

## UPDATE

### The Fair Work Commission on the collection of sensitive information and privacy compliance in the workplace

A decision of the Full Bench of the Fair Work Commission provides important guidance on the application of the Australian Privacy Principles (**APPs**) in the workplace including obligations that apply when collecting personal information from employees and the scope of the employee records exemption.

Mr Lee worked as a machinery operator and general factory hand at the Superior Wood (**SW**) sawmill in Imbil, Queensland. In October of 2017 SW announced at a floor meeting that it was introducing fingerprint scanners to register employee attendance and track worktimes. A new Site Attendance Policy requiring use of the scanner by all employees (**Policy**) was published.

Mr Lee expressed a belief that the scanners would collect his fingerprints and that SW could not guarantee that third parties would not access and use his data once stored electronically. He objected to the scanners and refused to use them. On 12 February 2018 Mr Lee was terminated for failure to adhere to the Policy.

Mr Lee brought a case before the Fair Work Commission claiming he was wrongly terminated for failing to comply with an unlawful direction. Mr Lee alleged the direction that he adhere to the Policy was unlawful because:

- SW and its holding company Finlayson Timber and Hardware Company (**FTHC**) (which was responsible for ownership and operation of the scanner) did not have a privacy policy governing the privacy of employees in breach of APP 1.
- the proposed collection constituted a collection of sensitive information without consent in breach of APP 3.3.
- The proposed use of his personal information under the Policy was not “reasonably necessary” for any function or activity of SW as required by APP 3.2.
- SW and FTHC had not taken reasonable steps to ensure Mr Lee was aware of the matters listed in APP 5 at, before or as soon as practicable after, the collection.
- The data from the scanner was not stored by SW, so records held did not benefit from exception in 7B(3) of the *Privacy Act (1988)* (**Privacy Act**) as relating to an act done, or practice engaged in by an organisation that is, or was, an employer, and directly related the employment relationship and an employee record. Therefore, disclosure to FTHC was a breach of the Privacy Act.
- The conduct of SW constituted “serious and repeated interferences with privacy” giving rise to an offence under s13G of the Privacy Act.

SW submitted the termination of Mr Lee was not unlawful because he had been given a reasonable direction and plenty of time to consider his position.

SW argued for a wide interpretation of the employee records exemption and that use of the fingerprint scanner was reasonable and beneficial particularly due to administrative efficiencies and because it allowed SW to know instantly who was at the worksite should there be an emergency.

At first instance Commissioner Hunt found<sup>1</sup> the SW policy requiring use of the scanner was reasonable and not unlawful. Also, that the collection of sensitive personal information using the

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<sup>1</sup> *Mr Jeremy Lee v Superior Wood Pty Ltd T/A Superior Wood [2018] FWC 4762*

system was reasonably necessary. Commissioner Hunt noted that SW did not, in fact, collect any of Mr Lee's sensitive information without consent and considered the failure of SW to comply with APP 5 not sufficient to make the dismissal unlawful. Commissioner Hunt found the sharing of Mr Lee's information with FTHC authorised by 13B of the Privacy Act: a conditional exception for related bodies corporate.

On appeal the Full Bench of the Commission found<sup>2</sup> that SW was in breach of the Privacy Act by not, at the relevant time, having a Privacy Policy related to employees and not providing Mr Lee with collection information as required by APP5. The Full Bench found:

- The direction that Mr Lee submit to collection of his fingerprint data was unlawful and that "any "consent" that might have given, once told that he faced discipline or dismissal, would likely have been vitiated by the threat. It would not have been genuine consent".
- Mr Lee's failure to comply with the Policy was not a valid ground for dismissal and that SW had breached the Privacy Act even though Mr Lee's data had not been collected.
- The use of the fingerprint scanner by SW was not "reasonably necessary" and that SW could have considered other options to identify and record the attendance at work of Mr Lee.
- The dismissal was unjust and unlawful.

### **Comment**

This case highlights the limits of the employee records exemption. The employee records exception relates only to records held by the employer (or previous employer) once they are created.

Subject to the limited employee records exception, where an organisation is regulated by the Privacy Act the APPs apply to the management of the personal information of employees generally. The organisation must have a privacy policy dealing with employee personal information, comply with Privacy Act regarding what can be collected and how it can be used and must make APP5 compliant notifications to employees at, before or as soon as practicable after the personal information is collected.

APP 5 requires disclosure of collecting entity, purpose, whether the collection is required by law, the main consequences if the information is not collected, other entities to whom information of the type is usually disclosed, the existence and some features of the privacy policy (the ability to access, correct and/or complain about the handling of personal information), whether the information is likely to be disclosed offshore and, if so, where. Where personal information is collected from a third party (e.g., an academic institution, previous employer or criminal record check), APP 5 requires that individuals be notified of the collection and the circumstances of collection of their personal information from the third party.

Regulated organisations wishing to implement systems or procedures that collect sensitive information must:

- Consider whether the collection is "reasonably necessary", a threshold above mere convenience which also requires consideration of alternative business solutions.
- Take into consideration that the right to give consent for the collection of sensitive information carries with it a right to withhold consent and, therefore, endeavour to accommodate an employee preference not to provide sensitive information.

**Please contact me if you have any questions regarding the matters discussed in this update.**

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<sup>2</sup> *Mr Jeremy Lee v Superior Wood Pty Ltd T/A Superior Wood* [2019] FWCFB 2946 IR 368,