

PRIVACY CODE OF PRACTICE FOR THE NSW DEPARTMENT OF FAIR TRADING

1. NSW DEPARTMENT OF FAIR TRADING

The NSW Department of Fair Trading was established in October 1995, through the integration of:

- the Department of Consumer Affairs
- the Building Services Corporation
- the Office of Real Estate Services
- the Registry of Cooperatives.

The Department's role is to safeguard consumer rights and to advise business and traders on fair, ethical practice. We do this in regard to:

- consumer goods and services
- accommodation and property services
- home building.

The Department currently administers over 40 pieces of legislation, and it aims to protect consumers while minimising unnecessary restrictions on business and traders.

As well as maintaining the policy framework which provides the setting for consumer and trader interactions, the Department of Fair Trading provides information to the community and conducts education programs for both business and consumers, with the aim of encouraging self-help and informal resolution of matters directly between the parties. The Department also receives formal complaints, investigates non-compliance with the Department's legislation, and obtains redress for consumers.

2. PURPOSE OF THE CODE OF PRACTICE

This Code of Practice is made under Part 3, Division 1 of the Privacy and Personal Information Protection Act 1998.

The Privacy and Personal Information Protection Act 1998 sets out standards for the protection of personal information which apply to most of the NSW public sector. These standards regulate the way public sector agencies deal with personal information. Personal information is information or an opinion about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion. This covers information where the identity of the individual can be ascertained by reference to some other source of information.

The Privacy and Personal Information Protection Act lays down a number of "Information Protection Principles" which regulate the way in which public sector agencies collect, store, use and disclose personal information.

If a public sector agency believes that any of the provisions of the Privacy and Personal Information Protection Act are unworkable in a particular circumstance, it can submit a draft Privacy Code of Practice to be made by the Attorney General. A

Privacy Code of Practice is a statement of how one or more of the provisions of the Privacy and Personal Information Protection Act will be modified in its application to an agency. A Code of Practice is not meant to be a comprehensive guide to an agency's information management practices – this is the task of the agency's Privacy Management Plan.

This Privacy Code of Practice sets out how a number of the provisions of the Privacy and Personal Information Protection Act will be modified in their application to the Department of Fair Trading.

3. INFORMATION COVERED BY THE CODE

The Code of Practice applies to personal information dealt with by the Department of Fair Trading. The Code itself spells out the classes of information and activities which it applies to.

4. INTERPRETATION

In this Code:

“information” means personal information as defined in section 4 of the Privacy and Personal Information Protection Act;

“law enforcement” means any action which is aimed at enforcing compliance with legislation administered by the Minister for Fair Trading, and includes the issue of penalty notices, civil action (such as obtaining an injunction), administrative action (such as the cancellation of a licence), and prosecution.

5. WHY IS A CODE NECESSARY?

The Department of Fair Trading undertakes numerous functions which may involve dealing with personal information. These functions include:

- Assisting customers, traders and the community on all aspects of fair trading. This involves responding to enquiries and complaints, and providing information to assist with the resolution of disputes through self-help
- Monitoring marketplace performance, and identifying, deterring and remedying illegal conduct and ensuring compliance with fair trading legislation.
- Administering a number of trade and business licensing schemes, including associated public registers
- Administering registration and incorporation schemes, including associated public registers
- Conducting disciplinary action in relation to licensing regimes
- Developing and implementing statewide trade measurement programs
- Identifying and removing unsafe consumer products from the marketplace and ensuring the safe installation of electrical equipment
- Acting as custodian of rental bond money
- Providing tenancy information
- Providing an information and mediation service for people living in Strata Title and Community Title schemes

- Administration of the government insurance scheme and oversight of the private insurance scheme for residential building;
- Administering the Register of Encumbered Vehicles.

Undertaking these functions involves dealing with large amounts of information. Although the majority of this information relates to businesses rather than individuals, the line between business and personal information is often blurred, and business information may become personal information if the identity of the persons who act on behalf of the business can be reasonably ascertained.

Some of the functions of the Department of Fair Trading, which are essential to ensuring protection for consumers, cannot be effectively carried out while also maintaining strict compliance with all of the provisions of the Privacy and Personal Information Protection Act.

Section 25 of the Privacy and Personal Information Protection Act provides that a public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18, or 19 of the Act if the agency is lawfully authorised or required not to comply with the principle concerned or non-compliance is otherwise permitted or is necessarily implied or reasonably contemplated under an Act or any other law. The Department of Fair Trading is able to rely on section 25 in some circumstances to enable it to effectively carry out its functions. In other circumstances, where there is no other law authorising departure from the provisions of the Privacy and Personal Information Protection Act, the Department requires a Code of Practice to enable it to carry out its functions. The Code of Practice only authorises departure from the requirements of the Privacy and Personal Information Protection Act where this is necessary in order to effectively protect and assist consumers.

6. EXPLANATION OF THE CODE'S PROVISIONS

The Code of Practice provides for modification of a number of the Information Protection Principles set out in the Privacy and Personal Information Protection Act.

Principle 1 - Collection of personal information for lawful purposes (section 8)

Section 8 of the Privacy and Personal Information Protection Act provides that a public sector agency must not collect personal information unless:

- (a) the information is collected for a lawful purpose that is directly related to a function or activity of the agency, and
- (b) the collection of the information is reasonably necessary for that purpose.

Section 8 also provides that a public sector agency must not collect personal information by any unlawful means.

The Code of Practice does not provide for any exemption from section 8.

Principle 2 – Collection of personal information directly from the individual (section 9)

Section 9 of the Privacy and Personal Information Protection Act provides that a public sector agency must, in collecting personal information, collect the information directly from the individual to whom the information relates unless

- (a) the individual has authorised collection of the information from someone else or,
- (b) in the case of information relating to a person who is under the age of 16, the information has been provided by a parent or guardian of the person.

The Code of Practice authorises departure from section 9 in the case of:

- (i) Inquiries and complaints received by the Department of Fair Trading about the conduct of third persons, which may involve fair trading issues;
- (ii) Correspondence received by the Department of Fair Trading containing allegations or information about third parties, which may involve fair trading issues;
- (iii) Information collected for the purposes of investigating possible breaches of legislation administered by the Minister for Fair Trading and for taking action to enforce compliance with that legislation;
- (iv) Information collected to enable the Department to effectively deal with complaints received under (i) and (ii) above and referred to the Department by other bodies;
- (v) Information collected for the purpose of providing an effective licensing regime;
- (vi) Information collected for the purpose of carrying out certification activities;
- (vii) Correspondence referred to the Department of Fair Trading by other State/Territory, Commonwealth and overseas government Ministers and bodies.

The exemptions relating to consumer complaints, inquiries and correspondence are designed to enable the Department of Fair Trading to effectively carry out its function of assisting consumers with fair trading issues. Complaints and inquiries will frequently contain information about a trader or other individuals and the exemption will allow the Department to receive this information from the complainant or inquirer so that it can provide effective assistance.

The exemption relating to information collected for the purpose of investigations and law enforcement recognises that, in order to effectively carry out these functions, the Department, like all investigative and law enforcement agencies, must be able to collect information from all possible sources, including other law enforcement and regulatory bodies. Limiting the collection of information to the person who may have committed the breach would make it impossible to effectively investigate possible breaches of the law and to collect evidence for law enforcement.

The fourth exemption, relating to information collected for the purposes of enabling the Department to effectively deal with complaints, recognises that, in order to provide an effective complaint handling service, it is necessary for the Department of Fair Trading to exchange information with other fair trading, licensing and regulatory bodies, both in Australia and overseas, which may be able to provide assistance with resolving the complaint.

The fifth exemption, for information collected for the purpose of providing an effective licensing regime, will ensure that the Department of Fair Trading can collect from any source information regarding the eligibility of licence applicants, the ongoing eligibility of licence holders, and possible breaches of licensing legislation. In the case of building and travel agent's licences, which require licensees to maintain insurance cover, the exemption will allow collection of information regarding compliance with licence conditions from approved insurers, and, in the case of

electrician's licences, it will allow collection of information regarding defective electrical work from electricity supply companies who inspect electricians' work. Although from 1 July 2000 the Department's licence application forms will be amended to include a term authorising the Department to collect information regarding an applicant's initial and ongoing eligibility for a licence, these forms will not have been signed by existing licence holders, and the new forms will be phased in gradually as existing stocks of old forms are used up. The exemption is therefore necessary to cover cases where the new licence application form was not used.

The exemption relating to certification activities allows the Department of Fair Trading to collect information relevant to the certification of articles and instruments under consumer safety and trade measurement legislation.

The final exemption allows the Department of Fair Trading to accept letters about fair trading issues which are referred on by other Ministers and Departments. Given that anyone who writes to a Minister about an issue is likely to want the letter passed to the appropriate organisation, this exemption will allow the provision of an effective service to the public.

Principle 3 – Requirements when collecting personal information (section 10)

Section 10 of the Privacy and Personal Information Protection Act requires that, if a public sector agency collects information from an individual, the agency must take such steps as are reasonable in the circumstances to ensure that, before the information is collected or as soon as practicable after collection, the individual to whom the information relates is made aware of the following:

- (a) the fact that the information is being collected,
- (b) the purposes for which the information is being collected,
- (c) the intended recipients of the information,
- (d) whether the supply of the information by the individual is required by law or is voluntary, and any consequences for the individual if the information (or any part of it) is not provided,
- (e) the existence of any right of access to, and correction of, the information,
- (f) the name and address of the agency that is collecting the information and the agency that is to hold the information.

The Code of Practice authorises non-compliance with section 10 where the Department of Fair Trading considers that compliance with this principle is reasonably likely to detrimentally affect (or prevent the proper exercise of) investigative or law enforcement activities.

Principle 4 – Other requirements relating to collection of personal information (section 11)

Section 11 of the Privacy and Personal Information Protection Act provides that, if a public sector agency collects personal information from an individual, the agency must take such steps as are reasonable in the circumstances (having regard to the purposes for which the information is collected) to ensure that:

- (a) the information collected is relevant to that purpose, is not excessive, and is accurate, up to date and complete, and
- (b) the collection of the information does not intrude to an unreasonable extent on the personal affairs of the individual to whom the information relates.

The Code does not provide for any exemptions from section 11.

Principle 5 – Retention and security of personal information (section 12)

Section 12 of the Privacy and Personal Information Protection Act provides that a public sector agency that holds personal information must ensure:

- (a) that the information is kept for no longer than is necessary for the purposes for which the information may lawfully be used, and
- (b) that the information is disposed of securely and in accordance with any requirements for the retention and disposal of personal information, and
- (c) that the information is protected, by taking such security safeguards as are reasonable in the circumstances, against loss, unauthorised access, use, modification or disclosure, and against all other misuse, and
- (d) that, if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or disclosure of the information.

The Code does not provide for any exemptions from section 12.

Principle 6 – Information about personal information held by agencies (section 13)

Principle 7 – Access to personal information held by agencies (section 14)

Principle 8 – Alteration of personal information (section 15)

Sections 13, 14 and 15 of the Privacy and Personal Information Protection Act deal with individual's rights to inquire about, access and amend information about themselves.

Section 13 requires an agency that holds personal information to take steps as are, in the circumstances, reasonable to enable any person to ascertain:

- (a) whether the agency holds personal information,
- (b) whether it holds personal information relating to that person, and
- (c) if the agency holds personal information relating to that person:
 - (i) the nature of that information,
 - (ii) the main purposes for which the information is used and
 - (iii) the person's entitlement to gain access to the information.

Section 14 states that an agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay and expense, provide the individual with access to the information.

Section 15 provides that:

- 1) a public sector agency that holds personal information must, at the request of an individual to whom information relates, make appropriate amendments (whether by way of corrections, deletions or additions) to ensure that the personal information:
 - (a) is accurate, and
 - (b) having regard to the purpose for which the information was collected (or is to be used) and to any purpose that is directly related to that purpose, is relevant, up to date, complete and not misleading.
- 2) If a public sector agency is not prepared to amend personal information in accordance with a request by the individual to whom the information relates, the agency must, if so requested by the individual concerned, take such steps as are reasonable to attach to the information, in such a manner as is capable of being read with the information, any statement provided by that individual of the amendment sought.
- 3) If personal information is amended in accordance with this section, the individual to whom the information relates is entitled, if it is reasonably practicable, to have recipients of that information notified of the amendments made by the public sector agency.

The Code of Practice authorises non-compliance with sections 13, 14 and 15 where the Department of Fair Trading considers that compliance with these principles is reasonably likely to detrimentally affect (or prevent the proper exercise of) investigative or law enforcement activities.

This exemption recognises that under some circumstances providing information regarding information which is held about an individual, and allowing that individual to inspect and alter that information, could compromise investigative or law enforcement activities.

Principle 9 – Agency must check accuracy of personal information before use (section 16)

Section 16 of the Privacy and Personal Information Protection Act provides that a public sector agency which holds personal information must not use the information without taking such steps as are reasonable in the circumstances to ensure that, having regard to the purpose for which the information is proposed to be used, the information is relevant, up to date, complete and not misleading.

The Code of Practice does not provide for any exemptions from section 16.

Principle 10 – Limits on use of personal information (section 17)

Section 17 of the Privacy and Personal Information Protection Act provides that a public sector agency that holds personal information must not use the information for a purpose other than that for which it was collected, unless

- (a) the individual to whom the information relates has consented to the use of the information for that other purpose, or
- (b) the other purpose for which the information is used is directly related to the purpose for which the information was collected, or
- (c) the use of the information for that other purpose is necessary to prevent or lessen a serious or imminent threat to the life or health of the individual to whom the information relates or another person.

The Code of Practice authorises non-compliance with section 17 in the case of information which is being used for the purpose of investigative and law enforcement activity, to the extent that the use of any such information for these purposes departs from the requirements of section 17.

In most cases information used for investigative and law enforcement purposes is collected specifically for such purposes and therefore satisfies the requirements of section 17. Information used for these purposes may also be obtained from consumer inquiries and complaints. Given that individuals who make complaints to the Department of Fair Trading do so in order to resolve disputes with traders and to report unfair and illegal conduct, it can be argued that investigation of breaches of fair trading legislation and law enforcement are purposes directly related to the purpose for which the information was provided and are therefore permissible under section 17.

Nevertheless, given the importance of allowing the Department of Fair Trading to effectively carry out investigations and law enforcement, the Code of Practice provides for an exemption from section 17 to the extent that section 17 prevents the use of any information held by the Department for these purposes.

Principle 11 – Limits on disclosure of personal information (section 18)

Section 18 of the Privacy and Personal Information Protection Act provides that:

- 1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:
 - (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
 - (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or
 - (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

- 2) If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

The Code of Practice authorises non-compliance with section 18 where disclosure of information to other bodies is reasonably necessary for the purpose of effective investigations, law enforcement, licensing and complaint handling, and where the information is provided on the basis that it is to be kept confidential and used only for the purposes for which it was disclosed.

This exemption is necessary in order to enable the Department of Fair Trading to effectively carry out its functions.

For example, in order to facilitate its investigative, law enforcement, licensing and complaint handling functions, the Department of Fair Trading regularly exchanges information with other fair trading, regulatory and law enforcement bodies in Australia and overseas. This exchange of information avoids duplication between agencies, maximises efficiency in complaint handling, licensing and law enforcement and promotes cooperation in dealing with common issues and protecting consumers.

In the case of builders' and travel agents' licences, where there is a statutory requirement that all licensees hold appropriate insurance, information regarding compliance with licence conditions is also exchanged with approved insurers and the Travel Agents' Compensation Fund. In the case of electricians' licences, the exemption will allow exchange of information regarding defective electrical work with electricity supply companies who inspect electricians' work.

It could be argued that all the information which the Department of Fair Trading discloses for licensing, law enforcement, investigative and complaint handling purposes has been collected for these purposes. For example, when the Department collects information from a licence applicant the aim is to ensure that only suitably qualified persons can engage in that particular occupation, and when it collects complaints about fair trading practices from consumers it aims to ensure compliance with fair trading legislation. In fact all the information which the Department of Fair Trading collects is for the broad purpose of ensuring compliance with legislation administered by the Minister for Fair Trading.

However, section 18(a) and (b) require that, in addition to using information for the purpose for which it was collected, either DFT should have no reason to believe that the person to whom information relates would object to the disclosure (subsection (a)) or that person must be reasonably likely to have been aware or have been made aware in accordance with section 10 that information of that kind is usually disclosed to that other person or body (subsection (b)).

In the case of information which is being used for investigations or law enforcement, DFT may not notify the person to whom the information relates if this would compromise law enforcement process and so may be in breach of section 18(a) and (b), unless it could be argued that the person would be reasonably likely to be aware that this kind of information would be disclosed to other law enforcement or regulatory bodies.

Similarly, although from 1 July 2000 the Department's licence application forms are to be amended to contain a clause whereby the applicant authorises the Department to make inquiries and to exchange information with other bodies regarding the applicant's current and ongoing eligibility to hold a licence, this form will not have been signed by existing licence holders, and the new forms will be phased in gradually as stocks of old forms are used up. The exemption is therefore necessary to enable the exchange of information to occur in relation to licence holders who did not use the new form.

The exemption will also allow the Department of Fair Trading to disclose relevant background information to any person or body who is asked to provide the Department with information which will assist with its licensing, investigative or law enforcement functions. For example, if the Department requires a bank to provide financial information regarding someone under investigation for a breach of legislation, the Department must disclose the person's identifying details in order to allow the bank to comply with this request.

Principle 12 – Special restrictions on disclosure of personal information (section 19)

Section 19 of the Privacy and Personal Information Protection Act:

- 1) provides that a public sector agency must not disclose personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual activities unless the disclosure is necessary to prevent a serious and imminent threat to the life or health of the individual concerned or another person;
- 2) prohibits an agency from disclosing personal information to any person or body who is in a jurisdiction outside of New South Wales, unless a relevant privacy law, approved by the Privacy Commissioner, is in force in that jurisdiction, or the disclosure is permitted under a Privacy Code of Practice.

The Code of Practice authorises non-compliance with section 19(2) where disclosure of information to other bodies is reasonably necessary for the purpose of effective investigations, law enforcement, licensing and complaint handling, and where the information is provided on the basis that it is to be kept confidential and used only for the purposes for which it was disclosed. The reasons for this exemption are the same as apply to section 18.

7. THE CODE OF PRACTICE

Section 8: Collection of personal information for lawful purposes

There is no intention to depart from this principle. All information collected by the Department of Fair Trading is collected for the purposes of carrying out the Department's lawful functions.

Section 9: Collection of personal information directly from the individual

The Department of Fair Trading generally collects personal information directly from the individual to whom the information relates. However, this Code authorises collection otherwise than directly from this individual in the case of:

- (i) Inquiries and complaints received by the Department of Fair Trading about the conduct of third persons, which may involve fair trading issues;
- (ii) Correspondence received by the Department of Fair Trading containing allegations or information about third parties, which may involve fair trading issues;
- (iii) Information collected for the purposes of investigating possible breaches of legislation administered by the Minister for Fair Trading and for taking action to enforce compliance with that legislation;
- (iv) Information collected to enable the Department to effectively deal with complaints received under (i) and (ii) above and referred to the Department by other bodies;
- (v) Information collected for the purpose of providing an effective licensing regime;
- (vi) Information collected for the purpose of carrying out certification activities;
- (vii) Correspondence referred to the Department of Fair Trading by other State/Territory, Commonwealth and overseas government Ministers and bodies.

Section 10: Requirements when collecting personal information

This Code authorises non-compliance with section 10 where the Department of Fair Trading considers that compliance with this principle is reasonably likely to detrimentally affect (or prevent the proper exercise of) the Department of Fair Trading's investigative or law enforcement activities.

Section 11: Other requirements relating to collection of personal information

There is no intention to depart from this principle.

Section 12: Retention and security of personal information

There is no intention to depart from this principle.

Section 13: Information about personal information held by agencies

Section 14: Access to personal information held by agencies, and

Section 15: Alteration of personal information

This Code authorises non-compliance with sections 13, 14 and 15 where the Department of Fair Trading considers that compliance with these principles is reasonably likely to detrimentally affect (or prevent the proper exercise of) investigative or law enforcement activities of the Department of Fair Trading, another investigative or law enforcement body or an investigative or law enforcement body in another jurisdiction.

Section 16: Checking accuracy of personal information before use

There is no intention to depart from the requirements of section 16.

Section 17: Limits on use of personal information

This Code authorises non-compliance with section 17 in the case of information which is being used for the purpose of investigative and law enforcement activity, to the extent that the use of any such information for these purposes departs from the requirements of section 17.

Section 18: Limits on disclosure of personal information

This Code of Practice authorises non-compliance with section 18 where disclosure of information to other bodies is reasonably necessary for the purpose of effective investigations, law enforcement, licensing and complaint handling, and where the information is provided on the basis that it is to be kept confidential and used only for the purposes for which it was disclosed.

Section 19 : Special restrictions on disclosure of personal information

This Code authorises non-compliance with section 19(2) where disclosure of information to other bodies is reasonably necessary for the purpose of effective investigations, law enforcement, licensing and complaint handling, and where the information is provided subject to agreement that it is to be kept confidential and used only for the purposes for which it was disclosed.