

EXPOSURE DRAFT

2019-2020-2021

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

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

3 The Parliament of Australia enacts:

4 **1 Short title**

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

7 **2 Commencement**

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

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1

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.

2

Note: This table relates only to the provisions of this Act as originally enacted.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.

3

4

5

(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.

6

7

8

3 Schedules

9

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

10

11

12

2

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Online privacy code **Schedule 1**
Amendments **Part 1**

1 **Schedule 1—Online privacy code**

2 **Part 1—Amendments**

3 *Privacy Act 1988*

4 **1 Subsection 5B(1A)**

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

7 **2 Subsection 5B(1A) (note)**

8 Repeal the note, substitute:

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

13 **3 Subsection 6(1)**

14 Insert:

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

17 **4 Subsection 6(1) (after paragraph (b) of the definition of**
18 ***breach*)**

19 Insert:

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

22 **5 Subsection 6(1)**

23 Insert:

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

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

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

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Schedule 1 Online privacy code

Part 1 Amendments

- 1 **OP code developer** means:
- 2 (a) an OP organisation; or
- 3 (b) a group of OP organisations; or
- 4 (c) one or more bodies or associations representing one or more
- 5 OP organisations.
- 6 **OP complaint** means a complaint about an act or practice that, if
- 7 established, would be an interference with the privacy of an
- 8 individual because it breached the registered OP code.
- 9 **OP organisation** has the meaning given by section 6W.
- 10 **OP public interest determination** means a determination made
- 11 under subsection 79A(1).
- 12 **registered OP code** has the meaning given by section 26KB.
- 13 **temporary APP public interest determination** means a
- 14 determination made under subsection 80A(2).
- 15 **temporary OP public interest determination** means a
- 16 determination made under subsection 80DA(2).

17 **6 Subsection 6(1) (definition of *temporary public interest***

18 ***determination*)**

19 Repeal the definition.

20 **7 At the end of subsection 6(7)**

- 21 Add:
- 22 ; or (h) being both an OP complaint and any of the following:
- 23 (i) an APP complaint;
- 24 (ii) a credit reporting complaint;
- 25 (iii) a code complaint;
- 26 (iv) a file number complaint.

27 **8 After section 6B**

28 Insert:

1 **6BAA Breach of the registered OP code**

2 *Breach if contrary to, or inconsistent with, code*

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

6 *No breach—contracted service provider*

- 7 (2) An act or practice does not **breach** the registered OP code if:
8 (a) the act is done, or the practice is engaged in:
9 (i) by an OP organisation that is a contracted service
10 provider for a Commonwealth contract (whether or not
11 the organisation is a party to the contract); and
12 (ii) for the purposes of meeting (directly or indirectly) an
13 obligation under the contract; and
14 (b) the act or practice is authorised by a provision of the contract
15 that is inconsistent with the code.

16 *No breach—disclosure to the National Archives of Australia*

- 17 (3) An act or practice does not **breach** the registered OP code if the act
18 or practice involves the disclosure by an OP organisation of
19 personal information in a record (as defined in the *Archives Act*
20 1983) solely for the purposes of enabling the National Archives of
21 Australia to decide whether to accept, or to arrange, care (as
22 defined in that Act) of the record.

23 *No breach—act or practice outside Australia*

- 24 (4) An act or practice does not **breach** the registered OP code if:
25 (a) the act is done, or the practice is engaged in, outside
26 Australia and the external Territories; and
27 (b) the act or practice is required by an applicable law of a
28 foreign country.

29 *Effect despite subsection (1)*

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

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Schedule 1 Online privacy code

Part 1 Amendments

1 **9 After Division 2 of Part II**

2 Insert:

3 **Division 2A—Key definitions relating to online privacy**

4 **6W Meaning of *OP organisation***

5 *Organisations providing social media services*

- 6 (1) An organisation is an ***OP organisation*** if the organisation:
- 7 (a) provides an electronic service that satisfies each of the
- 8 following conditions:
- 9 (i) the sole or primary purpose of the service is to enable
- 10 online social interaction between 2 or more end-users,
- 11 including online interaction that enables end-users to
- 12 share material for social purposes;
- 13 (ii) the service allows end-users to link to, or interact with,
- 14 some or all of the other end-users;
- 15 (iii) the service allows end-users to post material on the
- 16 service;
- 17 (iv) such other conditions (if any) as are specified in a
- 18 legislative instrument made under subsection (7); and
- 19 (b) is not specified in, or does not belong to a class of
- 20 organisations specified in, a legislative instrument made
- 21 under subsection (7).
- 22 (2) In determining whether the condition set out in
- 23 subparagraph (1)(a)(i) is satisfied, disregard each of the following
- 24 purposes:
- 25 (a) the provision of advertising material on the service;
- 26 (b) the generation of revenue from the provision of advertising
- 27 material on the service.

28 *Organisations providing data brokerage services etc.*

- 29 (3) An organisation is also an ***OP organisation*** if:
- 30 (a) the organisation collects personal information about an
- 31 individual for the sole or primary purpose of disclosing that

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- 1 information (or information derived from that information) in
2 the course of or in connection with providing a service (a
3 **data brokerage service**); and
4 (b) the information:
5 (i) is collected by the organisation from the individual by
6 the use of an electronic service, other than an electronic
7 service covered by subsection (1); or
8 (ii) was previously collected by another organisation from
9 the individual by the use of an electronic service,
10 including an electronic service covered by
11 subsection (1); and
12 (c) the organisation is not specified in, or does not belong to a
13 class of organisations specified in, a legislative instrument
14 made under subsection (7).

15 *Large online platforms*

- 16 (4) An organisation is also an **OP organisation** at a particular time in a
17 year if the organisation:
18 (a) either:
19 (i) for an organisation that carried on business in the
20 previous year—had, in the previous year, at least
21 2,500,000 end-users in Australia;
22 (ii) for an organisation that did not carry on business in the
23 previous year—has in the current year at least 2,500,000
24 end-users in Australia; and
25 (b) collects personal information about an individual in the
26 course of or in connection with providing access to
27 information, goods or services (other than a data brokerage
28 service) by the use of an electronic service (other than an
29 electronic service covered by subsection (1)); and
30 (c) is not specified in, or does not belong to a class of
31 organisations specified in, a legislative instrument made
32 under subsection (7).
33 (5) However, an organisation is not an **OP organisation** for the
34 purposes of subsection (4) to the extent that the organisation
35 collects personal information about an individual in the course of
36 or in connection with providing a customer loyalty scheme.

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Schedule 1 Online privacy code

Part 1 Amendments

1

Specified organisations

2

- (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).

3

4

5

Minister may specify conditions, organisations and classes of organisations

6

7

- (7) The Minister may, by legislative instrument:

8

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

9

10

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

11

12

13

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

14

15

(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

16

17

18

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

19

20

6X Meaning of *electronic service*

21

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

22

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

23

24

(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).

25

26

27

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

28

29

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

30

31

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

32

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

8

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

4 **10 After subsection 13(1)**

5 Insert:

6 *OP organisations*

7 (1A) An act or practice of an OP organisation is an *interference with the*
8 *privacy of an individual* if the act or practice breaches the
9 registered OP code in relation to personal information about the
10 individual.

11 **11 After subparagraph 13(3)(c)(ii)**

12 Insert:

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

15 **12 Subsection 13(3) (note)**

16 Repeal the note, substitute:

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

20 **13 Subsection 13B(1)**

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

22 **14 Subsection 13B(1) (note)**

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

26 **15 Subsection 13B(1A) (note)**

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

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Schedule 1 Online privacy code

Part 1 Amendments

1 **16 Subsection 13C(1) (note)**

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

7 **17 Subsection 13C(2)**

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

9 **18 Subsection 13D(2)**

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

11 **19 Section 26**

12 After:

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

17 insert:

18 Division 2A deals with a code of practice about online privacy,
19 called an OP code. OP code developers or the Commissioner may
20 develop an OP code, which:
21 (a) must set out how certain Australian Privacy Principles
22 are to be applied or complied with; and
23 (b) must make provision for, or in relation to, other
24 specified matters, such as the providing of consent for
25 the collection, use or disclosure of personal information;
26 and
27 (c) may deal with other specified matters, including the
28 matters that may be dealt with by an APP code.

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Online privacy code **Schedule 1**
Amendments **Part 1**

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

4 **20 After Division 2 of Part IIIB**

5 Insert:

6 **Division 2A—Registered OP code**

7 **Subdivision A—Compliance with the registered OP code**

8 **26KA OP organisations to comply with the registered OP code**

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

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

14 **26KB What is the *registered OP code*?**

- 15 (1) The *registered OP code* is the OP code that is included on the
16 Codes Register.
- 17 (2) The registered OP code is a legislative instrument.
- 18 (3) The registered OP code prevails over a registered APP code that
19 binds an APP entity that is an OP organisation to the extent of any
20 inconsistency.
- 21 (4) Subsection 12(2) (retrospective application of legislative
22 instruments) of the *Legislation Act 2003* does not apply to the
23 registered OP code.

24 **26KC What is an *OP code*?**

- 25 (1) An *OP code* is a written code of practice about online privacy.
- 26 (2) An OP code must:

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Part 1 Amendments

- 1 (a) bind all OP organisations; and
- 2 (b) set out how an OP organisation's APP privacy policy is to
- 3 comply with paragraph 1.4(c) of Australian Privacy
- 4 Principle 1 in stating the purposes for which the organisation
- 5 collects, holds, uses and discloses personal information; and
- 6 (c) make provision for, or in relation to, requiring an OP
- 7 organisation to notify an individual, or to otherwise ensure
- 8 that the individual is aware, of the purposes for which the
- 9 organisation collects, uses and discloses personal
- 10 information; and
- 11 (d) set out how an OP organisation is to comply with Australian
- 12 Privacy Principles 3 and 6 in ensuring that an individual has
- 13 provided consent for the collection, use or disclosure of
- 14 personal information; and
- 15 (e) make provision for, or in relation to, the providing of such
- 16 consent, including setting out the circumstances in which:
- 17 (i) consent is taken to be provided voluntarily, and is
- 18 informed, unambiguous and specific; and
- 19 (ii) consent is taken to be current and, in the case of
- 20 sensitive information, is taken to have been renewed
- 21 periodically or when circumstances change; and
- 22 (f) set out how an OP organisation is to comply with:
- 23 (i) Australian Privacy Principle 5; and
- 24 (ii) any requirements of the OP code made under
- 25 paragraph (c);
- 26 in providing for how an individual is notified, or otherwise
- 27 made aware, of the matters specified in that principle or the
- 28 requirements specified in the code; and
- 29 (g) make provision for, or in relation to, the providing of such
- 30 notifications, including requiring that notices, or other
- 31 methods used to make individuals aware of those specified
- 32 matters or requirements, are:
- 33 (i) clear and understandable; and
- 34 (ii) current; and
- 35 (iii) provided in a timely manner; and
- 36 (h) subject to subsection (3), make provision for or in relation to
- 37 requiring OP organisations to take such steps (if any) as are

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- 1 reasonable in the circumstances to not use or disclose, or to
2 not further use or disclose, the personal information of an
3 individual if so requested by the individual.
- 4 (3) Paragraph (2)(h) does not cover the use or disclosure, or the further
5 use or disclosure, of the personal information of an individual if the
6 use or disclosure of that information is covered by
7 paragraph 6.2(b), (c), (d) or (e) of Australian Privacy Principle 6.
- 8 (4) For the purposes of paragraph (2)(h), but without limiting that
9 paragraph, the requirements must include the following:
- 10 (a) a requirement that an OP organisation must respond to a
11 request to not use, or to not further use, personal information
12 within a reasonable period;
- 13 (b) if the organisation is unable to comply with such a request—
14 a requirement that the organisation must give the individual a
15 written notice that sets out:
- 16 (i) the reasons for the refusal (except to the extent that,
17 having regard to the grounds for the refusal, it would be
18 unreasonable to do so); and
- 19 (ii) the mechanisms available to complain about the refusal;
20 and
- 21 (iii) any other matter specified in a legislative instrument
22 made under subsection (9);
- 23 (c) a requirement that:
- 24 (i) if an OP organisation is unable to comply with a request
25 referred to in paragraph (a)—the organisation must not
26 impose a charge in relation to the request; and
- 27 (ii) otherwise—any charges imposed by an OP organisation
28 in complying with a request must not be excessive and
29 must not apply to the making of the request.
- 30 (5) For each of the matters in paragraphs (2)(a) to (h), the OP code
31 must:
- 32 (a) provide for how the matters apply in relation to the following
33 classes of individuals:
- 34 (i) children;

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Part 1 Amendments

- 1 (ii) other individuals who are physically or legally
2 incapable of giving consent to the collection, use or
3 disclosure of personal information; and
- 4 (b) make provision for, or in relation to, the provision of consent
5 for the collection, use or disclosure of such information by:
- 6 (i) those individuals; or
7 (ii) parents, guardians or representatives of those
8 individuals.
- 9 (6) Without limiting subsection (5), the OP code must require OP
10 organisations of a kind covered by subsection 6W(1) to do the
11 following:
- 12 (a) take all reasonable steps to verify the age of individuals to
13 whom the OP organisation provides an electronic service;
- 14 (b) obtain the consent of a parent or guardian of a child who has
15 not reached 16 years before collecting, using or disclosing
16 personal information of the child;
- 17 (c) if the OP organisation becomes aware after it collects, uses or
18 discloses personal information of an individual that the
19 individual is a child who has not reached 16 years, obtain the
20 consent of a parent or guardian of the child as soon as
21 practicable after becoming so aware;
- 22 (d) take all reasonable steps to verify the consent obtained for the
23 purposes of paragraph (b) or (c);
- 24 (e) in collecting, using or disclosing personal information of
25 children, ensure that such collection, use or disclosure is fair
26 and reasonable in the circumstances;
- 27 (f) in determining what is fair and reasonable for the purposes of
28 paragraph (e), have the best interests of the child as the
29 primary consideration.
- 30 (7) The OP code may make provision in relation to:
- 31 (a) what constitutes reasonable steps for the purposes of
32 paragraphs (6)(a) and (d); and
- 33 (b) matters to be taken into account when considering the matters
34 referred to in paragraph (6)(e).
- 35 (8) An OP code may do one or more of the following:

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- 1 (a) set out how one or more of the Australian Privacy Principles
2 not otherwise covered by paragraphs (2)(a) to (h) are to be
3 applied or complied with;
- 4 (b) impose additional requirements to those imposed by the
5 Australian Privacy Principles, so long as the additional
6 requirements are not contrary to, or inconsistent with:
7 (i) those principles; or
8 (ii) any provisions of the OP code made for the purposes of
9 paragraphs (2)(a) to (h);
- 10 (c) deal with the internal handling of complaints;
- 11 (d) provide for the reporting to the Commissioner about
12 complaints;
- 13 (e) for OP organisations of a kind covered by
14 subsection 6W(4)—provide for the reporting to the
15 Commissioner about the number of end-users in Australia
16 such organisations had or have;
- 17 (f) deal with any other relevant matters.
- 18 (9) An OP code may be expressed to apply differently in relation to:
19 (a) classes of OP organisations; and
20 (b) classes of personal information, or information derived from
21 personal information; and
22 (c) classes of activities of OP organisations.
- 23 (10) An OP code is not a legislative instrument.
- 24 (11) The Minister may, by legislative instrument, specify matters for the
25 purposes of subparagraph (4)(b)(iii).

Subdivision B—Development and registration of OP code

26KE Development of OP code by OP code developers

- 28 (1) The Commissioner may, in writing, request an OP code developer
29 to develop an OP code and apply to the Commissioner for the code
30 to be registered.
- 31 (2) The request must:

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- 1 (a) specify the period within which the request must be complied
2 with; and
3 (b) set out the effect of section 26KA; and
4 (c) if the Commissioner requires the OP code to deal with, or to
5 provide for, one or more matters mentioned in
6 subsection 26KC(7) or (8)—specify those matters.
- 7 (3) The period:
8 (a) must run for at least 120 days from the date the request is
9 made; and
10 (b) may be extended by the Commissioner.
- 11 (4) The Commissioner must make a copy of the request publicly
12 available as soon as practicable after the request is made.

26KF Application for registration of OP code

- 13
14 (1) If an OP code developer develops an OP code, the developer may
15 apply to the Commissioner for registration of the code.
- 16 (2) Before making the application, the OP code developer must:
17 (a) make a draft of the OP code publicly available; and
18 (b) invite the public to make submissions to the developer about
19 the draft within a specified period (which must run for at
20 least 28 days); and
21 (c) give consideration to any submissions made within the
22 specified period.
- 23 (3) The application must:
24 (a) be made in the form and manner specified by the
25 Commissioner; and
26 (b) be accompanied by such information as is specified by the
27 Commissioner.
- 28 (4) The OP code developer may vary the OP code at any time before
29 the Commissioner registers the code, but only with the consent of
30 the Commissioner.

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Online privacy code **Schedule 1**
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1 **26KG Commissioner may develop OP code**

- 2 (1) The Commissioner may develop an OP code if:
- 3 (a) the Commissioner has been unable to identify an OP code
4 developer that is suitable to develop an OP code; or
- 5 (b) the Commissioner made a request under section 26KE and
6 either:
- 7 (i) the request has not been complied with; or
- 8 (ii) the request has been complied with but the
9 Commissioner has decided under section 26KH not to
10 register the OP code that was developed as requested.
- 11 (2) For the purposes of paragraph (1)(a), but without limiting that
12 paragraph, an OP code developer is not suitable to develop an OP
13 code if the Commissioner is satisfied that the developer:
- 14 (a) does not have sufficient expertise to develop the code; or
15 (b) does not sufficiently represent OP organisations.
- 16 (3) Before registering the OP code under section 26KH, the
17 Commissioner must:
- 18 (a) make a draft of the code publicly available; and
19 (b) invite the public to make submissions to the Commissioner
20 about the draft within a specified period (which must run for
21 at least 40 days); and
22 (c) give consideration to any submissions made within the
23 specified period.

24 **26KH Commissioner may register OP code**

- 25 (1) If:
- 26 (a) an application for registration of an OP code is made under
27 section 26KF; or
- 28 (b) the Commissioner develops an OP code under section 26KG;
29 the Commissioner may register the code by including it on the
30 Codes Register.
- 31 (2) In deciding whether to register the OP code, the Commissioner:

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- 1 (a) must consult, and have regard to the views of, the Australian
2 Competition and Consumer Commission and the eSafety
3 Commissioner; and
4 (b) may consult, and have regard to the views of, any other
5 person the Commissioner considers appropriate about
6 registering the code; and
7 (c) may consider the matters specified in any relevant guidelines
8 made under section 26V.
- 9 (3) If the Commissioner decides not to register an OP code developed
10 by an OP code developer, the Commissioner must give written
11 notice of the decision to the developer, including reasons for the
12 decision.
- 13 (4) The Commissioner must ensure that there is one, and only one,
14 registered OP code at all times after this Division commences.

15 Subdivision C—Variation of the registered OP code

16 26KJ Variation of the registered OP code

- 17 (1) The Commissioner may, in writing, approve a variation of the
18 registered OP code:
19 (a) on the Commissioner's own initiative; or
20 (b) on application by an OP organisation; or
21 (c) on application by a body or association representing one or
22 more OP organisations.
- 23 (2) An application under paragraph (1)(b) or (c) must:
24 (a) be made in the form and manner specified by the
25 Commissioner; and
26 (b) be accompanied by such information as is specified by the
27 Commissioner.
- 28 (3) Before deciding whether to approve a variation, the Commissioner
29 must:
30 (a) make a draft of the variation publicly available; and

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- 1 (b) consult, and have regard to the views of, the Australian
2 Competition and Consumer Commission and the eSafety
3 Commissioner; and
4 (c) consider the extent to which members of the public have
5 been given an opportunity to comment on the variation.
- 6 (4) In deciding whether to approve a variation, the Commissioner may:
7 (a) consider the matters specified in any relevant guidelines
8 made under section 26V; and
9 (b) consult, and have regard to the views of, any other person the
10 Commissioner considers appropriate about the variation.
- 11 (5) If the Commissioner approves a variation of the registered OP code
12 (the *original code*), the Commissioner must:
13 (a) remove the original code from the Codes Register; and
14 (b) register the OP code, as varied, by including it on the
15 Register.
- 16 (6) If the Commissioner approves a variation, the variation comes into
17 effect on the day specified in the approval, which must not be
18 before the day on which the OP code, as varied, is included on the
19 Codes Register.
- 20 (7) An approval is not a legislative instrument.
- 21 Note: The OP code, as varied, is a legislative instrument once it is included
22 on the Codes Register: see section 26KB.

21 After paragraph 26U(1)(b)

23 Insert:

- 24 (ba) the OP code the Commissioner has decided to register under
25 section 26KH; and
26 (bb) the OP code the Commissioner must register under
27 section 26KJ; and
28

22 After paragraph 26U(2)(a)

29 Insert:

- 30 (aa) the OP code removed from the Register under section 26KJ;
31 or
32

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Part 1 Amendments

1 **23 After paragraph 26V(1)(b)**

2 Insert:

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

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

6 **24 Paragraph 26V(2)(a)**

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

8 **25 Paragraph 26V(2)(b)**

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

10 **26 After subsection 26W(1)**

11 Insert:

12 (1A) The Commissioner may review the operation of the registered OP
13 code.

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

16 **27 After subparagraph 28(1)(c)(ii)**

17 Insert:

18 (iia) the registered OP code; and

19 **28 After paragraph 33C(1)(a)**

20 Insert:

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

24 **29 After subsection 33C(1)**

25 Insert:

26 (1A) Without limiting paragraph (1)(aa), the Minister may request the
27 Commissioner to conduct an assessment of whether an OP
28 organisation of a kind covered by subsection 6W(1) is maintaining

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Online privacy code **Schedule 1**
Amendments **Part 1**

1 and handling personal information of children held by the
2 organisation in accordance with the registered OP code.

3 **30 Paragraph 40(2)(a)**

4 Repeal the paragraph, substitute:

5 (a) the act or practice may be:

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

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

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

11 **31 Subsection 63(2A)**

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

13 **32 Before section 71**

14 Insert:

15 **Subdivision A—General**

16 **33 Section 71**

17 After “section 73”, insert “or 79B”.

18 **34 After section 71**

19 Insert:

20 **Subdivision B—APP public interest determinations**

21 **35 Subsection 72(2)**

22 Omit “Division”, substitute “Subdivision”.

23 **36 Subsection 72(2)**

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

26 **37 Subsection 72(3) (heading)**

27 Repeal the heading.

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Part 1 Amendments

1 **38 Subsection 72(3)**

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

4 **39 Subsection 72(4) (heading)**

5 Omit “*under subsection (2)*”.

6 **40 Subsection 72(4)**

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

9 **41 Subsection 73(1)**

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

12 **42 Subsection 73(3)**

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

17 **43 Subsection 73(4)**

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

22 **44 Subsection 75(1)**

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

25 **45 Subsection 75(3)**

26 Repeal the subsection.

27 **46 Subsection 76(1)**

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

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Amendments **Part 1**

1 **47 Section 78**

2 Omit “Part”, substitute “Subdivision”.

3 **48 Paragraph 78(a)**

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

6 **49 Subsections 79(1) and (2)**

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

9 **50 At the end of Division 1 of Part VI**

10 Add:

11 **Subdivision C—OP public interest determinations**

12 **79A Power to make, and effect of, determinations**

13 *Determinations about an OP organisation’s acts or practices*

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

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

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

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

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

25 *Commissioner may give determinations general effect*

26 (3) The Commissioner may, by legislative instrument, make a
27 determination that no OP organisation is taken to contravene
28 section 26KA if, while that determination is in force, an OP

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1 organisation does an act, or engages in a practice, that is the subject
2 of an OP public interest determination in relation to that
3 organisation or any other OP organisation.

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

6 **79B Application by OP organisation**

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

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

13 **79C Publication of application etc.**

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

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

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

20 **79D Draft determinations**

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

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

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

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

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

3 **79E Conference**

- 4 (1) If an OP organisation or a person notifies the Commissioner,
5 within the period specified in an invitation sent to the organisation
6 or person in relation to a draft OP public interest determination,
7 that the organisation or person wishes a conference to be held
8 about the determination, the Commissioner must hold such a
9 conference.
- 10 (2) The Commissioner must specify a day, time and place for the
11 holding of the conference.
- 12 (3) The day specified must not be more than 30 days after the latest
13 day on which a period specified in any of the invitations sent in
14 relation to the determination expires.
- 15 (4) The Commissioner must give notice of the day, time and place of
16 the conference to the organisation and to each person to whom an
17 invitation was sent.

18 **79F Conduct of conference**

- 19 (1) At the conference, the OP organisation is entitled to be represented
20 by a person who is, or persons each of whom is, a director, officer
21 or employee of the organisation.
- 22 (2) A person to whom an invitation was sent, or any other person who
23 is interested in the application and whose presence at the
24 conference is considered by the Commissioner to be appropriate, is
25 entitled to attend the conference and participate personally or, in
26 the case of a body corporate, to be represented by a person who is,
27 or persons each of whom is, a director, officer or employee of the
28 body corporate.
- 29 (3) The Commissioner may exclude from the conference a person
30 who:

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- 1 (a) is not entitled to participate in the conference or to represent
2 a person who is entitled to be represented at the conference;
3 or
4 (b) uses insulting language at the conference; or
5 (c) creates, or takes part in creating or continuing, a disturbance
6 at the conference; or
7 (d) repeatedly disturbs the conference.

8 **79G Determination of application**

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

- 11 (a) such OP public interest determination as the Commissioner
12 considers appropriate; or
13 (b) a written determination dismissing the application.

14 **79H Making of determinations**

- 15 (1) The Commissioner must, in making an OP public interest
16 determination, take account of all matters raised at a conference
17 held in relation to the determination.
- 18 (2) The Commissioner must, in making an OP public interest
19 determination, take account of all submissions about the
20 application that have been made, whether at a conference or not, by
21 the OP organisation or any other person.

22 **51 Before section 80A**

23 Insert:

24 **Subdivision A—Temporary APP public interest determinations**

25 **52 Section 80A (heading)**

26 Repeal the heading, substitute:

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Amendments **Part 1**

1 **80A Power to make determinations**

2 **53 Paragraph 80A(1)(a)**

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

5 **54 Subsection 80A(2)**

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

8 **55 Section 80B (heading)**

9 Repeal the heading, substitute:

10 **80B Effect of determinations**

11 **56 Subsection 80B(1)**

12 After “temporary”, insert “APP”.

13 **57 Subsection 80B(3) (heading)**

14 After “*temporary*”, insert “*APP*”.

15 **58 Subsection 80B(3)**

16 After “temporary”, insert “APP”.

17 **59 Subsection 80D(1)**

18 Repeal the subsection, substitute:

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

24 **60 Subsection 80D(2)**

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

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Part 1 Amendments

1 **61 Paragraph 80D(2)(a)**

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

4 **62 At the end of Division 2 of Part VI**

5 Add:

6 **Subdivision B—Temporary OP public interest determinations**

7 **80DA Power to make determinations**

- 8 (1) This section applies if the Commissioner is satisfied that:
- 9 (a) the act or practice of an OP organisation that is the subject of
10 an application for an OP public interest determination
11 breaches, or may breach the registered OP code; and
12 (b) the public interest in the organisation doing the act, or
13 engaging in the practice, outweighs to a substantial degree
14 the public interest in the organisation adhering to that code;
15 and
16 (c) the application raises issues that require an urgent decision.
- 17 (2) The Commissioner may, by legislative instrument, make a
18 determination (a *temporary OP public interest determination*) that
19 the Commissioner is satisfied of the matters set out in
20 subsection (1). The Commissioner may do so:
- 21 (a) on request by the OP organisation; or
22 (b) on the Commissioner’s own initiative.
- 23 (3) The Commissioner must specify in the temporary OP public
24 interest determination a period of up to 12 months during which
25 the determination is in force (subject to subsection 80DC(2)).

26 **80DB Effect of determinations**

27 *OP organisation covered by determination*

- 28 (1) If an act or practice of an OP organisation is the subject of a
29 temporary OP public interest determination, the organisation is

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Amendments **Part 1**

1 taken not to contravene section 26KA if the organisation does the
2 act, or engages in the practice, while the determination is in force.

3 *Giving a temporary OP public interest determination general effect*

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

10 *Effect of determination under subsection (2)*

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

13 **80DC Commissioner may continue to consider application**

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

19 (2) A temporary OP public interest determination about an act or
20 practice is repealed when:
21 (a) an OP public interest determination about the act or practice
22 comes into effect; or
23 (b) a determination is made under paragraph 79G(b) to dismiss
24 the application for the OP public interest determination.

25 **63 Subsection 80E(1)**

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

27 **64 Subsection 80P(4)**

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

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Schedule 1 Online privacy code

Part 1 Amendments

1 **65 After paragraph 96(1)(a)**

2 Insert:

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

5 **66 After paragraph 96(1)(d)**

6 Insert:

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

9 **67 After subsection 96(2)**

10 Insert:

11 (2AA) An application under paragraph (1)(aa) may only be made by the
12 OP code developer that developed the OP code.

13 **68 After subsection 96(2C)**

14 Insert:

15 (2CA) An application under paragraph (1)(d) may only be made by the
16 applicant for the APP public interest determination.

17 (2CB) An application under paragraph (1)(da) may only be made by the
18 applicant for the OP public interest determination.

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Online privacy code **Schedule 1**
Consequential amendments **Part 2**

1 **Part 2—Consequential amendments**

2 *Australian Human Rights Commission Act 1986*

3 **69 Paragraph 20(4A)(b)**

4 Omit “subsection 13(1) or (4)”, substitute “subsection 13(1), (1A) or
5 (4)”.

6 *Competition and Consumer Act 2010*

7 **70 At the end of section 56EC**

8 Add:

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

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

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Schedule 1 Online privacy code

Part 3 Application of amendments

1 **Part 3—Application of amendments**

2 **71 OP code may be developed etc. during the transition**
3 **period**

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

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

11 (3) In this item:

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

- 14 (a) Division 2A of Part II;
15 (b) Division 2A of Part IIIB.

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

- 17 (a) starting at the time this Act receives the Royal Assent; and
18 (b) ending immediately before the commencement of this item.

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Enforcement and penalties **Schedule 2**
Amendments **Part 1**

1 **Schedule 2—Enforcement and penalties**

2 **Part 1—Amendments**

3 *Privacy Act 1988*

4 **1 Paragraph 5B(3)(c)**

5 Repeal the paragraph.

6 **2 Subsection 6(1)**

7 Insert:

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

9 **3 Section 13G**

10 Omit “An”, substitute “(1) An”.

11 **4 Section 13G (penalty)**

12 Repeal the penalty, substitute:

13 Civil penalty: 2,400 penalty units.

14 **5 At the end of section 13G**

15 Add:

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

19 (a) \$10,000,000;

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

25 (c) if the court cannot determine the value of that benefit—10%
26 of the relevant turnover of the body corporate during the
27 12-month period ending at the end of the month in which the

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Schedule 2 Enforcement and penalties

Part 1 Amendments

- 1 body corporate engaged, or began engaging, in the conduct
2 constituting the contravention.
- 3 (3) Subsection (2) applies despite paragraph 82(5)(a) of the Regulatory
4 Powers Act.
- 5 (4) For the purposes of paragraph (2)(c), the *relevant turnover*, of a
6 body corporate, during a 12-month period, is the sum of the values
7 of all the supplies that the body corporate, and any related body
8 corporate, have made, or are likely to make, during the 12-month
9 period, other than:
- 10 (a) supplies made from any of those bodies corporate to any
11 other of those bodies corporate; or
- 12 (b) supplies that are input taxed; or
- 13 (c) supplies that are not for consideration (and are not taxable
14 supplies under section 72-5 of the *A New Tax System (Goods
15 and Services Tax) Act 1999*); or
- 16 (d) supplies that are not made in connection with an enterprise
17 that the body corporate carries on; or
- 18 (e) supplies that are not connected with Australia.
- 19 (5) Expressions used in subsection (4) that are also used in the *A New
20 Tax System (Goods and Services Tax) Act 1999* have the same
21 meaning as in that Act.

22 **6 Subparagraphs 25(1)(a)(i) and 25A(1)(a)(i)**

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

24 **7 After paragraph 33C(1)(c)**

25 Insert:

- 26 (ca) the ability of an entity subject to Part IIIC to comply with
27 that Part, including the extent to which the entity has
28 processes and procedures in place to:
- 29 (i) assess suspected eligible data breaches; and
- 30 (ii) provide notice of eligible data breaches to the
31 Commissioner and to individuals at risk from such
32 breaches;

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Enforcement and penalties **Schedule 2**
Amendments **Part 1**

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:

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Schedule 2 Enforcement and penalties

Part 1 Amendments

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

4 **11 After subsection 52(1A)**

5 Insert:

6 (1AAA) Without limiting subparagraph (1)(b)(ia) or paragraph (1A)(b), the
7 steps specified by the Commissioner may include a requirement for
8 the respondent to:

- 9 (a) engage, in consultation with the Commissioner, a suitably
10 qualified independent adviser to review:
- 11 (i) the acts or practices engaged in by the respondent that
12 were the subject of the complaint; and
 - 13 (ii) the steps (if any) taken by the respondent to ensure that
14 the conduct referred to in the determination is not
15 repeated or continued; and
 - 16 (iii) any other matter specified in the declaration that is
17 relevant to those acts or practices, or that complaint; and
- 18 (b) provide a copy of the review to the Commissioner.

19 **12 After section 52**

20 Insert:

21 **52A Determination—requirement to notify conduct constituting** 22 **interference with privacy of individual**

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

- 27 (a) prepare a statement, in consultation with the Commissioner,
28 setting out:
- 29 (i) the identity and contact details of the respondent or, if
30 the respondent is the principal executive of an agency,
31 the agency; and

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Enforcement and penalties **Schedule 2**
Amendments **Part 1**

- 1 (ii) a description of the conduct engaged in by the
2 respondent that constitutes the interference with the
3 privacy of an individual; and
4 (iii) the steps (if any) undertaken, or to be undertaken, by the
5 respondent to ensure the conduct is not repeated or
6 continued; and
7 (iv) any other information required by the declaration to be
8 included in the statement; and
9 (b) if required by the declaration—give a copy of the statement
10 to the complainant or, if the complaint is a representative
11 complaint, to each class member identified as affected by the
12 determination, in the manner specified by the declaration;
13 and
14 (c) if required by the declaration—publish, or otherwise
15 communicate, the statement in the manner specified by the
16 declaration; and
17 (d) give the Commissioner, within 14 days after the end of the
18 period specified in the declaration, evidence that the actions
19 required by paragraphs (b) and (c) were taken in accordance
20 with this section and the declaration.
- 21 (2) The matters specified by the Commissioner for the purposes of
22 subsection (1) must be reasonable and appropriate.

23 **13 Division 3 of Part V (heading)**

24 Repeal the heading, substitute:

25 **Division 3—Enforcement of determinations**

26 **14 At the end of section 55**

27 Add:

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

32 **15 At the end of section 58**

33 Add:

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Schedule 2 Enforcement and penalties

Part 1 Amendments

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

16 At the end of section 59

5 Add:
6 ; and (d) the preparation, publishing or communicating of a statement
7 in accordance with a declaration included in the
8 determination under subparagraph 52(1)(b)(iia) or
9 paragraph 52(1A)(ba) and section 52A.
10

17 Subsection 66(1)

11 Repeal the subsection, substitute:

13 *Basic contravention*

- 14 (1) A person contravenes this subsection if:
15 (a) the person is required to give information, answer a question
16 or produce a document or record under subsection 33C(3),
17 section 44 or subsection 46(4) or 47(1); and
18 (b) the person refuses or fails to do so.

19 Civil penalty: 60 penalty units.

18 After subsection 66(1)

20 Insert:

22 *Multiple contraventions*

- 23 (1AA) A person commits an offence if:
24 (a) the person is a corporation; and
25 (b) the person engages in conduct that constitutes a system of
26 conduct or a pattern of behaviour; and
27 (c) the system of conduct or pattern of behaviour results in 2 or
28 more contraventions of subsection (1).

29 Penalty: 300 penalty units.

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Enforcement and penalties **Schedule 2**
Amendments **Part 1**

1 **19 Subsection 66(1B)**

2 After “(1)”, insert “or (1AA)”.

3 **20 Subsection 66(1B) (note)**

4 Repeal the note, substitute:

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

9 **21 After Division 1 of Part VIB**

10 Insert:

11 **Division 1A—Infringement notices**

12 **80UB Infringement notices**

13 *Provisions subject to an infringement notice*

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

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

18 *Infringement officer*

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

22 (a) the Commissioner;

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

26 *Relevant chief executive*

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

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Schedule 2 Enforcement and penalties

Part 1 Amendments

1 *Extension to external Territories*

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

5 **22 Subsection 94T(2) (note)**

6 Repeal the note.

7 **23 At the end of section 94T**

8 Add:

- 9 (3) A person contravenes this subsection if:
10 (a) the person is required to give information or produce a
11 document under subsection (2); and
12 (b) the person refuses or fails to do so.

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

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

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

EXPOSURE DRAFT

Enforcement and penalties **Schedule 2**
Application of amendments **Part 2**

1 **Part 2—Application of amendments**

2 **24 Application of amendments**

- 3 (1) Section 13G of the *Privacy Act 1988*, as amended by Part 1 of this
4 Schedule, does not apply in relation to an act done, or a practice
5 engaged in, before the commencement of this item.
- 6 (2) Section 33C of the *Privacy Act 1988*, as amended by Part 1 of this
7 Schedule, applies in relation to:
8 (a) assessments started before the commencement of this item
9 but not concluded at that commencement; and
10 (b) assessments started after that commencement.
- 11 (3) Section 52 of the *Privacy Act 1988*, as amended by Part 1 of this
12 Schedule, applies in relation to:
13 (a) the investigation of complaints that started before the
14 commencement of this item but not finally dealt with at that
15 commencement; and
16 (b) the investigation of complaints that started after that
17 commencement.

EXPOSURE DRAFT

Schedule 3 Information sharing

Part 1 Amendments

1 **Schedule 3—Information sharing**

2 **Part 1—Amendments**

3 *Australian Information Commissioner Act 2010*

4 **1 Paragraph 29(2)(a)**

5 Repeal the paragraph, substitute:

6 (a) both of the following apply:

- 7 (i) the information was acquired by the person in the
8 course of performing an information commissioner
9 function or exercising a related power;
- 10 (ii) the person records, discloses or otherwise uses the
11 information in the course of performing an information
12 commissioner function or exercising a related power; or

13 (aa) both of the following apply:

- 14 (i) the information was acquired by the person in the
15 course of performing a freedom of information function
16 or exercising a related power;
- 17 (ii) the person records, discloses or otherwise uses the
18 information in the course of performing a freedom of
19 information function or exercising a related power; or

20 (ab) both of the following apply:

- 21 (i) the information was acquired by the person in the
22 course of performing a privacy function or exercising a
23 related power;
- 24 (ii) the person records, discloses or otherwise uses the
25 information in the course of performing a privacy
26 function or exercising a related power; or

27 **2 Paragraph 29(2)(aa)**

28 Reletter as paragraph (ac).

EXPOSURE DRAFT

Information sharing **Schedule 3**
Amendments **Part 1**

1 ***Privacy Act 1988***

2 **3 Subsection 6(1)**

3 Insert:

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

6 **4 Division 3 of Part IV (heading)**

7 Repeal the heading, substitute:

8 **Division 3—Reports and information sharing by**
9 **Commissioner**

10 **5 At the end of Division 3 of Part IV**

11 Add:

12 **33A Commissioner may share information with other authorities**

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

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

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

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

21 (a) an enforcement body;

22 (b) an alternative complaint body;

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

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

EXPOSURE DRAFT

Schedule 3 Information sharing

Part 1 Amendments

- 1 (a) the information or documents were acquired by the
2 Commissioner in the course of exercising powers, or
3 performing functions or duties, under this Act; and
4 (b) the Commissioner is satisfied on reasonable grounds that the
5 receiving body has satisfactory arrangements in place for
6 protecting the information or documents.
- 7 (4) If the Commissioner acquired the information or documents from
8 an agency, the Commissioner may only share the information or
9 documents with a receiving body under this section if the receiving
10 body is an agency.
- 11 (5) To avoid doubt, the Commissioner may share information or
12 documents with a receiving body under this section whether or not
13 the Commissioner is transferring a complaint or part of a complaint
14 to the body.

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

- 15
16
- 17 (1) Subject to subsections (2) and (3), the Commissioner may disclose
18 information acquired by the Commissioner in the course of
19 exercising powers, or performing functions or duties under this Act
20 if the Commissioner is satisfied that it is in the public interest to do
21 so.
- 22 (2) The Commissioner must not disclose information relating to an
23 eligible data breach of an entity unless:
24 (a) the information relates to a contravention by the entity of one
25 or more of the following subsections:
26 (i) subsection 26WH(2);
27 (ii) subsection 26WK(2);
28 (iii) subsection 26WL(3);
29 (iv) subsection 26WR(10); and
30 (b) the Commissioner is satisfied that it is in the public interest to
31 disclose the information.
- 32 (3) Despite subsection (2), the Commissioner may disclose
33 information relating to an eligible data breach of an entity if the

EXPOSURE DRAFT

Information sharing **Schedule 3**
Amendments **Part 1**

1 information is confirmation that the entity has given a statement
2 under section 26WK(2) to the Commissioner.

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

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

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

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

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

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

16 (6) In this section:

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

18 **6 Subsection 50(1)**

19 Omit “section”, substitute “Act”.

20 **7 Subsection 50(1) (definition of *Ombudsman*)**

21 Repeal the definition.

22 **8 Subsection 50(1) (after paragraph (b) of the definition of** 23 ***alternative complaint body*)**

24 Insert:

25 (ba) the eSafety Commissioner; or

26 **9 After subsection 52(5)**

27 Insert:

28 (5A) The Commissioner may publish a determination made under this
29 section on the Commissioner’s website.

EXPOSURE DRAFT

Schedule 3 Information sharing

Part 2 Application of amendments

1 **Part 2—Application of amendments**

2 **10 Application of amendments**

- 3 (1) Subsection 29(2) of the *Australian Information Commissioner Act 2010*,
4 as amended by Part 1 of this Schedule, applies in relation to information
5 acquired before or after the commencement of this item.
- 6 (2) Section 33A of the *Privacy Act 1988*, as inserted by Part 1 of this
7 Schedule, applies in relation to the sharing of information or documents
8 after the commencement of this item, whether the information or
9 documents were obtained by the Commissioner before or after that
10 commencement.
- 11 (3) Section 33B of the *Privacy Act 1988*, as inserted by Part 1 of this
12 Schedule, applies in relation to the disclosure of information after the
13 commencement of this item, whether the information was obtained by
14 the Commissioner before or after that commencement.
- 15 (4) Subsection 52(5A) of the *Privacy Act 1988*, as inserted by Part 1 of this
16 Schedule, applies in relation to determinations made by the
17 Commissioner before or after the commencement of this item.