

PRIVACY REFORMS – WHERE ARE WE HEADING?

PREPARED BY

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AGENDA

- The purpose of the Privacy Act
- Background to the reform process
- What's next
- How might this affect corporate counsel?

Privacy Reforms – Where are we heading?

BACKGROUND – EVOLUTION OF THE PRIVACY ACT

- The *Privacy Act* has experienced problems from the very outset
 - Confined to the Commonwealth public sector
- Major amendment in 2001
 - Extended to private sector, but two sets of privacy principles
- Major amendment in 2014
 - Privacy Principles consolidated
- Lingering problems
 - Not up to international standard
 - Contentious exemptions
 - Lack of "adequacy" status
 - Imprecise cross-border transfer obligations
 - Excessive reliance on APP Guidelines

Privacy Reforms – Where are we heading?

BACKGROUND – THE CURRENT REFORM PROCESS

- **2017** – ACCC investigation into online search engines
 - Commenced 2017
 - Final report 2019 – *Digital Platforms Inquiry Final Report*
- **2019** – Commonwealth government response
 - Further ACCC investigation into ad-tech
- **2020** – Commonwealth government Issues paper
- **2021** – Commonwealth government Discussion Paper
- **2022** – Interim Reform:
 - Penalties increased
- **2023** – Two developments
 - February: Attorney-General's *Privacy Act Review Report*
 - September: Attorney-General announces review of *Privacy Act* after assessing Feedback

Privacy Reforms – Where are we heading?

2024 REFORMS

- Four distinct initiatives:
 - Amendments to the data protection provisions of the *Privacy Act*
 - Amendment of the Criminal Code to create new offences of “doxing”
 - Introduction of a statutory cause of action for serious invasions of privacy to the *Privacy Act*
 - Introduction of new tiered civil penalty regime and OAIC enforcement powers

Privacy Reforms – Where are we heading?

2024 – DATA PROTECTION

- Four changes which impact the current data protection provisions of the Privacy Act:
 - APP 8 – whitelist
 - APP 11 – reasonable security measures
 - Part IIIC – notifiable data breaches
 - Automated decision making

Privacy Reforms – Where are we heading?

2024 – DOXXING

- “Doxxing” takes many forms but essentially involves the intentional online exposure of an individual’s identity, private information or personal details without their consent
- 2024 Amendment Act amended the Criminal Code to create two new offences of doxing:
 - Releasing personal data to menace or harass an individual;
 - Releasing personal data to menace or harass a group distinguished by protected attributes (race, religion, sex etc).
- Penalty – up to 7 years’ imprisonment
- Privacy Act exemptions do not apply

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2024 - STATUTORY PRIVACY TORT

Common law position unclear:

- *ABC v Lenah Game Meats* (2001) 208 CLR 199
- *Doe v ABC* [2007] VCC 281
- *Sands v South Australia* [2013] SASC 44

Recommended legislation:

- ALRC, 2008
- VLRC, 201
- Federal Government Discussion Paper, 2011
- ALRC, 2014
- NSW Standing Committee of Justice, 2016
- ACCC, 2018

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2024 - STATUTORY PRIVACY TORT [CONT.]

- To be introduced no later than 10 June 2025
- Not the same as data protection
- Key elements:
 - Intruding upon seclusion or misusing information
 - Person had a reasonable expectation of privacy
 - Intentional or reckless act
 - Serious
- Exemptions
- Damages

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2024 – OAIC enforcement powers

- Amendment Act introduces new tiered civil penalty regime:
 - Top tier ('Serious' interferences with privacy of an individual)
 - Mid-tier (all other non-'serious' interferences with privacy of an individual)
 - Low-tier (administrative breaches eg. failing to have up-to-date privacy policy)
 - OAIC can issue **infringement notices** and **compliance notices**
- Information Commissioner can conduct public enquiries (on direction of Minister)
- Expanded Federal Court powers to make orders beyond pecuniary remedies.

Privacy Reforms – Where are we heading?

2024 - DATA SECURITY

- *Cyber Security Act 2024* (Cth)
- Act addresses:
 - (Part 2) – mandatory security standards for smart devices
 - (Part 3) – mandatory reporting obligations regarding ransomware
 - (Part 4) – information sharing for entities impacted by a cyber security incident
 - (Part 5) – Cyber Incident review Board
- Parts 4 and 5 commenced 30 November 2024; Parts 2 and 3 are not yet in force

Foreshadowed Amendments
The Privacy Act 1988

2025 AND BEYOND

Reforms previously foreshadowed and possibly on the horizon:

- Fair and reasonable test
- Harmonisation
- Review of exemptions
- Notice and consent
- Privacy Policies
- Controllers and processors
- Personal rights and freedoms
- Security and destruction
- Direct marketing and targeting

Presenters



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