The Australian Privacy Act - no more a 'toothless tiger'?

In a first for Australia, the Federal Court has granted an injunction to stop a breach of privacy law. **Ian McGill**, **Karin Clark** and **Banjo McLachlan** report on the implications for all businesses covered by the National Privacy Principles, including call centres, telemarketers and businesses with large customer databases.

WHAT HAPPENED IN THE CASE

Seven Network (Operations) Limited (Seven) proposed a new enterprise agreement directly with its employees.

One of the unions that opposed the move contracted a call centre to poll Seven staff about the proposed agreement. The union provided the call centre with an internal Seven phone directory (the Seven Directory) and ticked on the directory-listing those employees who should be called. No evidence was given as to how the union came into possession of the Seven Directory, but it was clear that Seven had not given permission to use it.

The script provided for call centre employees to say that they were from the union and to ask various questions about the employee's employment position. Employees were asked how they felt about the proposed new enterprise agreement, including how they were likely to vote and why, and how they got their information. Questions were also asked to ascertain whether employees were interested in becoming activists in relation to the issue.

The call centre prepared a database that allowed direct entry of polling results by call centre staff. The database included details copied directly from the Seven Directory.

THE LEGAL ISSUES

WORKPLACE RELATIONS ACT – INTENT TO COERCE

Seven submitted that the polling was intended to coerce the employees to vote against the agreement, contrary to the Workplace Relations Act. However, the court (Justice Gyles) found that in the circumstances there was not an implied threat of victimisation or any intent to overbear the will of those polled.

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COPYRIGHT

In one aspect of the judgment, Seven successfully argued that it owned copyright of the Seven Directory and that the union reproduced the directory contrary to exclusive rights granted to Seven under the Copyright Act. Justice Gyles found that in creating a database to contain the name, telephone number and location of persons, the call centre also infringed the exclusive right of Seven to reproduce its directory in digital form.

In addition to granting the injunctions sought by Seven in relation to a breach of Seven's copyright, the court awarded damages of AUS$10,000 against the union and said that it was prepared to order damages of AUS$2,500 against the call centre because it had profited financially. (However, the court was prepared to hear further arguments from the parties on that point: it was not established that the call centre had knowledge of the circumstances under which the union had obtained the Directory.)

PRIVACY

One of the novel elements of this case was the obtaining of an injunction from the court to prevent a breach of privacy. The union and the call centre argued that the scheme of the Privacy Act was for complaints about privacy breaches to be first made to the Privacy Commissioner, who would investigate the complaint and then make a determination.

The court held that there was no reason why section 98 of the Privacy Act - which provides that the Federal Court or the Federal Magistrates Court can grant an injunction to restrain a person from engaging in conduct that would breach the Privacy Act - should not be given effect.

Justice Gyles found several breaches of the National Privacy Principles (or NPPs) under the Privacy Act and held that Seven was entitled to the injunctive orders it sought. The court even commented that:

> Indeed, it is fairly obvious from both the manner in which the matter was handled at the time and from the evidence of [the manager of the call centre] that neither MEAA [the union] nor Connect [the call centre] gave any serious consideration to the application of the Privacy Act to the task at hand, surprising as that may be in view of the significance of the extension of the Act to just such organisations as those in 2001.

The court found that both the union and the call centre clearly breached those parts of NPP 1 that require an organisation to take steps to give a 'collection statement' to individuals. Such statements will include information about the purpose of collection and a person's rights to access their personal information.

The court also made interesting comments on the scope of some of the NPPs.

For example, NPP 1.1 provides that an organisation can collect personal information only if the information is necessary for its functions or activities. The court found that the union was in breach of this principle in obtaining the personal information that the call centre had collected from the employees: and that while this information was useful or desirable to the union, it was 'hardly necessary for any of its functions'. (The court did not make a similar finding in relation to the personal information in the Seven Directory, but only because it could not be shown that this was collected after December 21st 2001, when NPP 1 came into effect.)

The court also found that the call centre did not breach NPP 1.1 in collecting the information because collecting that information was part of the call centre's functions.

In relation to the collection of personal information by the union, the court's findings seem based on a curiously narrow interpretation of what is 'necessary' for an organisation's functions or activities, and the reasoning behind this finding is perhaps one aspect of the judgment that could be challenged. On the other hand, if this finding is correct, then many organisations may need to re-consider whether they collect any personal information that is not 'necessary' for their activities in this strict sense (despite considering such information useful or desirable).

THE IMPLICATIONS

This case therefore has obvious implications for a range of organisations that use personal information for marketing or polling purposes. Call centres and telemarketing companies, for example, and the businesses that use them, are reminded that they need to check for compliance with the Privacy Act in relation to:

- what personal information they can source to make outbound calls and how they can source that information
- what personal information they can collect in both inbound and outbound calls and how they can collect it; and
- how they deal with the information collected.

The case also confirms that copyright can exist in phone directories (see *Desktop Marketing Systems Pty Limited v Telstra Corporation Limited (2002) 119 FCR 491*) and other sources of personal information, and that breach of copyright can result in an award of damages or an account of profits having to be made.

It is not just the individuals concerned, or the Privacy Commissioner, who can ask for an injunction under the Privacy Act. Any other party with sufficient standing (such as Seven in this case) can apply for such an injunction.

Perhaps most significantly for all organisations covered by the NPPs, this case puts paid to the mistaken view that privacy law is a 'toothless tiger'. This view has sometimes been expressed on the basis that a complaint relating to a breach of the NPPs can be made by the relevant individual only to the Federal Privacy Commissioner. The Commissioner must then investigate the matter and make a determination, but the determination (which can include an order for compensation) is not binding between the parties. Although the complainant or the Commissioner can commence proceedings in court for an order to enforce a determination, the court is required to deal afresh with the question of whether there was a breach of the Privacy Act.

Even before the *Seven* case, this view ignored important factors such as the risk to brand and business reputation if the Privacy Commissioner makes an unfavourable public determination against a business.

The *Seven* case makes it clear that complainants have another remedy. They can go quickly and directly to the Federal Court or the Federal Magistrates Court to prevent the use, or potential use, of personal information in breach of the privacy law. This means that a business that plans a marketing campaign without taking the privacy laws into account may have that campaign stopped by an injunction, and may thus jeopardise the resources spent planning and executing the campaign.

Even more significantly, it is not just the individuals concerned, or the Privacy Commissioner, who can ask for an injunction under the Privacy Act. Any other party with sufficient standing (such as Seven in this case) can apply for such an injunction. Thus, for example, if a business obtains the customer list of a competitor, the competitor might be able to apply to the court to prevent the use of the list in breach of the Privacy Act .

This case is a timely reminder that privacy law compliance needs to be taken as seriously as any other legal compliance, and that breaching privacy laws can be very costly for business.

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