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Privacy, FOI and Public Interest Disclosure Implications for Commonwealth Procurement

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- Three key Acts relating to management of information by Commonwealth agencies impose obligations that need to be addressed in contracting and procurement:
 - *Privacy Act 1988*
 - *Freedom of Information Act 1983*
 - *Public Interest Disclosure Act 2013.*
- The aim today is to:
 - overview what these Acts do and how they work
 - outline Commonwealth contract provisions
 - consider practical implications and how to manage them.

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Privacy Act 1988

Today is a big day for privacy law!

- Privacy Principles cover collection, use, disclosure and handling of *personal information*
 - IPPs applied to Commonwealth government agencies
 - NPPs applied to private sector organisations
 - New Australian Privacy Principles have replaced both.
- Similar principles for *agencies* and *organisations*
- No more "light touch"
 - Civil penalties for serious and repeated breaches (up to \$1.7 m)
 - New compliance powers
- New emphasis on practices, procedures and systems
- Greater obligation to ensure personal information is protected in the hand of third parties.

Australian Privacy Principles

1. Open and transparent management of personal information
2. Anonymity and pseudonymity
3. Collection of solicited personal information
4. Dealing with unsolicited personal information
5. Notification of collection
6. Use or disclosure
7. Direct marketing
8. Cross-border disclosure of personal information
9. Adoption, use or disclosure of Government identifiers
10. Quality of personal information
11. Security of personal information
12. Access to personal information
13. Correction of personal information

Outsourced functions frequently require a contractor to collect and handle personal information on behalf of an agency

The Privacy Act aims to ensure that where agencies outsource or procure services:

- there are contractual remedies for breach of privacy;
- contractors can be held directly accountable under the Act.

Many new APP requirements will impact on contracting:

- Restructuring/renumbering
- Transparency and privacy policies
- "Practices, procedures and systems" to ensure compliance
- Use and disclosure (including direct marketing)
- Cross border disclosures
- Protection from loss, misuse etc

- **Government contract:** Commonwealth contract or a State contract.
- **Commonwealth contract:** a contract to which the Commonwealth, Norfolk Island or an agency is or was a party, under which services are to be, or were to be, provided to an agency.
- **Services provided to an agency** include services provided to other persons in connection with the functions of an agency (s. 6(9))
- **"Contracted service provider":** an organisation that is or was a party to a government contract and that is or was responsible for provision of services to an agency or a State or Territory authority under the contract. Includes subcontractors.
- **Subcontract** is a contract under which a contracted service provider [...] is engaged to provide services to another contracted service provider or any agency for the purposes (direct or indirect) of the Commonwealth contract.

Section 95B of the Privacy Act:

- Aims to ensure that CSP complies with privacy laws as if it were an agency
- The contract is the primary source of the CSP's obligation
- An agency entering into a Commonwealth contract must:
 - take contractual measures to ensure that a CSP does not do an act, or engage in a practice, that would breach an APP if done or engaged in by the agency; and
 - ensure that the contract does not authorise a CSP to do such and act or engage in such a practice.
- Applies whether the agency is entering into the contract on behalf of the Commonwealth or in its own right.

A Commonwealth contract may authorise a CSP to do something that would otherwise breach the APPs (eg where APPs contain different requirements for agencies and organisations).

6A(2) An act or practice does not breach an Australian Privacy Principle if:

- (a) the act is done, or the practice is engaged in:
 - (i) by an organisation that is a contracted service provider for a Commonwealth contract (whether or not the organisation is a party to the contract); and*
 - (ii) for the purposes of meeting (directly or indirectly) an obligation under the contract; and**
- (b) the act or practice is authorised by a provision of the contract that is inconsistent with the Principle.*

Interference with privacy (s. 13)

However, an act or practice that is inconsistent with the provision of the contract will be an interference with privacy.

13(3) An act or practice of an organisation is an interference with the privacy of an individual if:

- (a) the act or practice relates to personal information about the individual; and*
- (b) the organisation is a contracted service provider for a Commonwealth contract (whether or not the organisation is a party to the contract); and*
- (c) the act or practice does not breach:*
 - (i) an Australian Privacy Principle; or*
 - (ii) a registered APP code that binds the organisation;**in relation to the personal information because of a provision of the contract that is inconsistent with the principle or code; and*
- (d) the act is done, or the practice is engaged in, in a manner contrary to, or inconsistent with, that provision.*

- Commonwealth agencies contract with many small businesses, particularly as conduits for grants/funding
- Small business operators (ie turnover < \$3m pa) are generally exempt from compliance with APPs
- However, small business operator that is a Commonwealth contractor is not exempt in respect of activities under that contract (s. 6D(4))

Open and transparent use of personal information (APP 1)

- New privacy policy requirements
 - use and disclosure
 - international data disclosures
 - complaints.
- Practices, procedures and systems to ensure compliance
 - contractual arrangements are part of this.

Notification about collection (APP 5)

- Individuals must be given certain information when their personal information is collected
- Agencies need to be sure that CSPs collecting personal information on their behalf meet these requirements.

Use and disclosure (APP 6)

- Provision of personal information by an agency to a CSP often involves "disclosure" to the CSP.
- Individuals would "reasonably expect" minimum personal information necessary for the contractor's role to be disclosed to a CSP.
- However, if the agency does not release the information from its effective control, this will be treated as a "use" (eg where information provided to service provider for storage only).
- Disclosures need to be identified in collection statements.
- To avoid triggering disclosure obligations, contracts may need to:
 - specify/limit the purposes (eg to storage only)
 - limit third party access
 - give the agency "effective control" over data.

Direct marketing (APP 7)

- Organisations can use personal information for direct marketing in some circumstances
 - where within reasonable expectation of the individual
 - where opt-out opportunity provided
- Generally, *agencies* cannot use personal information for direct marketing.
- CSP can use information for direct marketing purposes for the purpose of meeting an obligation under a Commonwealth contract (APP 7.4)
- Contracts may to include a prohibition on use for direct marketing
- If direct marketing is required, the scope should be spelt out very clearly in the contract.

Cross border data transfers: APP 8

- An entity that discloses personal information to an overseas recipient must take reasonable steps to ensure the recipient does not breach APPs.
- Breach by O/S recipient may be breach by Australian entity (s 16C)
- Exceptions:
 - *law or binding scheme giving equivalent protections*; or
 - informed consent
 - "permitted general situation".
- "Reasonable steps" will generally require contractual controls, eg:
 - specifying/limiting types of information and purposes of disclosure
 - requiring O/S entity (and subcontractors) to comply with APPs
 - complaint handling process
 - data breach response plan.

Security of personal information: APP 11

- Agency must take reasonable steps to protect information from:
 - misuse, interference and loss; and
 - unauthorised access, modification and disclosure
- Data breach by contractor will expose the agency to breach of APP 11, if it hasn't put proper contractual protections in place
 - see: OAIC Guide to Information Security
- Agency must take reasonable steps to destroy or permanently identify personal information that is no longer needed
 - exception for Commonwealth records (Archives Act)
 - records held by CSPs may be Commonwealth records
- (Note: this also applies where APPs 4.3 requires destruction of unsolicited information).

Robust privacy clauses are essential. CSPs need to be required to

- comply with the Privacy Act and applicable Codes etc
- not engage in conduct that would breach the APPs
- collect, use, disclose, handle only for the purposes of the contract
- comply with security protocols
- comply with privacy related directions
- notify the agency of suspected breaches
- provide warranties as to authority to deal with data
- indemnify in relation to breaches
- notify of and assist in regulatory (OAIC) intervention.

OAIC likely to release model clauses



Freedom of Information

- Fol Act creates enforceable rights of access to agency documents
- Various categories of documents are exempt from disclosure
- Some are conditionally exempt: access must be granted unless disclosure contrary to public interest.
- Two major issues for contractors:
 - confidential information provided to agency
 - documents held by CSPs now subject to Fol.
- Statutory time limits:
 - acknowledgment within 14 days (s. 15(5)(a))
 - request must be processed within 30 days, otherwise deemed refusal (s. 15(5)(b))
- Provision for internal and external review
- "Reverse Fol" for third party (including contractor) documents

Exemptions – no public interest test

- National security, defence and international relations (s. 33)
- Cabinet documents (s. 34)
- Law enforcement and public safety (s. 37)
- Documents subject to statutory secrecy provisions (s. 38)
- Legal privilege (s. 42)
- Material obtained in confidence (s. 45)
- Parliamentary Budget Office documents (s. 45A)
- Contempt of Parliament or Court (s. 46)
- Trade secrets or commercially valuable information** (s. 47)
- Electoral rolls and related documents (s. 47A)

Conditionally exempt documents

- Commonwealth-State Relations (s. 47B)
- Deliberative processes (s. 47C)
- Substantial adverse affect on Cth. financial or property interests (s. 47D)
- Substantial adverse effect on certain agency operations (s.47E)
- Unreasonable disclosure of personal information (s. 47F)
- Business, commercial or financial affairs** (s. 47G)
- Research (CSIRO/ANU specific) (s. 47H)
- Substantial adverse affect on Australia's economy (s. 47J)

"Commonwealth contract" means a contract:

- to which the Commonwealth...or an agency is, or was, a party;
 - under the contract, services are, or were, to be provided
 - by another party, and
 - for or on behalf of an agency; and
- to a person who is not the Commonwealth, Norfolk Island or an agency; and
- the services are in connection with the performance of the functions, or the exercise of the powers, of an agency.

"Document of an agency" includes a document in relation to which an agency has taken contractual measures under section 6C to ensure that it receives the document from a contractor or sub-contractor providing services to the public on the agency's behalf.

Agencies must ensure Commonwealth contracts contain measures that enable them to obtain documents from contractors to respond to FoI requests for access.

Section 6C

- (1) *This section applies to an agency if a service is, or is to be, provided under a Commonwealth contract in connection with the performance of the functions or the exercise of the powers of the agency.*
- (2) *The agency must take contractual measures to ensure that the agency receives a document if:*
 - (a) *the document is created by, or is in the possession of:*
 - (i) *a contracted service provider for the Commonwealth contract; or*
 - (ii) *a subcontractor for the Commonwealth contract; and*
 - (b) *the document relates to the performance of the Commonwealth contract (and not to the entry into that contract); and*
 - (c) *the agency receives a request for access to the document.*

Lack of contractual measures may result in complaint to the OAIC.

- OAIC Guidelines on Contractor Documents include a model clause that provides:
 - Contractor acknowledges that the contract is a Commonwealth contract.
 - Where the Agency receives a request for access to a document held by the contractor it may give notice requiring the document to be provided.
 - Contractor must promptly comply with the notice at no additional cost .
 - Contractor must require subcontractors to comply with similar obligations.
- It might also be desirable to require contractor to assist in identifying relevant documents.

If the contractor won't co-operate?

- If the contractor delays or refuses to provide a document, the agency is at risk of breaching time limits for agency decisions.
- No automatic extension of time where the contractor refuses to comply, but the agency could:
 - seek applicant's agreement to extend for up to 30 days (s 15AA).
 - apply to the Information Commissioner for an extension if the access request is voluminous or complex (s 15AB).
- An agency can refuse an access request where it has not received a document from a contractor and the agency has taken all reasonable steps to obtain it (s 24A(2)).
- What are reasonable steps:
 - seeking all possible extensions?
 - action against the contractor?

The image features a decorative background with a central white horizontal band. The top and bottom portions of the image are a deep purple color, containing several translucent, spherical objects that resemble marbles or beads. The text "Public Interest Disclosure" is centered within the white band in a bold, purple, sans-serif font.

Public Interest Disclosure

Objects of the PID Act:

- promoting integrity and accountability in the Commonwealth public sector
- encouraging and facilitating disclosure of suspected wrongdoing in the public sector
- ensuring that agencies properly handle, investigate and respond to public interest disclosures
- ensuring that disclosers are protected from adverse consequences of making public interest disclosures.

Individuals and organisations providing goods or services under Commonwealth contracts can make disclosures.

Disclosures can be made about contracted service providers.

- The identity of a person who makes a public interest disclosure must be kept confidential (subject to the exceptions).
- The discloser is protected from civil, criminal and administrative liability (including disciplinary action) for making the disclosure.
- Contractual and other remedies (eg breach of confidentiality obligations) not enforceable against the discloser for making the disclosure.
- Disclosure does not breach secrecy provisions.
- The disclosure attracts absolute privilege in defamation.
- However, the Act does not protect a discloser from:
 - liability for making false or misleading statements; or
 - the consequences of his or her own conduct.

What is a public interest disclosure?

- A disclosure of information only attracts the protection of the PID Act if it is a *public interest disclosure*.
- A disclosure is a *public interest disclosure* if, and only if:
 1. the discloser is a current or former *public official*; and
 2. the discloser believes, on reasonable grounds, that the information tends to show one or more instances of *disclosable conduct*; and
 3. the information is disclosed to the proper recipient, as set out in the PID Act.
- A public interest disclosure can be made to the person's supervisor, an "authorised officer" or the Ombudsman.

Types of conduct that is disclosable

Includes conduct that:

- contravenes a law (including a foreign law)
- is corrupt
- relates to perverting the course of justice
- constitutes maladministration (ie is unjust, oppressive or negligent)
- is an abuse of public trust
- results in wastage of public money or property
- constitutes misconduct relating to scientific research etc
- unreasonably endangers health, safety or the environment
- is an abuse of a public official's position, or
- would be grounds for disciplinary action if proven.

Public official: includes an individual who:

- is a CSP for a Commonwealth contract; or
- an officer or employee of or service provider for a CSP.

Disclosable conduct: refers to certain types of conduct engaged in by an agency, a public official or a CSP in connection *with the entering into or giving effect to* of a Commonwealth contract.

Commonwealth contract: a contract to which the Commonwealth [agency] is a party and under which goods or services are provided to it or on its behalf in connection with its functions /powers.

Contracted service provider: a party to a Commonwealth contract who is responsible for providing goods or services under the contract, or a party to a contract with that person who is responsible for providing goods or services for the contract (ie a subcontractor).

- Individuals and organisations providing goods or services under Commonwealth contracts can make disclosures.
- Disclosures can be made about contracted service providers.
- Conduct of CSPs in connection with tendering as well as service delivery is disclosable.
- Agencies must appoint authorised officers to receive disclosures. Authorised officers must be identified and accessible to staff who may wish to make a disclosure. This includes CSP staff.
- The Act imposes extensive obligations on agencies to facilitate and encourage disclosures and protect disclosers.
- These may need to be supported by contractual obligations on CSPs.

- The Privacy Act, FoI Act and the PID Act all seek to extend obligations of Commonwealth agencies to contractors providing services to or on behalf of those agencies.
- There are some explicit requirements to that need to be reflected in Commonwealth contracts.
- There are a number other obligations which create risks that need to be managed contractually.
- Contract obligations need to be informed by an understanding of the agencies obligation, roles and responsibilities.



Questions?