

A new Privacy Act

What to expect when you're collecting

David Ireland
Partner

Campbell Featherstone
Senior Associate

Financial Advice NZ
19 August 2020

Introduction

Today's topics

- Global context – drivers for change
- The Privacy Act 2020
- What's not there (yet)?
- Our tips

Global context

GDPR

Global context

GDPR

- Extraterritorial application – does it apply to you?
- Over two years since implementation
- ‘Insufficient technical and organisational measures to ensure information security’
- Google – €50,000,000 fine
- Potentially huge fines – British Airways and Marriott
- Enforcement action against Canadian company

Global context

Australia

- Significant increase in penalty regime
- Mandatory data breach notification regime
- Increased powers of the Office of Australian Information Commissioner
- New social media platform requirements
- Still not of universal application

Key changes in New Zealand The Privacy Act 2020

Key changes in New Zealand

Overview

- Privacy Act 2020 replaces Privacy Act 1993
- Comes into force on 1 December 2020
- The ‘information privacy principles’ (IPPs) mostly the same, with some subtle tweaks (and one new IPP)
- Already vocal Privacy Commissioner likely to become even more vocal
- Opportune time to consider practices and policies
- Not just about the law: consumers recognising the importance of protecting their personal information
- Still subordinate to other legislation which requires the use, collection or disclosure of personal information (such as AML/CFT law)

Key changes in New Zealand

Minimisation of collection

- Change to IPP 1:

‘If the lawful purpose for which personal information about an individual is collected does not require the collection of an individual’s identifying information, the agency may not require the individual’s identifying information.’

- Principle of ‘data minimisation’
- Think about why you need the information – is it actually going to be used?
- Legal obligation to collect?
- Personal information can be a ‘toxic asset’ – the more you hold, the more risk (and cost) to the business
- Think about retention periods

Key changes in New Zealand

Binding access direction

- Currently, an individual has the right to request personal information held by an agency about the individual
- Similar rules apply under the 2020 Act...
- ...but the Privacy Commissioner can now issue an ‘access direction’
- HRRT can impose \$10,000 fine for failure to comply with access direction ‘without reasonable excuse’
- Think about systems and processes in place to respond to access directions – can you even provide for self-service?

Key changes in New Zealand Mandatory data breach reporting

- From voluntary to mandatory
- Offence if you fail to notify
- Must have reasonable grounds for believing no reporting obligation
- Will keep the Privacy Commissioner busy
- Prepare: assume it will happen to you one day

Key changes in New Zealand Mandatory data breach reporting

- Is it notifiable?
- Notify Privacy Commissioner
- Notify individual – or public generally, if not possible
- Exceptions
- Describe breach and steps taken
- Identify who may be in possession of personal information
- Contact person for agency

Key changes in New Zealand Mandatory data breach reporting

Response plan:

- Who is engaged?
- Shut down breach
- Who fronts media?
- Reputational repair?
- Other agencies

Key changes in New Zealand Enforcement powers

- Teeth or gums?
- New criminal offences – fine up to \$10,000
- Access direction
- Commissioner may publicise compliance notices
 - Identity of agency
 - Other relevant details
 - Commissioner's statement or comment
- Reputational risk

Key changes in New Zealand Cloud computing

- Not actually a change?
- Confirms liability of agency where service provider is holding personal information on their behalf
- Transfer of data between an agency and a cloud service provider is not a 'disclosure' for the purpose of the IPPs where provider holding personal information as 'agent'
- Do some diligence
- What do your agreements with service providers say?

Key changes in New Zealand International disclosures

New IPP 12:

- Strengthens cross-border data flow protections
- Applies to disclosures by a New Zealand agency to an overseas person
- Does not apply to transfer to another person who is holding personal information as agent
- Exceptions

Key changes in New Zealand

Territorial effect

Key change in New Zealand

Click to consent

- Not a change in law – a change in regulatory focus
- *‘...take any steps that are, in the circumstances, reasonable to ensure that the individual concerned is aware...’* (IPP 3)
- Don't bury disclosures of how information will be used in your privacy policy
- Think about your user experience
- What is your user's reasonable expectation of what information will be collected and how the information will be used?
- Transparency is key

What's not there...

...yet?

- More significant fines?
- Data portability/a 'consumer data right'?
- Restrictions on automated profiling?

Tips for New Zealand agencies

- Don't wait for the law to catch up
- Privacy by design
- Transparency first
- Sort out your arrangements with service providers

Thank you

Dentons Kensington Swan
89 The Terrace
PO Box 10246
Wellington 6143
DX SP26517

Contact

david.ireland@dentons.com

DDI +64 4 498 0840 **M** +64 21 343 615

campbell.featherstone@dentons.com

DDI +64 4 498 0832 **M** +64 21 809 779

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Enterprise, Dentons' wholly owned subsidiary of innovation, advisory and technology operating units. Dentons' polycentric approach, commitment to inclusion and diversity and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.