

# Privacy: it's coming faster than Christmas

The *Privacy Amendment (Private Sector) Act 2000* will have a significant impact on the way in which many private organisations handle personal information.

"Personal information" basically means information that can be used to identify a person. For example, a person's name, contact details and date of birth.

The Amendment Act is due to commence on 21 December 2001 and will introduce minimum standards that most private organisations will have to comply with when dealing with personal information. These principles are known as the National Privacy Principles (NPPs) and they provide for:

- collection of personal information to be necessary, lawful, fair and generally with consent
- use and disclosure of personal information for the primary purpose only unless consent to secondary use is given
- maintenance of data quality and data security
- openness in relation to practices of organisations
- access and correction rights for individuals to their personal information
- prohibition on use of government identifiers (eg Tax File Number or Medicare number)
- if lawful and practicable, the option of anonymity
- restrictions on trans-border data flows
- higher levels of protection for collection of sensitive information – eg information relating to health, criminal records, political, religious or sexual preference but not financial information.

The mere adoption of a privacy policy will not be sufficient compliance on the part of

an organisation. It will be necessary to ensure that the policy is performed in all parts of the organisation. Best practice may require regular audits of practices for handling personal information and appropriate staff training.

## Exemptions

The Amendment Act contains exemptions for specified organisations - including media organisations, registered political parties and State or Territory bodies. Small businesses will also be exempt, unless they:

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- provide a health service and hold health information (apart from employee records)
- trade in personal information
- are related to a body corporate that is not a small business, or
- act as a contract service provider to the Commonwealth Government.

There are also exemptions for specified activities - including some acts by employers in relation to employee records, passing of personal information between related bodies corporate and certain non-business activities.

The impact of the Amendment Act will also be less significant for financial institutions, which are already subject to the credit reporting provisions of Part IIIA of the Privacy Act and Codes such as the Code of Banking Conduct and the Electronic Funds Transfer Code.

FOR FURTHER INFORMATION, CONTACT JANE DIAMOND (02) 9334 9328

## THE KEMP STRANG BRIEF

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THE KEMP STRANG BRIEF IS INTENDED TO KEEP READERS AHEAD OF CURRENT LEGAL AND FIRM DEVELOPMENTS. IT IS NOT TO BE USED OR RELIED UPON AS A SUBSTITUTE FOR PROFESSIONAL ADVICE. BEFORE ACTING ON ANY MATTER, READERS SHOULD CONSULT WITH THEIR ADVISERS.

We look at how bankers often have to deal with difficult situations when customers are having financial problems. Freezing a customer's accounts sometimes needs to be considered but is not a step to be taken lightly.

## The banker's right to freeze accounts revisited

Bankers are sometimes faced with difficult decisions when a customer shows signs of looking financially shaky, but wishes to continue to draw on loan facilities previously agreed. The Bank will be mindful of honouring its commitments but, on the other hand, it will be concerned at continuing facilities in these circumstances. Moreover, having received notice of potential insolvency there is the added risk to the Bank that payments into the customer's account may be "preferences" under bankruptcy law and therefore have to be disgorged in the event that the customer ultimately goes into liquidation.

The response of Banks to notice of potential insolvency is often to freeze the customer's accounts, direct the customer to draw no more cheques on these accounts, and require the customer to open new accounts to operate in credit only. Does the Bank need to give the customer reasonable notice before taking this drastic action? One trial judge recently raised the blood pressure of a few Bankers when he answered "yes". However, in *State Bank of NSW v Currabubula Holdings Pty Ltd*, the NSW Court of Appeal disagreed.

The facts of the case are these. Briefly, the Bank became concerned at the financial standing of a customer and decided on a unilateral basis and without notice to "freeze" its accounts. The Bank allowed new accounts to be opened but they were to be operated on a credit basis only. At the point the accounts were frozen the customer was fully drawn on the loan facilities agreed to be provided.

The customer sued the Bank for damages alleging breach of contract. The Bank lost at first instance. The trial judge found that the Bank was liable in contract for breach of an implied term requiring that it give reasonable notice to the customer in the event that it decided to vary its customary mode of providing banking services. Damages were awarded against the Bank.

The Bank appealed. The Court of Appeal determined that there was no such implied term and upheld the appeal.

Stopping a customer's accounts is not a step to be taken lightly by a Bank

The Court of Appeal said that it is not enough that it is reasonable to imply a term - rather it must be necessary to do so in order to give business efficacy to the contract and the suggested term must be so obvious that it goes without saying.

The Court held that it was not reasonable and equitable to inhibit the Bank from seeking immediately to act in a manner perceived to protect it from insolvency or possible insolvency of the customer. The Court also held that, in the circumstances of this case, the Bank did not have to give reasonable notice before freezing accounts.

The *Currabubula Holdings* Case did not deal with the situation where the customer had its accounts frozen at a time when undrawn facilities were available to it. In these cases Banks must take great care before "freezing" the customer's accounts.

Stopping a customer's accounts is not a step to be taken lightly by a Bank given the serious consequences which can flow from doing so. Before taking that step due care should be taken and legal advice obtained.

# Odds change in NSW gaming

Are you planning to deal with a pub or club? If so, the NSW Government recently changed the odds.

On 26 July 2001, the New South Wales State Government announced a number of measures designed to reduce and restrict gaming in New South Wales. To date no legislation has been introduced to implement these changes - but anyone dealing with hotels or clubs need to carefully consider the broad package. Some of the changes are back-dated to 19 April 2001.

One significant measure the Government announced was a cap on the total number of gaming machines in New South Wales at the existing level. Each of the 18 clubs that have more than 450 machines must dispose of 10% of them over the next 5 years. The present cap of 30 machines per hotel remains.

The gaming reform package also includes:

- the establishment of two transferable gaming machine permit systems (one for clubs and one for hotels)
- the requirement for a social impact assessment before any hotel can obtain additional machines. Transfers are prohibited to a hotel which is in the immediate vicinity of a school, place of public worship or a hospital
- restrictions on the opening hours of gaming rooms
  - gaming machine operations must now be closed for at least 6 hours each day.

The transferable gaming machine permit systems require a club (or hotel) to forfeit a permit to the

Government for every 2 permits transferred to another club (or hotel). This, over time, will reduce the number of gaming machines in New South Wales. However, the forfeiture provisions don't apply to the gaming machine permits that were issued by the Government in 1997 at an issue price of \$50,000 (which had been trading for up to \$275,000).

The transfer of the permits under the new transferable system will be at prices set by the hotel and club markets. There is no present indication what the market price for any of these permits will be. The requirement that a social impact assessment be obtained before an hotel can obtain additional machines may well limit the value attributed to the permits.

Anyone dealing with an hotel or a club, as a seller, buyer, financier or operator, needs to carry out due diligence inquiries to verify how many poker machines could operate on 19 April 2001 and how many permits have been transferred from or to it since that time. If it is intended to increase its number of gaming machines, consideration will also have to be given to the likely outcome of the social impact assessment. The past profit levels of clubs and pubs may also be affected by the new restrictions on opening hours.

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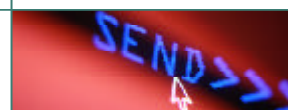
# Making IT work ...

Kelvin O'Connor from InterLegal Pty Limited, our information technology consultants, discusses our technology interface.

Kemp Strang is currently in the process of implementing an electronic document management system called 'iManage'. This will allow easier internal document sharing and collaboration and, because this is linked to our electronic mail system, we will be able to have access to one electronic filing cabinet of all client matter related information. As a by-product of this implementation, Kemp Strang will be able to extend their document management services to clients using an

'infoCommerce' interface. This will enable clients to have access to their own customised 'home page' that allows document and task sharing, discussions, and sharing other matter management related functions. Currently we are trialling this system with some of our clients to provide up-to-date details of transaction progress and to help stop the 'telephone tag' that follows paper intensive tasks. Contact your client liaison partner to find out more about how we can work together.

If you would like to receive future issues of the Kemp Strang Brief by email, please contact us at [info@kempstrang.com.au](mailto:info@kempstrang.com.au).



Our September Brief's interview is with Paul Frederick, a Partner in our Agribusiness and Rural practice group.

Paul, tell us how you became involved in rural work?

Greaves Wannan & Williams, my old firm, was originally a city firm with a few country connections. Then, in the 1960s, the firm was approached by US interests looking to buy suitable land in the central north of the State to grow irrigated cotton. That early involvement was the first step in the establishment of a significant rural practice, based on providing legal services to those involved in, or seeking to become involved in, irrigated farming. My involvement in this area of the law commenced in the mid-1970s and it has been the major part of my practice for the last 25 years.

You and some other Greaves Wannan & Williams partners and staff joined Kemp Strang earlier this year. How have you found the change?

Without doubt it has been a good move for a variety of reasons, not the least of which is the ability to provide to the clients of Greaves Wannan & Williams who have come across with us a wider variety of specialist services. Kemp Strang as a larger, quality firm has a great deal of top level expertise available in tax and superannuation, commercial litigation, human resources and corporate law, to name but a few areas, and the depth and quality of expertise can only benefit those clients.

Is it difficult being based in Sydney and providing legal services to country clients?

No, in fact it is a plus. A number of my clients are large corporates with head offices in Sydney. The majority of clients, however, are country based and are either family run organisations (many of a significant size involving a number of farming properties) or

bodies which represent cotton growers and/or irrigators. Because my clients are located in areas throughout the State from the Murrumbidgee River in the south to the border rivers (with Queensland) in the north, Sydney is the best place to be. With phone, email and faxes the "tyranny of distance" is not an issue.

In particular, what sort of work do you do in the rural area?

Frankly, whatever comes along. There is, of course, the large scale rural conveyancing involving water rights, and in such matters there is often scope to achieve significant savings for clients in the way the transaction is structured.

I am often involved in settling commercial documentation for rural clients, particularly processors and marketers of cotton. This work involves corporate financing, preparation of processing and marketing agreements and preparation of documentation related to crop financing for my clients' customers/growers.

Currently I am involved in advising lending institutions on the impacts which the new Water Management Act will have on their securities over irrigation properties.

There are issues constantly arising in the irrigation area which need resolution for clients – whether they are disputes between neighbours (access to water, flood flows diverted onto neighbouring properties by earthworks, etc.) or disputes with the Department of Land and Water Conservation as to how it has treated the client on a particular issue.

My aim at Kemp Strang is, with others, to continue to develop a strong Agribusiness practice catering for the needs of our clients in all these areas.

What are your interests outside work?

Obviously, my family and friends are important to me and I value the quiet times when I can unwind. I play tennis whenever I get the opportunity, enjoy bushwalking, travel and good wines (not necessarily in that order) and am an active member of St Clement's Church at Mosman.

#### New Partners and Associates

Mark Hickey became a Partner of Kemp Strang on 1 July 2001. At the same time, Dominic Calabria, Patrick Donovan and Michael Rozdal were appointed Associates.

#### St George Appointment

The firm is pleased to have been recently appointed to the Retail panel of St George Bank for its Sydney Business District.

#### Our Olympics Partner

We are very proud to announce that Partner, John Coates, AO, has been appointed to the International Olympic Committee.

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