

Explanatory Statement

Privacy Public Interest (Enhancing Privacy Protection) Amendment and Repeal Determination 2014

Privacy Act 1988 and Privacy Amendment (Enhancing Privacy Protection) Act 2012

Section 72 of the *Privacy Act 1988* authorises the Australian Information Commissioner (the Commissioner) to make a determination that an act or practice of an agency or an organisation, that may constitute a breach of an Information Privacy Principle, a National Privacy Principle or an approved privacy code, shall be regarded as not breaching that principle or approved code for the purposes of the Privacy Act. A determination may only be made if the Commissioner is satisfied this is in the public interest. A determination made under section 72 is referred to as a Public Interest Determination.

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (the Privacy Amendment Act) significantly reforms the *Privacy Act 1988*. This includes amending the power to make a determination under section 72. Section 72, as amended, refers to a new set of Australian Privacy Principles (APPs) and to registered APP codes. This reflects other amendments made by the Privacy Amendment Act including the replacement of the Information Privacy Principles and the National Privacy Principles with a single set of APPs. The amendments to the Privacy Act commence on 12 March 2014 (the commencement date).

Item 12 in Schedule 6 of the Privacy Amendment Act contains the following savings provisions for public interest determinations in force prior to the commencement date:

- This item applies to a determination if the determination was made under section 72 of the Privacy Act and the determination was in force immediately before the commencement date (subitem 12(1)).
- An existing Public Interest Determination has effect after the commencement date as if it had been made under the amended Privacy Act (subitem 12(2)).
- The Commissioner may, by legislative instrument, vary an existing Public Interest Determination after the commencement date to take into account amendments made by the Privacy Amendment Act (subitem 12(3)).
- In deciding whether to vary a Public Interest Determination, the Commissioner may consult any person or entity, and take into account any matter that the Commissioner considers relevant (subitem 12(4)).

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The purpose and intended operation of this Determination is to:

- Amend Public Interest Determination Numbers 3A, 5, 12 and 12A, to which subitem 12(1) in Schedule 6 of the Privacy Amendment Act applies. These public interest determinations permit certain acts and practices that may otherwise breach an Information Privacy Principle or National Privacy Principle, where the Commissioner is satisfied that the public interest in doing the act, or engaging in the practice, substantially outweighs the public interest in adhering to the principle. From commencement, the acts and practices covered by these determinations may breach equivalent APPs. The amendments made under item 12(3), Schedule 6, are intended to ensure that each determination operates in an identical fashion to the way it operated, as in force immediately before commencement.
- Repeal Public Interest Determination Numbers 4, 7, 11, 11A, 13 and 13A, to which subitem 12(1) in Schedule 6 of the Privacy Amendment Act applies. These public interest determinations are no longer required. From the commencement date, the acts and practices covered by these determinations do not breach an APP because an exemption or exception to an APP applies. The Commissioner has the power to repeal these determinations under section 72 of the Privacy Act (by virtue of s 33(3) of the *Acts Interpretation Act 1901*).
- Repeal Public Interest Determination No. 8, to which item 12(1) in Schedule 6 of the Privacy Amendment Act applies. The determination is no longer required as the act or practice covered by the determination is complete. The Commissioner has the power to repeal this determination under section 72 of the Privacy Act (by virtue of subsection 33(3) of the *Acts Interpretation Act 1901*).

This Determination is made by the Privacy Commissioner. Under subsection 12(1) of the *Australian Information Commissioner Act 2010* (the AIC Act) the Privacy Commissioner has the privacy functions conferred on the Information Commissioner. Under subsection 9(1) of the AIC Act, the privacy functions are functions conferred on the Information Commissioner by an Act (or an instrument under an Act), if the functions relate to the privacy of an individual and are not freedom of information functions. The privacy functions include the power to make a public interest determination under section 72 of the Privacy Act.

Consultation Process

The Office of the Australian Information Commissioner gave notice to:

- The Commonwealth Director of Public Prosecutions, the applicant for Public Interest Determination Numbers 3A and 8, of the proposed amendments to Public Interest Determination No. 3A, and the proposed repeal of Public Interest Determination No. 8.
- The Australian Federal Police, the applicant for Public Interest Determination Numbers 4 and 5, of the proposed repeal of Public Interest Determination No. 4 and the proposed amendment of Public Interest Determination No. 5.
- The Department of Foreign Affairs and Trade, the applicant for Public Interest Determination No. 7, of the proposed repeal of that determination.

- Dr Elizabeth McCusker, the applicant for Public Interest Determination No. 11, of the proposed repeal of that determination and of the related Public Interest Determination No. 11A, as well as notifying the National Health and Medical Research Council of these matters.
- Dr Steve Hambleton, President of the Australian Medical Association, the applicant for Public Interest Determination No. 12, of the proposed amendments to that determination, and to the related Public Interest Determination No. 12A.
- Uniting Communities, the applicant for Public Interest Determination No. 13, of the proposed repeal of that determination and of the related Public Interest Determination No. 13A.

The effects of the Determination are of a minor or machinery nature and will not substantially alter existing arrangements. Therefore the Commissioner was satisfied that further consultation was unnecessary, in accordance with paragraph 18(2)(a) of the *Legislative Instruments Act 2003*.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The purpose of the Determination is to:

- Amend Public Interest Determination Numbers 3A, 5, 12 and 12A, which were made by the Commissioner under section 72 of the Privacy Act.
- Repeal Public Interest Determination Numbers 4, 7, 8, 11, 11A, 13 and 13A, which were made by the Commissioner under section 72 of the Privacy Act.

Human rights implications

The Determination engages article 17 of the International Covenant on Civil and Political Rights (ICCPR), which provides that ‘no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation’, and that ‘everyone has the right to the protection of the law against such interference and attacks.’

The APPs make provision for the protection of the privacy of individuals, consistent with article 17 of the ICCPR.

Under section 72 of the Privacy Act, the Privacy Commissioner made a number of Public Interest Determinations to permit certain agencies and organisations to do an act, or engage in a practice, that would otherwise breach the requirements of the former Information Privacy Principles or

National Privacy Principles. In making these determinations, the Commissioner was satisfied that the public interest in the agency or organisation doing the act, or engaging in the practice, outweighs to a substantial degree the public interest in adhering to that principle.

The Determination amends certain Public Interest Determinations to ensure that the determinations continue to operate in an identical fashion after the commencement of the Privacy Amendment Act. That is, the amended determinations permit the same acts and practices permitted prior to commencement of the Privacy Amendment Act. The amendments do not limit the right to privacy in article 17 of the ICCPR any further than it was already limited immediately prior to commencement of the Privacy Amendment Act.

The Determination also repeals certain Public Interest Determinations that are no longer necessary from the commencement of the Privacy Amendment Act. The acts and practices are either permitted under changes made to the Privacy Act by the Privacy Amendment Act, or are complete. The repeals will not result in any limitation of the right to privacy in article 17 of the ICCPR.

Conclusion

The Determination is compatible with human rights because, while it engages article 17 of the ICCPR, it does not result in any additional limitation of those rights.