2019‑2020‑2021

The Parliament of the

Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

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| **EXPOSURE DRAFT** |

Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021

No. , 2021

(Attorney‑General)

A Bill for an Act to amend the law in relation to privacy, and for related purposes

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A Bill for an Act to amend the law in relation to privacy, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act is the *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Act 2021*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
| --- | --- | --- |
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. |  |
| 2. Schedule 1 | A single day to be fixed by Proclamation.  However, if the provisions do not commence within the period of 12 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period. |  |
| 3. Schedules 2 and 3 | The day after this Act receives the Royal Assent. |  |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Online privacy code

Part 1—Amendments

Privacy Act 1988

1 Subsection 5B(1A)

Omit “code and the registered CR code”, substitute “code, the registered CR code and the registered OP code”.

2 Subsection 5B(1A) (note)

Repeal the note, substitute:

Note: The act or practice overseas will not breach an Australian Privacy Principle, a registered APP code or the registered OP code if the act or practice is required by an applicable foreign law (see sections 6A, 6B and 6BAA).

3 Subsection 6(1)

Insert:

***APP public interest determination*** means a determination made under subsection 72(2).

4 Subsection 6(1) (after paragraph (b) of the definition of *breach*)

Insert:

(ba) in relation to the registered OP code, has the meaning given by section 6BAA; and

5 Subsection 6(1)

Insert:

***child*** means an individual who has not reached 18 years.

***electronic service*** has the meaning given by section 6X.

***OP code*** has the meaning given by section 26KC.

***OP code developer*** means:

(a) an OP organisation; or

(b) a group of OP organisations; or

(c) one or more bodies or associations representing one or more OP organisations.

***OP complaint*** means a complaint about an act or practice that, if established, would be an interference with the privacy of an individual because it breached the registered OP code.

***OP organisation*** has the meaning given by section 6W.

***OP public interest determination*** means a determination made under subsection 79A(1).

***registered OP code*** has the meaning given by section 26KB.

***temporary APP public interest determination*** means a determination made under subsection 80A(2).

***temporary OP public interest determination*** means a determination made under subsection 80DA(2).

6 Subsection 6(1) (definition of *temporary public interest determination*)

Repeal the definition.

7 At the end of subsection 6(7)

Add:

; or (h) being both an OP complaint and any of the following:

(i) an APP complaint;

(ii) a credit reporting complaint;

(iii) a code complaint;

(iv) a file number complaint.

8 After section 6B

Insert:

6BAA Breach of the registered OP code

Breach if contrary to, or inconsistent with, code

(1) For the purposes of this Act, an act or practice ***breaches*** the registered OP code if, and only if, it is contrary to, or inconsistent with, the code.

No breach—contracted service provider

(2) An act or practice does not ***breach*** the registered OP code if:

(a) the act is done, or the practice is engaged in:

(i) by an OP organisation that is a contracted service provider for a Commonwealth contract (whether or not the organisation is a party to the contract); and

(ii) for the purposes of meeting (directly or indirectly) an obligation under the contract; and

(b) the act or practice is authorised by a provision of the contract that is inconsistent with the code.

No breach—disclosure to the National Archives of Australia

(3) An act or practice does not ***breach*** the registered OP code if the act or practice involves the disclosure by an OP organisation of personal information in a record (as defined in the *Archives Act 1983*) solely for the purposes of enabling the National Archives of Australia to decide whether to accept, or to arrange, care (as defined in that Act) of the record.

No breach—act or practice outside Australia

(4) An act or practice does not ***breach*** the registered OP code if:

(a) the act is done, or the practice is engaged in, outside Australia and the external Territories; and

(b) the act or practice is required by an applicable law of a foreign country.

Effect despite subsection (1)

(5) Subsections (2), (3) and (4) have effect despite subsection (1).

9 After Division 2 of Part II

Insert:

Division 2A—Key definitions relating to online privacy

6W Meaning of *OP organisation*

Organisations providing social media services

(1) An organisation is an ***OP organisation*** if the organisation:

(a) provides an electronic service that satisfies each of the following conditions:

(i) the sole or primary purpose of the service is to enable online social interaction between 2 or more end‑users, including online interaction that enables end‑users to share material for social purposes;

(ii) the service allows end‑users to link to, or interact with, some or all of the other end‑users;

(iii) the service allows end‑users to post material on the service;

(iv) such other conditions (if any) as are specified in a legislative instrument made under subsection (7); and

(b) is not specified in, or does not belong to a class of organisations specified in, a legislative instrument made under subsection (7).

(2) In determining whether the condition set out in subparagraph (1)(a)(i) is satisfied, disregard each of the following purposes:

(a) the provision of advertising material on the service;

(b) the generation of revenue from the provision of advertising material on the service.

Organisations providing data brokerage services etc.

(3) An organisation is also an ***OP organisation*** if:

(a) the organisation collects personal information about an individual for the sole or primary purpose of disclosing that information (or information derived from that information) in the course of or in connection with providing a service (a ***data brokerage service***); and

(b) the information:

(i) is collected by the organisation from the individual by the use of an electronic service, other than an electronic service covered by subsection (1); or

(ii) was previously collected by another organisation from the individual by the use of an electronic service, including an electronic service covered by subsection (1); and

(c) the organisation is not specified in, or does not belong to a class of organisations specified in, a legislative instrument made under subsection (7).

Large online platforms

(4) An organisation is also an ***OP organisation*** at a particular time in a year if the organisation:

(a) either:

(i) for an organisation that carried on business in the previous year—had, in the previous year, at least 2,500,000 end‑users in Australia;

(ii) for an organisation that did not carry on business in the previous year—has in the current year at least 2,500,000 end‑users in Australia; and

(b) collects personal information about an individual in the course of or in connection with providing access to information, goods or services (other than a data brokerage service) by the use of an electronic service (other than an electronic service covered by subsection (1)); and

(c) is not specified in, or does not belong to a class of organisations specified in, a legislative instrument made under subsection (7).

(5) However, an organisation is not an ***OP organisation*** for the purposes of subsection (4) to the extent that the organisation collects personal information about an individual in the course of or in connection with providing a customer loyalty scheme.

Specified organisations

(6) An organisation is also an ***OP organisation*** if the organisation is specified in, or belongs to a class of organisations specified in, a legislative instrument made under subsection (7).

Minister may specify conditions, organisations and classes of organisations

(7) The Minister may, by legislative instrument:

(a) specify conditions for the purposes of subparagraph (1)(a)(iv); and

(b) specify organisations, or classes of organisations, for the purposes of paragraphs (1)(b), (3)(c) and (4)(c) and subsection (6).

(8) Before deciding to specify an organisation or a class of organisations under paragraph (7)(b), the Minister must:

(a) be satisfied that it is desirable in the public interest for the organisation, or organisations within the class, to be, or not to be, OP organisations; and

(b) consult the Commissioner about the desirability of the decision.

6X Meaning of *electronic service*

(1) An ***electronic service*** is a service that:

(a) allows end‑users to access material using a carriage service (within the meaning of the *Telecommunications Act 1997*); or

(b) delivers material to persons having equipment appropriate for receiving that material, where the delivery of the service is by means of a carriage service (within the meaning of that Act).

(2) Despite subsection (1), none of the following is an ***electronic service***:

(a) a broadcasting service (within the meaning of the *Broadcasting Services Act 1992*);

(b) a datacasting service (within the meaning of that Act);

(c) a service the sole purpose of which is to process payments;

(d) a service the sole purpose of which is to provide access to a payment system (within the meaning of the *Payment Systems (Regulation) Act 1998*).

10 After subsection 13(1)

Insert:

OP organisations

(1A) An act or practice of an OP organisation is an ***interference with the privacy of an individual*** if the act or practice breaches the registered OP code in relation to personal information about the individual.

11 After subparagraph 13(3)(c)(ii)

Insert:

or (iii) if the provider is an OP organisation—the registered OP code;

12 Subsection 13(3) (note)

Repeal the note, substitute:

Note: See subsections 6A(2), 6B(2) and 6BAA(2) for when an act or practice does not breach an Australian Privacy Principle, a registered APP code or the registered OP code.

13 Subsection 13B(1)

Omit “subsection 13(1)”, substitute “subsections 13(1) and (1A)”.

14 Subsection 13B(1) (note)

Omit “Principles and a registered APP code that binds them”, substitute “Principles, a registered APP code that binds them and (if applicable) the registered OP code”.

15 Subsection 13B(1A) (note)

Omit “Principles, or a registered APP code that binds the body”, substitute “Principles, a registered APP code that binds the body or (if applicable) the registered OP code”.

16 Subsection 13C(1) (note)

Omit “they must comply with the Australian Privacy Principles and a registered APP code that binds them”, substitute “the new partnership must comply with the Australian Privacy Principles, a registered APP code that binds the partnership and (if applicable) the registered OP code”.

17 Subsection 13C(2)

Omit “13(1)”, substitute “13(1), (1A)”.

18 Subsection 13D(2)

Omit “13(1)”, substitute “13(1), (1A)”.

19 Section 26

After:

If the Commissioner includes an APP code on the Codes Register, an APP entity bound by the code must not breach it. A breach of a registered APP code is an interference with the privacy of an individual.

insert:

Division 2A deals with a code of practice about online privacy, called an OP code. OP code developers or the Commissioner may develop an OP code, which:

(a) must set out how certain Australian Privacy Principles are to be applied or complied with; and

(b) must make provision for, or in relation to, other specified matters, such as the providing of consent for the collection, use or disclosure of personal information; and

(c) may deal with other specified matters, including the matters that may be dealt with by an APP code.

An OP organisation must not breach the registered OP code. A breach of the registered OP code is an interference with the privacy of an individual.

20 After Division 2 of Part IIIB

Insert:

Division 2A—Registered OP code

Subdivision A—Compliance with the registered OP code

26KA OP organisations to comply with the registered OP code

An OP organisation must not do an act, or engage in a practice, that breaches the registered OP code.

Note: The Commissioner must ensure that there is always one, and only one, registered OP code at all times after this Division commences: see subsection 26KH(4).

26KB What is the *registered OP code*?

(1) The ***registered OP code*** is the OP code that is included on the Codes Register.

(2) The registered OP code is a legislative instrument.

(3) The registered OP code prevails over a registered APP code that binds an APP entity that is an OP organisation to the extent of any inconsistency.

(4) Subsection 12(2) (retrospective application of legislative instruments) of the *Legislation Act 2003* does not apply to the registered OP code.

26KC What is an *OP code*?

(1) An ***OP code*** is a written code of practice about online privacy.

(2) An OP code must:

(a) bind all OP organisations; and

(b) set out how an OP organisation’s APP privacy policy is to comply with paragraph 1.4(c) of Australian Privacy Principle 1 in stating the purposes for which the organisation collects, holds, uses and discloses personal information; and

(c) make provision for, or in relation to, requiring an OP organisation to notify an individual, or to otherwise ensure that the individual is aware, of the purposes for which the organisation collects, uses and discloses personal information; and

(d) set out how an OP organisation is to comply with Australian Privacy Principles 3 and 6 in ensuring that an individual has provided consent for the collection, use or disclosure of personal information; and

(e) make provision for, or in relation to, the providing of such consent, including setting out the circumstances in which:

(i) consent is taken to be provided voluntarily, and is informed, unambiguous and specific; and

(ii) consent is taken to be current and, in the case of sensitive information, is taken to have been renewed periodically or when circumstances change; and

(f) set out how an OP organisation is to comply with:

(i) Australian Privacy Principle 5; and

(ii) any requirements of the OP code made under paragraph (c);

in providing for how an individual is notified, or otherwise made aware, of the matters specified in that principle or the requirements specified in the code; and

(g) make provision for, or in relation to, the providing of such notifications, including requiring that notices, or other methods used to make individuals aware of those specified matters or requirements, are:

(i) clear and understandable; and

(ii) current; and

(iii) provided in a timely manner; and

(h) subject to subsection (3), make provision for or in relation to requiring OP organisations to take such steps (if any) as are reasonable in the circumstances to not use or disclose, or to not further use or disclose, the personal information of an individual if so requested by the individual.

(3) Paragraph (2)(h) does not cover the use or disclosure, or the further use or disclosure, of the personal information of an individual if the use or disclosure of that information is covered by paragraph 6.2(b), (c), (d) or (e) of Australian Privacy Principle 6.

(4) For the purposes of paragraph (2)(h), but without limiting that paragraph, the requirements must include the following:

(a) a requirement that an OP organisation must respond to a request to not use, or to not further use, personal information within a reasonable period;

(b) if the organisation is unable to comply with such a request—a requirement that the organisation must give the individual a written notice that sets out:

(i) the reasons for the refusal (except to the extent that, having regard to the grounds for the refusal, it would be unreasonable to do so); and

(ii) the mechanisms available to complain about the refusal; and

(iii) any other matter specified in a legislative instrument made under subsection (9);

(c) a requirement that:

(i) if an OP organisation is unable to comply with a request referred to in paragraph (a)—the organisation must not impose a charge in relation to the request; and

(ii) otherwise—any charges imposed by an OP organisation in complying with a request must not be excessive and must not apply to the making of the request.

(5) For each of the matters in paragraphs (2)(a) to (h), the OP code must:

(a) provide for how the matters apply in relation to the following classes of individuals:

(i) children;

(ii) other individuals who are physically or legally incapable of giving consent to the collection, use or disclosure of personal information; and

(b) make provision for, or in relation to, the provision of consent for the collection, use or disclosure of such information by:

(i) those individuals; or

(ii) parents, guardians or representatives of those individuals.

(6) Without limiting subsection (5), the OP code must require OP organisations of a kind covered by subsection 6W(1) to do the following:

(a) take all reasonable steps to verify the age of individuals to whom the OP organisation provides an electronic service;

(b) obtain the consent of a parent or guardian of a child who has not reached 16 years before collecting, using or disclosing personal information of the child;

(c) if the OP organisation becomes aware after it collects, uses or discloses personal information of an individual that the individual is a child who has not reached 16 years, obtain the consent of a parent or guardian of the child as soon as practicable after becoming so aware;

(d) take all reasonable steps to verify the consent obtained for the purposes of paragraph (b) or (c);

(e) in collecting, using or disclosing personal information of children, ensure that such collection, use or disclosure is fair and reasonable in the circumstances;

(f) in determining what is fair and reasonable for the purposes of paragraph (e), have the best interests of the child as the primary consideration.

(7) The OP code may make provision in relation to:

(a) what constitutes reasonable steps for the purposes of paragraphs (6)(a) and (d); and

(b) matters to be taken into account when considering the matters referred to in paragraph (6)(e).

(8) An OP code may do one or more of the following:

(a) set out how one or more of the Australian Privacy Principles not otherwise covered by paragraphs (2)(a) to (h) are to be applied or complied with;

(b) impose additional requirements to those imposed by the Australian Privacy Principles, so long as the additional requirements are not contrary to, or inconsistent with:

(i) those principles; or

(ii) any provisions of the OP code made for the purposes of paragraphs (2)(a) to (h);

(c) deal with the internal handling of complaints;

(d) provide for the reporting to the Commissioner about complaints;

(e) for OP organisations of a kind covered by subsection 6W(4)—provide for the reporting to the Commissioner about the number of end‑users in Australia such organisations had or have;

(f) deal with any other relevant matters.

(9) An OP code may be expressed to apply differently in relation to:

(a) classes of OP organisations; and

(b) classes of personal information, or information derived from personal information; and

(c) classes of activities of OP organisations.

(10) An OP code is not a legislative instrument.

(11) The Minister may, by legislative instrument, specify matters for the purposes of subparagraph (4)(b)(iii).

Subdivision B—Development and registration of OP code

26KE Development of OP code by OP code developers

(1) The Commissioner may, in writing, request an OP code developer to develop an OP code and apply to the Commissioner for the code to be registered.

(2) The request must:

(a) specify the period within which the request must be complied with; and

(b) set out the effect of section 26KA; and

(c) if the Commissioner requires the OP code to deal with, or to provide for, one or more matters mentioned in subsection 26KC(7) or (8)—specify those matters.

(3) The period:

(a) must run for at least 120 days from the date the request is made; and

(b) may be extended by the Commissioner.

(4) The Commissioner must make a copy of the request publicly available as soon as practicable after the request is made.

26KF Application for registration of OP code

(1) If an OP code developer develops an OP code, the developer may apply to the Commissioner for registration of the code.

(2) Before making the application, the OP code developer must:

(a) make a draft of the OP code publicly available; and

(b) invite the public to make submissions to the developer about the draft within a specified period (which must run for at least 28 days); and

(c) give consideration to any submissions made within the specified period.

(3) The application must:

(a) be made in the form and manner specified by the Commissioner; and

(b) be accompanied by such information as is specified by the Commissioner.

(4) The OP code developer may vary the OP code at any time before the Commissioner registers the code, but only with the consent of the Commissioner.

26KG Commissioner may develop OP code

(1) The Commissioner may develop an OP code if:

(a) the Commissioner has been unable to identify an OP code developer that is suitable to develop an OP code; or

(b) the Commissioner made a request under section 26KE and either:

(i) the request has not been complied with; or

(ii) the request has been complied with but the Commissioner has decided under section 26KH not to register the OP code that was developed as requested.

(2) For the purposes of paragraph (1)(a), but without limiting that paragraph, an OP code developer is not suitable to develop an OP code if the Commissioner is satisfied that the developer:

(a) does not have sufficient expertise to develop the code; or

(b) does not sufficiently represent OP organisations.

(3) Before registering the OP code under section 26KH, the Commissioner must:

(a) make a draft of the code publicly available; and

(b) invite the public to make submissions to the Commissioner about the draft within a specified period (which must run for at least 40 days); and

(c) give consideration to any submissions made within the specified period.

26KH Commissioner may register OP code

(1) If:

(a) an application for registration of an OP code is made under section 26KF; or

(b) the Commissioner develops an OP code under section 26KG;

the Commissioner may register the code by including it on the Codes Register.

(2) In deciding whether to register the OP code, the Commissioner:

(a) must consult*,* and have regard to the views of, the Australian Competition and Consumer Commission and the eSafety Commissioner; and

(b) may consult, and have regard to the views of, any other person the Commissioner considers appropriate about registering the code; and

(c) may consider the matters specified in any relevant guidelines made under section 26V.

(3) If the Commissioner decides not to register an OP code developed by an OP code developer, the Commissioner must give written notice of the decision to the developer, including reasons for the decision.

(4) The Commissioner must ensure that there is one, and only one, registered OP code at all times after this Division commences.

Subdivision C—Variation of the registered OP code

26KJ Variation of the registered OP code

(1) The Commissioner may, in writing, approve a variation of the registered OP code:

(a) on the Commissioner’s own initiative; or

(b) on application by an OP organisation; or

(c) on application by a body or association representing one or more OP organisations.

(2) An application under paragraph (1)(b) or (c) must:

(a) be made in the form and manner specified by the Commissioner; and

(b) be accompanied by such information as is specified by the Commissioner.

(3) Before deciding whether to approve a variation, the Commissioner must:

(a) make a draft of the variation publicly available; and

(b) consult*,* and have regard to the views of, the Australian Competition and Consumer Commission and the eSafety Commissioner; and

(c) consider the extent to which members of the public have been given an opportunity to comment on the variation.

(4) In deciding whether to approve a variation, the Commissioner may:

(a) consider the matters specified in any relevant guidelines made under section 26V; and

(b) consult, and have regard to the views of, any other person the Commissioner considers appropriate about the variation.

(5) If the Commissioner approves a variation of the registered OP code (the ***original code***), the Commissioner must:

(a) remove the original code from the Codes Register; and

(b) register the OP code, as varied, by including it on the Register.

(6) If the Commissioner approves a variation, the variation comes into effect on the day specified in the approval, which must not be before the day on which the OP code, as varied, is included on the Codes Register.

(7) An approval is not a legislative instrument.

Note: The OP code, as varied, is a legislative instrument once it is included on the Codes Register: see section 26KB.

21 After paragraph 26U(1)(b)

Insert:

(ba) the OP code the Commissioner has decided to register under section 26KH; and

(bb) the OP code the Commissioner must register under section 26KJ; and

22 After paragraph 26U(2)(a)

Insert:

(aa) the OP code removed from the Register under section 26KJ; or

23 After paragraph 26V(1)(b)

Insert:

(ba) to assist OP code developers to develop an OP code; or

(bb) to assist OP organisations to apply or comply with the registered OP code; or

24 Paragraph 26V(2)(a)

Omit “code or”, substitute “code, an OP code or”.

25 Paragraph 26V(2)(b)

Omit “code or”, substitute “code, the registered OP code or”.

26 After subsection 26W(1)

Insert:

(1A) The Commissioner may review the operation of the registered OP code.

Note: The review may inform a decision by the Commissioner to approve a variation of the registered OP code.

27 After subparagraph 28(1)(c)(ii)

Insert:

(iia) the registered OP code; and

28 After paragraph 33C(1)(a)

Insert:

(aa) whether personal information held by an OP organisation is being maintained and handled in accordance with the registered OP code;

29 After subsection 33C(1)

Insert:

(1A) Without limiting paragraph (1)(aa), the Minister may request the Commissioner to conduct an assessment of whether an OP organisation of a kind covered by subsection 6W(1) is maintaining and handling personal information of children held by the organisation in accordance with the registered OP code.

30 Paragraph 40(2)(a)

Repeal the paragraph, substitute:

(a) the act or practice may be:

(i) an interference with the privacy of an individual; or

(ii) a breach of Australian Privacy Principle 1; or

(iii) a breach of requirements of the registered OP code that apply instead of, or in addition to, Australian Privacy Principle 1; and

31 Subsection 63(2A)

Omit “code complaint”, substitute “code complaint, an OP complaint”.

32 Before section 71

Insert:

Subdivision A—General

33 Section 71

After “section 73”, insert “or 79B”.

34 After section 71

Insert:

Subdivision B—APP public interest determinations

35 Subsection 72(2)

Omit “Division”, substitute “Subdivision”.

36 Subsection 72(2)

After “make a determination”, insert “(an ***APP public interest determination***)”.

37 Subsection 72(3) (heading)

Repeal the heading.

38 Subsection 72(3)

Omit “determination is in force under subsection (2)”, substitute “APP public interest determination is in force”.

39 Subsection 72(4) (heading)

Omit “*under subsection (2)*”.

40 Subsection 72(4)

Omit “a determination under subsection (2)”, substitute “an APP public interest determination”.

41 Subsection 73(1)

Omit “a determination under section 72”, substitute “an APP public interest determination”.

42 Subsection 73(3)

Omit “subsection (2), a reference in the succeeding provisions of this Part”, substitute “subsection (2) on behalf of an agency, a reference in the succeeding provisions of this Subdivision, and of Subdivision A of Division 2 of this Part,”.

43 Subsection 73(4)

Omit “a determination under section 72 on an application made by virtue of subsection (2), that section”, substitute “an APP public interest determination on an application made by virtue of subsection (2), section 72”.

44 Subsection 75(1)

Omit “of his or her proposed determination”, substitute “APP public interest determination”.

45 Subsection 75(3)

Repeal the subsection.

46 Subsection 76(1)

Omit “draft determination”, substitute “draft APP public interest determination”.

47 Section 78

Omit “Part”, substitute “Subdivision”.

48 Paragraph 78(a)

Omit “determination under section 72 as he or she”, substitute “APP public interest determination as the Commissioner”.

49 Subsections 79(1) and (2)

Omit “a determination”, substitute “an APP public interest determination”.

50 At the end of Division 1 of Part VI

Add:

Subdivision C—OP public interest determinations

79A Power to make, and effect of, determinations

Determinations about an OP organisation’s acts or practices

(1) Subject to this Subdivision, if the Commissioner is satisfied that:

(a) an act or practice of an OP organisation breaches, or may breach, the registered OP code; but

(b) the public interest in the organisation doing the act, or engaging in the practice, substantially outweighs the public interest in adhering to that code;

the Commissioner may, by legislative instrument, make a determination (an ***OP public interest determination***) to that effect.

(2) The OP organisation is taken not to contravene section 26KA if the organisation does the act, or engages in the practice, while the OP public interest determination is in force.

Commissioner may give determinations general effect

(3) The Commissioner may, by legislative instrument, make a determination that no OP organisation is taken to contravene section 26KA if, while that determination is in force, an OP organisation does an act, or engages in a practice, that is the subject of an OP public interest determination in relation to that organisation or any other OP organisation.

(4) A determination under subsection (3) has effect according to its terms.

79B Application by OP organisation

(1) An OP organisation may apply, in writing, for an OP public interest determination about an act or practice of the organisation.

(2) The Commissioner may, in writing, dismiss the application if the Commissioner is satisfied that the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.

79C Publication of application etc.

The Commissioner must publish, in such manner as the Commissioner thinks fit, notice of:

(a) the receipt by the Commissioner of an application under subsection 79B(1); and

(b) if the Commissioner dismisses an application under subsection 79B(2)—the dismissal of the application.

79D Draft determinations

(1) On receiving an application from an OP organisation under subsection 79B(1), the Commissioner must:

(a) prepare a draft OP public interest determination in relation to the application; and

(b) send a written invitation to the OP organisation to notify the Commissioner, within the period specified in the invitation, whether or not the organisation wishes the Commissioner to hold a conference about the draft determination; and

(c) issue, in any way the Commissioner thinks appropriate, an invitation in corresponding terms to the other persons (if any) that the Commissioner thinks appropriate.

(2) Subsection (1) does not apply if the application is dismissed under subsection 79B(2).

79E Conference

(1) If an OP organisation or a person notifies the Commissioner, within the period specified in an invitation sent to the organisation or person in relation to a draft OP public interest determination, that the organisation or person wishes a conference to be held about the determination, the Commissioner must hold such a conference.

(2) The Commissioner must specify a day, time and place for the holding of the conference.

(3) The day specified must not be more than 30 days after the latest day on which a period specified in any of the invitations sent in relation to the determination expires.

(4) The Commissioner must give notice of the day, time and place of the conference to the organisation and to each person to whom an invitation was sent.

79F Conduct of conference

(1) At the conference, the OP organisation is entitled to be represented by a person who is, or persons each of whom is, a director, officer or employee of the organisation.

(2) A person to whom an invitation was sent, or any other person who is interested in the application and whose presence at the conference is considered by the Commissioner to be appropriate, is entitled to attend the conference and participate personally or, in the case of a body corporate, to be represented by a person who is, or persons each of whom is, a director, officer or employee of the body corporate.

(3) The Commissioner may exclude from the conference a person who:

(a) is not entitled to participate in the conference or to represent a person who is entitled to be represented at the conference; or

(b) uses insulting language at the conference; or

(c) creates, or takes part in creating or continuing, a disturbance at the conference; or

(d) repeatedly disturbs the conference.

79G Determination of application

The Commissioner must, after complying with this Subdivision in relation to an application under section 79B, make:

(a) such OP public interest determination as the Commissioner considers appropriate; or

(b) a written determination dismissing the application.

79H Making of determinations

(1) The Commissioner must, in making an OP public interest determination, take account of all matters raised at a conference held in relation to the determination.

(2) The Commissioner must, in making an OP public interest determination, take account of all submissions about the application that have been made, whether at a conference or not, by the OP organisation or any other person.

51 Before section 80A

Insert:

Subdivision A—Temporary APP public interest determinations

52 Section 80A (heading)

Repeal the heading, substitute:

80A Power to make determinations

53 Paragraph 80A(1)(a)

Omit “a determination under section 72”, substitute “an APP public interest determination”.

54 Subsection 80A(2)

Omit “determination that he or she”, substitute “determination (a ***temporary APP public interest determination***) that the Commissioner”.

55 Section 80B (heading)

Repeal the heading, substitute:

80B Effect of determinations

56 Subsection 80B(1)

After “temporary”, insert “APP”.

57 Subsection 80B(3) (heading)

After “*temporary*”, insert “*APP*”.

58 Subsection 80B(3)

After “temporary”, insert “APP”.

59 Subsection 80D(1)

Repeal the subsection, substitute:

(1) The fact that the Commissioner has made a temporary APP public interest determination about an act or practice does not prevent the Commissioner from dealing under Subdivision A of Division 1 of this Part with an application made under section 73 in relation to that act or practice.

60 Subsection 80D(2)

Omit “determination under this Division”, substitute “temporary APP public interest determination”.

61 Paragraph 80D(2)(a)

Omit “a determination made under subsection 72(2)”, substitute “an APP public interest determination”.

62 At the end of Division 2 of Part VI

Add:

Subdivision B—Temporary OP public interest determinations

80DA Power to make determinations

(1) This section applies if the Commissioner is satisfied that:

(a) the act or practice of an OP organisation that is the subject of an application for an OP public interest determination breaches, or may breach the registered OP code; and

(b) the public interest in the organisation doing the act, or engaging in the practice, outweighs to a substantial degree the public interest in the organisation adhering to that code; and

(c) the application raises issues that require an urgent decision.

(2) The Commissioner may, by legislative instrument, make a determination (a ***temporary OP public interest determination***) that the Commissioner is satisfied of the matters set out in subsection (1). The Commissioner may do so:

(a) on request by the OP organisation; or

(b) on the Commissioner’s own initiative.

(3) The Commissioner must specify in the temporary OP public interest determination a period of up to 12 months during which the determination is in force (subject to subsection 80DC(2)).

80DB Effect of determinations

OP organisation covered by determination

(1) If an act or practice of an OP organisation is the subject of a temporary OP public interest determination, the organisation is taken not to contravene section 26KA if the organisation does the act, or engages in the practice, while the determination is in force.

Giving a temporary OP public interest determination general effect

(2) The Commissioner may, by legislative instrument, make a determination that no OP organisation is taken to contravene section 26KA if, while that determination is in force, an OP organisation does an act, or engages in a practice, that is the subject of a temporary OP public interest determination in relation to that organisation or another OP organisation.

Effect of determination under subsection (2)

(3) A determination under subsection (2) has effect according to its terms.

80DC Commissioner may continue to consider application

(1) The fact that the Commissioner has made a temporary OP public interest determination about an act or practice does not prevent the Commissioner from dealing under Subdivision C of Division 1 of this Part with an application made under section 79B in relation to that act or practice.

(2) A temporary OP public interest determination about an act or practice is repealedwhen:

(a) an OP public interest determination about the act or practice comes into effect; or

(b) a determination is made under paragraph 79G(b) to dismiss the application for the OP public interest determination.

63 Subsection 80E(1)

Omit “Division 1 or 2”, substitute “this Part”.

64 Subsection 80P(4)

Omit “Principle, or a registered APP code that binds the entity”, substitute “Principle, a registered APP code that binds the entity or (if applicable) the registered OP code”.

65 After paragraph 96(1)(a)

Insert:

(aa) a decision under subsection 26KH(1) not to register an OP code developed by an OP code developer;

66 After paragraph 96(1)(d)

Insert:

(da) a decision under subsection 79B(2)to dismiss an application for an OP public interest determination;

67 After subsection 96(2)

Insert:

(2AA) An application under paragraph (1)(aa) may only be made by the OP code developer that developed the OP code.

68 After subsection 96(2C)

Insert:

(2CA) An application under paragraph (1)(d) may only be made by the applicant for the APP public interest determination.

(2CB) An application under paragraph (1)(da) may only be made by the applicant for the OP public interest determination.

Part 2—Consequential amendments

Australian Human Rights Commission Act 1986

69 Paragraph 20(4A)(b)

Omit “subsection 13(1) or (4)”, substitute “subsection 13(1), (1A) or (4)”.

Competition and Consumer Act 2010

70 At the end of section 56EC

Add:

(5) If there is an inconsistency between the provisions of this Part or the consumer data rules and the OP code (within the meaning of the *Privacy Act 1988*), the provisions of this Part or the consumer data rules (as the case may be) prevail over the OP code to the extent of the inconsistency.

Note: The OP code (which is made under Division 2A of Part IIIB of the *Privacy Act 1988*) is a written code of practice about online privacy.

Part 3—Application of amendments

71 OP code may be developed etc. during the transition period

(1) A function or power conferred on the Commissioner or an organisation by the OP provisions may be performed or exercised during the transition period as if the *Privacy Act 1988*, as amended by Part 1 of this Schedule, was in force during that period.

(2) The performance of such a function, or the exercise of such a power, during the transition period has effect, after the commencement of this item, as if it had been performed or exercised under the OP provisions.

(3) In this item:

***OP provisions*** means the provisions in the following Divisions of the *Privacy Act 1988*, as inserted by Part 1 of this Schedule:

(a) Division 2A of Part II;

(b) Division 2A of Part IIIB.

***transition period*** means the period:

(a) starting at the time this Act receives the Royal Assent; and

(b) ending immediately before the commencement of this item.

Schedule 2—Enforcement and penalties

Part 1—Amendments

Privacy Act 1988

1 Paragraph 5B(3)(c)

Repeal the paragraph.

2 Subsection 6(1)

Insert:

***related body corporate***: see subsection 6(8).

3 Section 13G

Omit “An”, substitute “(1) An”.

4 Section 13G (penalty)

Repeal the penalty, substitute:

Civil penalty: 2,400 penalty units.

5 At the end of section 13G

Add:

(2) The amount of the penalty for a contravention of subsection (1) by a body corporate is an amount not more than the greater of the following:

(a) $10,000,000;

(b) if the court can determine the value of the benefit that the body corporate, and any related body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the contravention—3 times the value of that benefit;

(c) if the court cannot determine the value of that benefit—10% of the relevant turnoverof the body corporate during the 12‑month period ending at the end of the month in which the body corporate engaged, or began engaging, in the conduct constituting the contravention.

(3) Subsection (2) applies despite paragraph 82(5)(a) of the Regulatory Powers Act.

(4) For the purposes of paragraph (2)(c), the ***relevant turnover***, of a body corporate, during a 12‑month period, is the sum of the values of all the supplies that the body corporate, and any related body corporate, have made, or are likely to make, during the 12‑month period, other than:

(a) supplies made from any of those bodies corporate to any other of those bodies corporate; or

(b) supplies that are input taxed; or

(c) supplies that are not for consideration (and are not taxable supplies under section 72‑5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or

(d) supplies that are not made in connection with an enterprise that the body corporate carries on; or

(e) supplies that are not connected with Australia.

(5) Expressions used in subsection (4) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

6 Subparagraphs 25(1)(a)(i) and 25A(1)(a)(i)

Omit “this Act (other than section 13G)”, substitute “this Part”.

7 After paragraph 33C(1)(c)

Insert:

(ca) the ability of an entity subject to Part IIIC to comply with that Part, including the extent to which the entity has processes and procedures in place to:

(i) assess suspected eligible data breaches; and

(ii) provide notice of eligible data breaches to the Commissioner and to individuals at risk from such breaches;

8 At the end of section 33C

Add:

(3) Without limiting subsection (2), if the Commissioner has reason to believe that an entity or file number recipient being assessed has information or a document relevant to the assessment the Commissioner may, by written notice, require the entity or file number recipient to give the information or produce the document within the period specified in the notice, which must not be less than 14 days after the notice is given to the entity or file number recipient.

Note: For a failure to give information etc., see section 66.

(4) The Commissioner must not give a notice under subsection (3) unless the Commissioner is satisfied that it is reasonable in the circumstances to do so, having regard to the following:

(a) the public interest;

(b) the impact on the entity or file number recipient of complying with the notice;

(c) any other matters that the Commissioner considers relevant.

(5) An enforcement body is not required to comply with a notice given by the Commissioner under subsection (3) if the chief executive officer of the enforcement body believes on reasonable grounds that compliance with the notice would be likely to prejudice one or more enforcement related activities conducted by or on behalf of the enforcement body.

(6) The Commissioner may publish information relating to an assessment on the Commissioner’s website.

9 After paragraph 52(1)(b)(ii)

Insert:

(iia) a declaration that the respondent must prepare and publish, or otherwise communicate, a statement about the conduct (see section 52A);

10 After paragraph 52(1A)(b)

Insert:

(ba) a declaration that the respondent must prepare and publish, or otherwise communicate, a statement about the conduct (see section 52A);

11 After subsection 52(1A)

Insert:

(1AAA) Without limiting subparagraph (1)(b)(ia) or paragraph (1A)(b), the steps specified by the Commissioner may include a requirement for the respondent to:

(a) engage, in consultation with the Commissioner, a suitably qualified independent adviser to review:

(i) the acts or practices engaged in by the respondent that were the subject of the complaint; and

(ii) the steps (if any) taken by the respondent to ensure that the conduct referred to in the determination is not repeated or continued; and

(iii) any other matter specified in the declaration that is relevant to those acts or practices, or that complaint; and

(b) provide a copy of the review to the Commissioner.

12 After section 52

Insert:

52A Determination—requirement to notify conduct constituting interference with privacy of individual

(1) If a determination under section 52 includes a declaration mentioned in subparagraph 52(1)(b)(iia) or paragraph (1A)(ba), the respondent must, within 14 days after receiving the determination (or such longer period as the Commissioner allows):

(a) prepare a statement, in consultation with the Commissioner, setting out:

(i) the identity and contact details of the respondent or, if the respondent is the principal executive of an agency, the agency; and

(ii) a description of the conduct engaged in by the respondent that constitutes the interference with the privacy of an individual; and

(iii) the steps (if any) undertaken, or to be undertaken, by the respondent to ensure the conduct is not repeated or continued; and

(iv) any other information required by the declaration to be included in the statement; and

(b) if required by the declaration—give a copy of the statement to the complainant or, if the complaint is a representative complaint, to each class member identified as affected by the determination, in the manner specified by the declaration; and

(c) if required by the declaration—publish, or otherwise communicate, the statement in the manner specified by the declaration; and

(d) give the Commissioner, within 14 days after the end of the period specified in the declaration, evidence that the actions required by paragraphs (b) and (c) were taken in accordance with this section and the declaration.

(2) The matters specified by the Commissioner for the purposes of subsection (1) must be reasonable and appropriate.

13 Division 3 of Part V (heading)

Repeal the heading, substitute:

Division 3—Enforcement of determinations

14 At the end of section 55

Add:

; and (d) must prepare and publish, or otherwise communicate, a statement in accordance with a declaration included in the determination under subparagraph 52(1)(b)(iia) or paragraph 52(1A)(ba) and section 52A.

15 At the end of section 58

Add:

; and (d) must prepare and publish, or otherwise communicate, a statement in accordance with a declaration included in the determination under subparagraph 52(1)(b)(iia) or paragraph 52(1A)(ba) and section 52A.

16 At the end of section 59

Add:

; and (d) the preparation, publishing or communicating of a statement in accordance with a declaration included in the determination under subparagraph 52(1)(b)(iia) or paragraph 52(1A)(ba) and section 52A.

17 Subsection 66(1)

Repeal the subsection, substitute:

Basic contravention

(1) A person contravenes this subsection if:

(a) the person is required to give information, answer a question or produce a document or record under subsection 33C(3), section 44 or subsection 46(4) or 47(1); and

(b) the person refuses or fails to do so.

Civil penalty: 60 penalty units.

18 After subsection 66(1)

Insert:

Multiple contraventions

(1AA) A person commits an offence if:

(a) the person is a corporation; and

(b) the person engages in conduct that constitutes a system of conduct or a pattern of behaviour; and

(c) the system of conduct or pattern of behaviour results in 2 or more contraventions of subsection (1).

Penalty: 300 penalty units.

19 Subsection 66(1B)

After “(1)”, insert “or (1AA)”.

20 Subsection 66(1B) (note)

Repeal the note, substitute:

Note: A person who wishes to rely on this subsection bears an evidential burden in relation to the matter in this subsection: see subsection 13.3(3) of the *Criminal Code* and section 96 of the Regulatory Powers Act.

21 After Division 1 of Part VIB

Insert:

Division 1A—Infringement notices

80UB Infringement notices

Provisions subject to an infringement notice

(1) Subsection 66(1) of this Act is subject to an infringement notice under Part 5 of the Regulatory Powers Act.

Note: Part 5 of the Regulatory Powers Act creates a framework for using infringement notices in relation to provisions.

Infringement officer

(2) For the purposes of Part 5 of the Regulatory Powers Act, each of the following is an infringement officer in relation to the provision mentioned in subsection (1):

(a) the Commissioner;

(b) a member of the staff of the Commissioner who holds, or is acting in, an office or position that is equivalent to a SES employee.

Relevant chief executive

(3) For the purposes of Part 5 of the Regulatory Powers Act, the Commissioner is the relevant chief executive in relation to the provision mentioned in subsection (1).

Extension to external Territories

(4) Part 5 of the Regulatory Powers Act, as that Part applies in relation tothe provision mentioned in subsection (1), extends to every external Territory.

22 Subsection 94T(2) (note)

Repeal the note.

23 At the end of section 94T

Add:

(3) A person contravenes this subsection if:

(a) the person is required to give information or produce a document under subsection (2); and

(b) the person refuses or fails to do so.

Penalty: Imprisonment for 12 months or 20 penalty units, or both.

(4) Subsection (3) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

Part 2—Application of amendments

24 Application of amendments

(1) Section 13G of the *Privacy Act 1988*, as amended by Part 1 of this Schedule, does not apply in relation to an act done, or a practice engaged in, before the commencement of this item.

(2) Section 33C of the *Privacy Act 1988*, as amended by Part 1 of this Schedule, applies in relation to:

(a) assessments started before the commencement of this item but not concluded at that commencement; and

(b) assessments started after that commencement.

(3) Section 52 of the *Privacy Act 1988*, as amended by Part 1 of this Schedule, applies in relation to:

(a) the investigation of complaints that started before the commencement of this item but not finally dealt with at that commencement; and

(b) the investigation of complaints that started after that commencement.

Schedule 3—Information sharing

Part 1—Amendments

Australian Information Commissioner Act 2010

1 Paragraph 29(2)(a)

Repeal the paragraph, substitute:

(a) both of the following apply:

(i) the information was acquired by the person in the course of performing an information commissioner function or exercising a related power;

(ii) the person records, discloses or otherwise uses the information in the course of performing an information commissioner function or exercising a related power; or

(aa) both of the following apply:

(i) the information was acquired by the person in the course of performing a freedom of information function or exercising a related power;

(ii) the person records, discloses or otherwise uses the information in the course of performing a freedom of information function or exercising a related power; or

(ab) both of the following apply:

(i) the information was acquired by the person in the course of performing a privacy function or exercising a related power;

(ii) the person records, discloses or otherwise uses the information in the course of performing a privacy function or exercising a related power; or

2 Paragraph 29(2)(aa)

Reletter as paragraph (ac).

Privacy Act 1988

3 Subsection 6(1)

Insert:

***alternative complaint body*** has the meaning given by subsection 50(1).

4 Division 3 of Part IV (heading)

Repeal the heading, substitute:

Division 3—Reports and information sharing by Commissioner

5 At the end of Division 3 of Part IV

Add:

33A Commissioner may share information with other authorities

(1) Subject to subsections (3) and (4), the Commissioner may share information or documents with a body covered by subsection (2) (a ***receiving body***):

(a) for the purpose of the Commissioner exercising powers, or performing functions or duties, under this Act; or

(b) for the purpose of the receiving body exercising its powers, or performing its functions or duties.

(2) The following bodies are covered by this subsection:

(a) an enforcement body;

(b) an alternative complaint body;

(c) a State or Territory authority, or an authority of the government of a foreign country, that has functions to protect the privacy of individuals (whether or not the authority has other functions).

(3) The Commissioner may only share information or documents with a receiving body under this section if:

(a) the information or documents were acquired by the Commissioner in the course of exercising powers, or performing functions or duties, under this Act; and

(b) the Commissioner is satisfied on reasonable grounds that the receiving body has satisfactory arrangements in place for protecting the information or documents.

(4) If the Commissioner acquired the information or documents from an agency, the Commissioner may only share the information or documents with a receiving body under this section if the receiving body is an agency.

(5) To avoid doubt, the Commissioner may share information or documents with a receiving body under this section whether or not the Commissioner is transferring a complaint or part of a complaint to the body.

33B Commissioner may disclose certain information if in the public interest etc.

(1) Subject to subsections (2) and (3), the Commissioner may disclose information acquired by the Commissioner in the course of exercising powers, or performing functions or duties under this Act if the Commissioner is satisfied that it is in the public interest to do so.

(2) The Commissioner must not disclose information relating to an eligible data breach of an entity unless:

(a) the information relates to a contravention by the entity of one or more of the following subsections:

(i) subsection 26WH(2);

(ii) subsection 26WK(2);

(iii) subsection 26WL(3);

(iv) subsection 26WR(10); and

(b) the Commissioner is satisfied that it is in the public interest to disclose the information.

(3) Despite subsection (2), the Commissioner may disclose information relating to an eligible data breach of an entity if the information is confirmation that the entity has given a statement under section 26WK(2) to the Commissioner.

(4) In determining under subsection (1) or paragraph (2)(b) whether the Commissioner is satisfied that a disclosure is in the public interest, the Commissioner must have regard to the following:

(a) the rights and interests of any complainant or respondent;

(b) whether the disclosure will or is likely to prejudice any investigation the Commissioner is undertaking;

(c) whether the disclosure will or is likely to disclose the personal information of any person;

(d) whether the disclosure will or is likely to disclose any confidential commercial information.

(5) This section does not limit any other powers the Commissioner has to disclose information under this Act or any other law of the Commonwealth.

(6) In this section:

***entity*** has the same meaning as in Part IIIC.

6 Subsection 50(1)

Omit “section”, substitute “Act”.

7 Subsection 50(1) (definition of *Ombudsman*)

Repeal the definition.

8 Subsection 50(1) (after paragraph (b) of the definition of *alternative complaint body*)

Insert:

(ba) the eSafety Commissioner; or

9 After subsection 52(5)

Insert:

(5A) The Commissioner may publish a determination made under this section on the Commissioner’s website.

Part 2—Application of amendments

10 Application of amendments

(1) Subsection 29(2) of the *Australian Information Commissioner Act 2010*, as amended by Part 1 of this Schedule, applies in relation to information acquired before or after the commencement of this item.

(2) Section 33A of the *Privacy Act 1988*, as inserted by Part 1 of this Schedule, applies in relation to the sharing of information or documents after the commencement of this item, whether the information or documents were obtained by the Commissioner before or after that commencement.

(3) Section 33B of the *Privacy Act 1988*, as inserted by Part 1 of this Schedule, applies in relation to the disclosure of information after the commencement of this item, whether the information was obtained by the Commissioner before or after that commencement.

(4) Subsection 52(5A) of the *Privacy Act 1988*, as inserted by Part 1 of this Schedule, applies in relation to determinations made by the Commissioner before or after the commencement of this item.