Regulators team up on privacy compliance

Senior Associate Jackie Lyne looks at the increased power and range of regulators of the new privacy regime in the light of a recent collaboration between two Federal bodies.

The collaborators
The Australian Competition and Consumer Commission (ACCC) and the Office of the Federal Privacy Commissioner (OPC) have agreed to co-operate in order to achieve and enforce privacy compliance. This announcement may have serious consequences, not only for private sector organisations which are subject to the new privacy regime, but also for their individual directors, officers and employees.

The proposed co-operation will highlight the overlap of the Privacy Act 1988 (the Privacy Act) with the Trade Practices Act 1974 (TPA) and will mean that:

- once under scrutiny by either agency, organisations may be subject to widespread investigation by both;
- companies which are already high risk from a trade practices perspective, such as internet retailers, organisations using comparative advertising or those dealing directly with consumers, may well find their information handling practices under the spotlight;
- individuals may be personally liable for breaches of the Privacy Act; and
- greater resources will be available to scrutinise companies’ privacy compliance and investigate privacy complaints.

The agreement
On 12 March 2002 the ACCC Chairman, Professor Alan Fels, and the Federal Privacy Commissioner (FPC), Mr Malcolm Crompton, signed a Memorandum of Understanding (MOU) which sets out the framework in which the two agencies intend to co-operate.
This will include a regular exchange of information, assisting each other with investigations and even forming a joint task force to conduct litigation.

Broadly speaking, the OPC’s function is to deal with complaints arising out of Privacy Legislation and to promote an Australian culture that respects privacy, whilst the ACCC is responsible for administering the TPA, which prohibits anti-competitive and unfair market practices.

The MOU deals with a number of areas in which the OPC and ACCC plan to co-operate and the main provisions are summarised below:

1. Information sharing

Representatives of the two agencies will meet at least every 6 months and will:

- share knowledge about projects, activities or developments that may impact on the discharge of the other agency’s responsibilities;
- tell each other about potential breaches of legislation administered by the other;
- share information about their proposed monitoring activities and identify opportunities for joint monitoring, promotion and educational activities; and
- confer on privacy codes submitted for approval under the Privacy Act, try to identify issues arising from, and processes to resolve, these issues.

The agencies will also co-operate to provide educational material and information for the media on matters that are of common interest to them.

2. Assistance with investigations and enforcement

Under the MOU, either agency can ask the other for help or information in carrying out its own duties, subject to any legal constraints which would prohibit this. These constraints include the privacy rights of individuals who have complained or whose personal information is being considered as part of an investigation.

Finally, if the agencies think it is likely to be more effective, the two regulators can agree to form a joint task force on particular investigations or litigation.

Why is this significant?

The significance of this co-operation becomes clear if we consider where the regulators' areas of responsibility overlap.

Under the Privacy Act, organisations must provide individuals with information about how their personal information is handled. An organisation must, for example, have a document containing clearly expressed policies on its management of individuals’ personal information and must make this document available to anyone on request.

Similarly, whenever an organisation collects personal information from someone, it must tell them why the information is being collected, to whom it may be disclosed, whether the collection is required by law and give them information about their rights to access that information.

The potential problems arise where companies’ information handling practices fail to live up to the statements contained in those documents. Under the TPA, a company will be liable if it engages in misleading and deceptive conduct in the course of trade or commerce. If a company makes a statement about the way it will handle information in a document which is available to the public and its practices are inconsistent with that statement, it runs the risk that it will be found to have engaged in misleading or deceptive conduct.

Having an appropriate privacy compliance regime in place will help to minimise this risk.

Consequences for companies

Under the Privacy Act the FPC has wide powers to investigate complaints made by individuals about the way an organisation has handled their personal information and can address infringing behaviour. These include powers to:

- declare that the company should reimburse the individual for reasonable expenses incurred in bringing the complaint;
- declare that the organisation must not repeat or continue any infringing conduct;
• require the organisation to redress any loss or damage suffered by the complainant;
• declare that the complainant is entitled to compensation;
• order the organisation to delete, correct or alter an individual’s data; or
• order the organisation not to repeat an activity.

The FPC also has the power to order a company to make a public apology to the individual, to improve or change its compliance systems or to submit to an audit by the FPC. However, the Privacy Act does not set out monetary penalties for organisations which fail to handle personal information appropriately.

The range of remedies which may be granted by a court for having engaged in misleading or deceptive conduct under the TPA are wide and include:
• awarding damages to compensate for any loss suffered;
• varying a contract; or
• declaring a contract void from its commencement (or from any date that the court considers appropriate).

Of course, another significant risk to companies which breach the Privacy Act is the potential damage to their reputation that could result from a privacy complaint, the ensuing investigation and attendant publicity. This may lead to a fall in the share price and infringing companies may have difficulty in recovering consumer trust.

**Consequences for individuals**

Under the Privacy Act liability for breach is clearly targeted at the organisation, rather than at its directors and officers, but certain provisions in the TPA extend liability for a breach to any individual who is involved in committing the breach.

An individual may be involved in a number of ways. This can range from aiding and abetting the breach, to being in any way indirectly or directly knowingly concerned in the breach.

An individual will be regarded as being involved where they have a close involvement in the breach.

Knowledge generally means actual knowledge but it can be inferred if there is a combination of suspicious circumstances and a failure to inquire on the part of the relevant individual.

If an individual is found to be involved in a breach of the TPA, they may be personally liable to pay damages for any loss suffered as a result of the breach.

Since privacy is a corporate compliance issue, a failure by a company to comply with the Privacy Act may also expose its directors and officers to liability for breach of directors duties under both the common law and the Corporations Act 2001 (Cth), as well as any breaches of the TPA.

Broadly speaking, directors have a duty of loyalty and good faith to their company, they must not exercise their powers for improper purposes or restrain the future exercise of those powers and must avoid being placed in a position of conflict of interest. They also have a statutory duty to act honestly as well as common law and statutory duties of care.

It is possible therefore, that a failure to comply with the Privacy Act may lead to serious consequences, not only for the company involved, but for individuals involved in the breach and for the company’s directors and officers.

With the alliance of the two regulators and their expanded range of remedies, Privacy Act defaults are more likely to lead to these consequences.

**Combined force**

The ACCC has already indicated that it will use the misleading and deceptive conduct provision of the TPA to prosecute companies who do not observe stated privacy policies. The co-operation envisaged by the recent collaboration between the ACCC and the OPC indicates that both these agencies intend to do all in their power to ensure compliance with the new privacy laws.
For further information, please contact:

Katherine Sainty
Partner, Sydney
+61 2 9230 4739
Katherine.Sainty@aar.com.au

John Gallimore
Partner, Brisbane
+61 7 3334 3135
John.Gallimore@aar.com.au

Julian Riekert
Partner, Melbourne
+61 3 9613 8672
Julian.Riekert@aar.com.au

Steven Cole
Partner, Perth
+61 8 9488 3743
Steven.Cole@aar.com.au

Have your details changed?
If your details have changed or you would like to subscribe or unsubscribe to this publication or others, please go to www.aar.com.au/general/subscribe.htm or contact Barbara Leis on +61 7 3334 3371 or email Barbara.Leis@aar.com.au