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Online Privacy Bill

Privacy reforms for the social media age

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Who does not need to comply?

The OP Code does not apply to Australian government agencies. These agencies are subject to the *Privacy (Australian Government Agencies – Governance) APP Code 2017*.

The OP Code also does not apply to organisations who undertake an act or practice done:

a. under contract with an Australian government agency; or

b. outside of Australia, in compliance with an applicable foreign law.

Introduction

The Attorney-General's Department has released the exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill (**Online Privacy Bill**).

The Online Privacy Bill sets out amendments to the *Privacy Act 1988* (Cth) (**Privacy Act**) to introduce a framework for the development and enforcement of a binding online privacy code (**OP Code**).

Who will need to comply with the OP code?

The Explanatory Paper to the Online Privacy Bill provides that OP Code will apply to private sector organisations (**OP Organisations**) that:

Provide an electronic service which has the sole or primary purpose of enabling social interaction between two or more end users	Allow interactions between end users	Allow end users to post material on the service

These OP Organisations would include:

Organisations that provide social media services	Organisations that provide data brokerage services	Large online platforms

Examples of social media services include social media platforms, dating applications, online content services, online blogging or forum sites, gaming platforms that enable end users to interact with other end users, and online messaging and video-conferencing platforms.

Examples of data brokerage services include organisations that collect personal information from an individual via an electronic service, organisations that collect personal information from another entity that collected the personal information via an electronic service (including a social media service), and organisations that collect personal information for the sole or primary purpose of disclosing the personal information in the course of providing a service.

Examples of large online platforms include organisations that collect personal information about an individual in the course of or in connection with providing access to information, goods or services by use of an electronic service, organisations that have more than 2.5 million end users in Australia in the previous 12 months, or organisations that have 2.5 million end users in the current year (if they did not carry on business in Australia in the previous year).

Extraterritoriality

At present, the *Privacy Act 1988* (Cth) will only apply to foreign organisations if they 'collect or hold' personal information from sources in Australia.

If the Online Privacy Bill is passed foreign organisations that carry on business in Australia will be required to comply with the *Privacy Act 1988* (Cth) even though they may not 'collect or hold' personal information from sources in Australia.

What is required under the proposed OP Code?

The proposed new OP Code will address particular privacy challenges posed by social media and other online platforms that collect a high volume of personal information or trade in personal information.

The Online Privacy Bill sets out the requirements that the proposed OP Code must include.

Existing Australian Privacy Principles that the OP Code must address

The OP Code is required to set out how the following Australian Privacy Principles (**APPs**) are to apply to OP Organisations:

- **APP 1.4(c):** The OP Code will require OP Organisations to ensure their privacy policies are clear and explain the purpose for which they 'collect, hold, use and disclose' personal information.

- **APP 5:** A requirement that all notices provided to individuals about the collection of individuals' personal information is clear, understandable, current and provided in a timely manner.

- **APP 3 and APP 6:** The OP Code will set out how OP Organisations are required to comply with OP 3 and OP 6, including in relation to consent. For categories of personal information the Privacy Act treats as 'sensitive information' organisations will also need to seek renewed consent periodically or when circumstances change.

New requirements in the OP Code

Ceasing to use or disclose personal information upon request

OP Organisations will be required under the OP Code to take such steps as are reasonable in the circumstances to not use or disclose, or not to further disclose, an individual's personal information if requested by the individual. For example, this may occur if an individual does not want their personal information disclosed for the purposes of direct marketing. This does not amount to a right to be forgotten (as is seen in some other jurisdictions) but rather that an OP Organisation should cease to use or disclose personal information if requested to do so.

The new requirement will not prevent uses or disclosures that:

- are authorised or required by or under another Commonwealth, State or Territory law or court or tribunal order; or

- are reasonably necessary to assist a law enforcement body undertake an enforcement-related activity; or

occur during a 'permitted general situation' or a 'permitted health situation', for example, in response to a serious threat to individual or public health or safety.

Optional requirements that may be included in the OP Code

The OP Code making powers provide that, if the Commissioner or the OP Code developer wish to use them, they may expand or clarify the obligation and procedures of the Code. These optional requirements would enable the OP Code to:

1. set out how one or more of the APPs are to be complied with;

2. impose additional (but not contrary or inconsistent) requirements to the APPs;

3. provide mechanisms to deal with the internal handling of complaints;

4. provide for the reporting of complaints to the Commissioner;

5. provide for the reporting to the Commissioner about the number of end users in Australia; and

6. any other relevant matter.

Vulnerable groups and children

The OP Code will also include specific provisions that relate to children and other individuals who are physically or legally incapable of giving consent to the collection, use or disclosure of personal information and how children and their parents/guardians will be able to provide consent to the collection, use or disclosure of the child's personal information.

There will be specific requirements that apply directly to social media platforms. These will require social media platforms to:

- take all reasonable steps to verify the age of individuals who use the social media service; and

- ensure that the collection, use or disclosure of a child's personal information is fair and reasonable in the circumstances, with the best interests of the child being the primary consideration when determining what is fair and reasonable; and

- obtain parental or guardian express consent before collecting, using or disclosing the personal information of a child who is under the age of 16, and take all reasonable steps to verify the consent. In the event that a social media service becomes aware that an individual was under the age of 16 (for instance if they had new information to suggest an individual previously believed to be over the age of 16 was in fact not), the social media service must take all reasonable steps to obtain verifiable parental or guardian consent as soon as practicable.

The OP Code may also set out what constitutes 'reasonable steps', or matters to take into account when considering whether the collection, use or disclosure of a child's personal information is fair and reasonable in the circumstances.

How does the OP Code and APP Code or OP Code and Consumer Data Right Interact?

Currently, the Privacy Commissioner has the power to create:

- an APP Code, which details the specific requirements that certain entities must comply with in relation to one or more APPs; or

- a credit reporting code (**CR Code**), which provides further information on the manner in which the Privacy Act's credit reporting provisions will apply.

The OP Code would represent a third category of mandatory codes which may be created under the Privacy Act. As multiple codes may apply to the same entity, technical amendments must be made to the Privacy Act to clarify which code will apply in the event of any inconsistency between the OP Code and any other code.

The Online Privacy Bill provides that the OP Code will take precedence to the extent of any inconsistency with an APP Code. At this stage, the Online Privacy Bill does not provide guidance on inconsistencies between the OP Code and the CR Code.

However, the Online Privacy Bill does recognise that an entity may be subject to the Consumer Data Right rules, created under the *Competition and Consumer Act 2010* (Cth), and the OP Code. In the event of any inconsistency between these rules and the OP Code, the rules will take precedence.

In practice, it is unlikely that inconsistencies between the OP Code and other codes/the Consumer Data Right rules will arise. This is because the Commissioner has the power to create and vary the codes to ensure that these inconsistencies do not arise.

What are the consequences for non-compliance?

The maximum penalty under the Privacy Act is currently A$2.1 million. If the Online Privacy Bill is passed, the maximum penalty will be increased to the greater of:

A$10 million	Three times the value of any benefit obtained through the misuse of the information	10% of the breaching entity's Australian turnover

Privacy key team members

Dudley Kneller
Partner
+61 3 9252 7748
+61 438 363 443
dudley.kneller@gadens.com

David Smith
Partner
+61 3 9252 2563
+61 419 890 225
david.smith@gadens.com

Raisa Blanco
Senior Associate
+61 3 9617 8572
raisa.blanco@gadens.com

Stephanie Rawlinson
Senior Associate
+61 3 9612 8363
stephanie.rawlinson@gadens.com

gadens

Adelaide
Level 1
333 King William Street
Adelaide SA 5000
T + 61 8 8456 2433

Brisbane
Level 11, ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
T + 61 7 3231 1666

Melbourne
Level 13, Collins Arch
447 Collins Street
Melbourne VIC 3000
T + 61 3 9252 2555

Perth (Lavan)
Level 20, The Quadrant
1 William Street
Perth WA 6000
T +61 8 9288 6000

Sydney
Level 20
25 Martin Place
Sydney NSW 2000
T +61 2 9231 4996

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