

PRIVACY AND COVID-19: CURRENT ISSUES

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INTELLECTUAL PROPERTY
TECHNOLOGY AND
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OVERVIEW

- Handling COVID-19 related information
 - condition of entry to workplace
 - employees/contractors/visitors
 - condition of providing a service (e.g. restaurants)
 - disclosure to third parties
- COVIDSafe app
 - privacy issues
 - collection, use, storage
 - mandating download

AUSTRALIA'S PRIVACY REGIME

- *Privacy Act 1988* (Cth)
- Australian Privacy Principles
 - Schedule 1 of *Privacy Act*
- State and Territory laws
 - e.g. *Privacy and Data Protection Act 2014* (Vic)
- Health records laws
 - e.g. *Health Records Act 2001* (Vic)

KEY PRIVACY PRINCIPLES

APP 3.2: collection of personal information permissible if “necessary for, or directly related to” an entity’s functions or activities

APP 3.3(a): collection of sensitive information also requires consent

APP 6.1: can use and disclose for primary purpose

APP 6.2(a): or for a (directly) related secondary purpose

APP 6.2(b): or if authorised by law

KEY PRIVACY PRINCIPLES (CONT.)

APP 11.1: personal information must be protected against misuse/interference/loss/unauthorised access/unauthorised modification/unauthorised disclosure

APP 11.2: personal information must be destroyed or de-identified if no longer required for its original purpose (except as required by law)

COMPLICATIONS

- Employee record exemption
 - *Privacy Act* s 7B(3)
- Small business exemption
 - *Privacy Act* s 6C, 6D
- Interaction with health records legislation
 - no employee record exemption
 - HPPs 1 (collection), 2 (disclosure), 4 (security, retention)

COMPLICATIONS (CONT)

- COVID-19 specific laws
- Distinction between employees and contractors
 - collector may not know, and may be confidential
 - legal distinction not always clear
- OH&S obligations
 - e.g. *Occupational Health and Safety Act 2004*
(Vic)
- Confidentiality

CHECKLIST

- (1) Is the collecting organisation a small business?
- (2) Is the individual an employee, contractor, service provider, visitor or other?
- (3) Is health information (e.g. temperature or symptoms) being collected?
- (4) What express or implied consent accompanied the collection?
- (5) If a small business:
 - *Privacy Act* does not apply
 - if health information is collected, AND if collected in Victoria, NSW or ACT, obligations arise under health records legislation

CHECKLIST (CONT)

(5) If an employee:

- *Privacy Act* does not apply if collection and handling “directly related to employee relationship”: s 7B(3)
- if health information is collected, AND if collected in Victoria, NSW or ACT, obligations arise under health records legislation

(6) If a contractor:

- APPs 3, 6 and 11 will apply
- if health information is collected, AND if collected in Victoria, NSW or ACT, obligations arise under health records legislation

CHECKLIST (CONT)

(7) If a prescribed business:

- comply with any legislative record keeping requirements
- comply with any collection notice requirements
- APPs 3, 6 and 11 will also apply
- if health information is collected, AND if collected in Victoria, NSW or ACT, obligations also arise under health records legislation

(8) Only release to third party with consent or as authorised by law

(9) Only retain whilst relevant or as otherwise required by law

(10) Consider OH&S obligations

(11) Consider confidentiality constraints

COVIDSAFE APP – BACKGROUND

- *Privacy Amendment (Public Health Contact Information) Act 2020* – came into effect 15 May 2020
- introduced new Part VIIIA to the *Privacy Act*
- Regulates use of “registration data” and “COVID app data”
- section 94B – object of Part VIIIA is to assist in preventing the spread of COVID-19

COVIDSAFE APP – DIVULGING INFORMATION

- section 94D(1) – general prohibition on collecting, using or disclosing COVID app data unless the collection or disclosure is expressly permitted by the section
- section 94D(2) – COVID app data may be used by State and Territory authorities
- No other uses or disclosures authorised by Part VIIIA

COVIDSAFE APP – NO COMPULSORY DOWNLOAD

Section 94H - no person can require, coerce, or otherwise oblige (directly or indirectly) any other person to install COVIDSafe.

For example, this means that –

- employers cannot require their employees to download the app; and
- businesses cannot confine service only to customers who can demonstrate that they have downloaded the app.