)

The Bill has been introduced into the Legislative Assembly on 17 May 2012 and will amend the *Health and Hospitals Network Act 2011* (Qld). According to the Bill's Explanatory Notes, the object of the Bill is strengthen the decentralisation of healthcare delivery in Queensland and implement the revised national health funding arrangements under the *National Health Reform Agreement*.

Amongst other changes, the Bill will remove the prohibition on hospital and health services (formerly known as local health and hospital networks) from owning land and buildings. The Bill will also remove the prohibition from hospital and health services employing staff, other than health executives, once the service is prescribed under regulation. The Bill will also establish the Queensland State Pool Account as part of the National Health Funding Pool.

The Bill further provides for the appointment of an administrator of the National Health Funding Pool. Some of the functions of the administrator include:

- keeping proper records of all payments made into the account;
- providing monthly reports to the Commonwealth and each State;
- providing annual and financial reports to the relevant Ministers; and
- making payments from each State Pool Accounts in accordance with the directions of each State.

Click here to view the Bill.

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