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Tax and Compliance Alert

Privacy and Other Legislation

Amendment Bill 2024 passed in both Houses of Parliament

At a glance

- ▶ Privacy Amendment Bill passed in both Houses of Parliament.
- ▶ The changes will take into effect on Royal Assent which we expect will be before Christmas 2024 or in early 2025.
- ▶ Key changes have been made to the Bill since it was introduced.
- ▶ What the changes mean.
- ▶ Actions to consider.
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On 29 November 2024, the *Privacy and Other Legislation Amendment Bill 2024 (Cth)* (the **Bill**) was passed by both Houses of Parliament to introduce a range of measures to protect the privacy of individuals with respect to their personal information.

The passage of the Bill continues a four-year long process encompassing a review of the Privacy Act 1988 (Cth) (**Privacy Act**) by the Attorney General's Department, stakeholder consultation and the Government's response, all targeted at strengthening and modernising the Privacy Act.

For more information on the Bill's development, please refer to our [September 2024 Tax and Compliance Alert](#).

The Bill's acceptance is the next step in making Tranche 1 of updates to the Privacy Act into law. These Tranche 1 updates cover:

- ▶ Expanding the Office of the Australian Information Commissioner's (**OAIC**) powers regarding enforcement, monitoring, and investigation of non-compliance with the Privacy Act.
- ▶ Strengthening privacy safeguards for children by requiring the development of a Children's Online Privacy Code (**COPC**) by the OAIC, capturing both social media platforms and any online services likely accessed by children.
- ▶ Providing protections for overseas disclosures of personal information, by requiring the Governor General to stipulate a list of countries with sufficient privacy protections and enforcement mechanism to facilitate cross-border data transfers.
- ▶ Facilitating emergency declarations to enhance information sharing in emergency situations or following eligible data breaches.
- ▶ Introducing new tiered civil penalties for entities that seriously interfere with the privacy of an individual, supported by infringement notices, undertakings to comply, and injunctions.
- ▶ Requiring cyber security uplifts by requiring that "reasonable security steps" for the purposes of Australian Privacy Principle (**APP**) 11 includes both technical and organisational measures.
- ▶ Mandating transparency about automated decisions using personal information by requiring privacy policies to contain information about automated decision-making (**ADM**) systems that significantly affect the rights or interests of individuals.
- ▶ Establishing a right for individuals to sue for serious privacy breaches, including defences, remedies and exceptions to the cause of action.

- ▶ Criminalising the act of doxxing to deter the sharing of personal information online in a menacing or harassing manner.

When do the changes take effect?

All of the changes included in this legislative amendment will take effect and commence on Royal Assent (as soon as the Bill becomes law) which we expect will be before Christmas 2024 or in early 2025, with a few exceptions:

- ▶ The provisions requiring the development of a COPC by the Information Commissioner necessitates that the COPC must be registered within 24 months after the Bill becomes law.
- ▶ The requirement for privacy policies to reflect information about ADM systems by an organisation will commence within 24 months after the Bill becomes law.
- ▶ The creation of a statutory tort for serious invasions of privacy will take effect within 6 months after the Bill becomes law.
- ▶ Although the introduction of a list of countries deemed acceptable for cross-border data transfers will commence when the Bill becomes law, the actual list will be developed through the implementation of specific regulations.

For all other changes, there is no "grace period" and compliance is expected from day one.

What are the key changes made to the Bill since it was introduced?

Although the current Bill is significantly similar to the version first introduced to Parliament on 12 September 2024, it is important to note that a few changes have been made to the provisions regarding the statutory tort for serious invasions of privacy and the enforcement powers of the Australian Information Commissioner.

Change 1: Statutory Tort for Serious Invasions of Privacy

The statutory tort creates a new civil wrong, allowing individuals to sue for compensation if their privacy is seriously invaded through intrusion or misuse of their personal information. To succeed, an individual must prove:

- (a) An invasion of privacy occurred through intrusion or misuse of information.
- (b) They had a reasonable expectation of privacy.
- (c) The defendant's actions were intentional or reckless.
- (d) The invasion was serious.
- (e) The plaintiff's privacy interest outweighs any public interest, such as freedom of expression.

The Senate has introduced a 'public interest' requirement, placing the burden of proof on the

plaintiff (the person bringing the claim). This means that the plaintiff must demonstrate that their need for privacy outweighs any opposing public benefits. Consequently, the plaintiff must provide the evidence to support their claim, rather than the defendant having to disprove it. The Bill also outlines examples of countervailing public interests, such as freedom of expression (including artistic expression), freedom of media, and open justice.

Change 2: Broader Enforcement Powers for the Australian Information Commissioner

As part of its broader enforcement powers, the OAIC will have the authority to issue compliance notices if they reasonably believe an entity has violated the Privacy Act.

These notices can mandate that an entity rectify its non-compliance, by detailing:

- ▶ The entity's name and details of the violation.
- ▶ The steps the entity must take to address the violation and prevent its recurrence.
- ▶ The timeframe within which these steps must be completed, which must be reasonable.
- ▶ Information on the consequences of non-compliance and the right to seek a review.

Entities must comply with these notices or face financial penalties. Compliance with a notice does not mean the entity admits to the violation.

Additionally, notices cannot be issued if an infringement notice or enforceable undertaking is already in place and not withdrawn. Entities have the right to apply to the Federal Court or the Federal Circuit and Family Court for a review of the notice if they believe they did not commit the violation or if the notice does not meet legal requirements. The court can then confirm, cancel, or modify the notice.

This is effectively another enforcement tool that the OAIC will have at its disposal to ensure compliance with the Privacy Act and may be intended to encourage compliance by an organisation that might otherwise pay a penalty but not meaningfully change its practices.

What do the changes mean?

The passage of the Bill marks the next step in Australia's Privacy Act reform, tackling the digital age's privacy challenges and aligning with international standards like the EU's General Data Protection Regulation (GDPR). Its enactment will impose new legislative and regulatory action, including increased enforcement action and fines for non-compliance.

Organisations in scope of the Privacy Act must prepare now to navigate this stricter privacy landscape.

Actions to consider now

In light of these changes, organisation should act now to:

- ▶ Get compliant with the Privacy Act.
- ▶ Review privacy governance, compliance and risk management practices to align with the Privacy Act and the Tranche 1 updates.
- ▶ Enhance security practices with robust technical and organisational controls.
- ▶ Assess ADM practices.
- ▶ Prepare for the forthcoming COPC, where children's personal information is processes.
- ▶ Develop forward-looking policies.
- ▶ Enhance processes for managing compliance across the full data lifecycle, including the development and implementation of retention policies.
- ▶ Uplift training programs for employees and effectively educate and engage them in relation to privacy principles and compliance.

What next?

While the Attorney General has yet to provide any specific details on Tranche 2 of updates to the Privacy Act, he has announced that this is the first step in delivering strong privacy protections and that [the Government will continue to consult with stakeholders to move those updates forward](#). The upcoming Australian election, likely to be held in May 2025, has had an impact on the timing and substance of these legal updates, with more significant changes expected to roll out after the election. The Liberal Party has yet to comment publicly on the Privacy Act updates but still may include them in their proposed legislative agenda.

However, given the number of 'agreed' and 'agreed in-principle' recommendations that were not included in the Tranche 1 changes through the Bill, it is likely that Tranche 2 of privacy reforms will introduce further substantial changes focussed on tightening regulations on:

- ▶ Expanding the definition of consent to align with GDPR.
- ▶ Introducing a 'fair and reasonable test' for dealing with personal information.
- ▶ Direct marketing that relies of personalisation.
- ▶ Reducing exemptions for employee records and small businesses.
- ▶ Broadening individual rights to include a right to deletion.
- ▶ Improving organisational accountability.

How EY can help

We can assist you with:

- ▶ Undertaking privacy compliance gap assessments
- ▶ Compliance remediation action plans
- ▶ Implementing recommendations across the full spectrum of privacy compliance
- ▶ Conducting Privacy Impact Assessments (PIAs) for new technologies and high-risk processing activities
- ▶ Mapping your data flows
- ▶ Data breach response plans and processes
- ▶ Training your employees
- ▶ Creating vendor onboarding processes that include privacy compliance
- ▶ Understanding the application of privacy and data protection laws

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