

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. , 2017**

Issued by the authority of the Attorney-General

*Privacy Act 1988*

*Privacy Amendment (Energy and Water Utilities) Regulations 2017*

The *Privacy Act 1988* (Cth) (Privacy Act) establishes, among other things, the Australian Privacy Principles (APPs), which regulate the collection, use, disclosure and storage of personal information by APP entities.

Subsection 100(1) of the Privacy Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Privacy Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Privacy Act.

The *Privacy Amendment (Energy and Water Utilities) Regulations 2017* (the Regulations) permit energy and water utilities in the Australian Capital Territory (the ACT) and the Northern Territory to disclose credit information until 1 January 2018. The Regulations also repeal the *Privacy Amendment (Australian Government Solicitor and Energy and Water Utilities) Regulation 2016* (the 2016 Regulations).

The Regulations are required because of a drafting error in the commencement provision in the 2016 Regulations, which meant that an amendment intended to permit energy and water utilities in the ACT and the Northern Territory to disclose credit information until 1 January 2018 could not take effect.

#### *External dispute resolution membership obligation for credit reporting*

Pursuant to subparagraph 21D(2)(a)(i) of the Privacy Act, credit providers are required to be members of an external dispute resolution (EDR) scheme recognised by the Australian Information Commissioner, or prescribed by the regulations, in order to disclose credit information about an individual to a credit reporting body and thereby participate in the credit reporting system. The purpose of this requirement is to ensure that consumers have access to a convenient, speedy and independent avenue of redress for complaints or other issues that might arise between the individual and the organisation on credit reporting matters. Utilities (water, gas and electricity providers) are considered credit providers under the Privacy Act.

#### *Permission for utilities to disclose credit information*

The Regulations permit energy and water utilities in the ACT and the Northern Territory to disclose credit information until 1 January 2018. This will allow energy and water utilities in the ACT and the Northern Territory to continue to access the credit reporting system without the requirement to be a member of an EDR scheme recognised by the Australian Information Commissioner.

All Australian jurisdictions require utilities in that jurisdiction to participate in EDR arrangements. To minimise the compliance burden, the simplest solution for utilities is if existing EDR schemes are also recognised as EDR schemes by the Australian

Information Commissioner for credit reporting purposes. Legislative amendments or other arrangements are required to enable the recognition of EDR schemes in the ACT and the Northern Territory. The permission for energy and water utilities in the ACT and the Northern Territory to disclose credit information until 1 January 2018 will enable those utilities to continue to access the credit reporting system whilst necessary legislative changes or other arrangements are made.

### *Repeal of the 2016 Regulations*

The 2016 Regulations contained 3 amending items and no application, saving or transitional provisions relating to the amending items. Amending item 1 of the 2016 Regulations repealed the prescription of the Australian Government Solicitor as an organisation for the purposes of subsection 7A(2) of the Privacy Act, and commenced on 13 December 2016. Amending items 2 and 3 of the 2016 Regulations, permitting the disclosure of credit information by energy and water utilities in the ACT and the Northern Territory until 1 January 2018, will never commence because of a drafting error in the commencement provision for the 2016 Regulations. As items 2 and 3 of the 2016 Regulations will never commence, it is likely that the 2016 Regulations will not be automatically repealed under section 48A of the *Legislation Act 2003*. To comply with the policy that legislative instruments that only amend other legislative instruments should be repealed once they have done their job, the Regulations expressly repeal the 2016 Regulations.

Details of the Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights is set out in Attachment B prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny Act) 2011*.

Consistent with the requirements of the *Legislation Act 2003* the Department of Treasury, the Office of the Australian Information Commissioner, the Northern Territory Department of Treasury and Finance and the ACT Justice and Community Safety Directorate were consulted on the proposal related to energy or water utilities in the ACT and the Northern Territory.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence the day after registration.

**ATTACHMENT A****Privacy Amendment (Energy and Water Utilities) Regulations 2017****Preliminary****Section 1 – Name of Regulations**

This section provides that the title of the Regulations is the *Privacy Amendment (Energy and Water Utilities) Regulations 2017*.

**Section 2 – Commencement**

This section provides that the whole of the instrument commences the day after registration.

**Section 3 – Authority**

This section provides that the proposed Regulations are made under the *Privacy Act 1988*.

**Section 4 – Schedule(s)**

This section provides that amendments or repeals have effect according to the terms set out in the Schedule(s).

**Part 1 – Amendments*****Privacy Regulation 2013*****Section 14A – Permitted disclosure of credit information by energy and water utilities**

Subsection 14A(1) provides that subparagraph 21D(2)(a)(i) of the *Privacy Act 1988* does not apply in relation to a disclosure of credit information by a credit provider that is an energy or water utility operating in the Australian Capital Territory or the Northern Territory.

Subsection 14A(2) provides that section 14A is repealed at the end of 1 January 2018.

**Part 2 – Repeals*****Privacy Amendment (Australian Government Solicitor and Energy and Water Utilities) Regulation 2016*****Part 2 – The whole of the regulation.**

Part 2 repeals the *Privacy Amendment (Australian Government Solicitor and Energy and Water Utilities) Regulation 2016*.

**ATTACHMENT B****Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

**Privacy Regulation 2013**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Privacy Amendment (Energy and Water Utilities) Regulations 2017* (the Regulations) amend the *Privacy Regulation 2013* to permit energy and water utilities in the Australian Capital Territory and the Northern Territory to disclose credit information until 1 January 2018. This will allow energy and water utilities in the Australian Capital Territory and the Northern Territory to continue to access the credit reporting system without the requirement to be a member of an external dispute resolution (EDR) scheme recognised by the Australian Information Commissioner.

**Human rights implications**

This Legislative Instrument engages the right to the protection against arbitrary interference with privacy, protected in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. In order for an interference with a right not to be 'arbitrary', the interference must be for a reason consistent with the relevant Convention and reasonable in the particular circumstances. The Regulations engage with the use and disclosure of credit information, which is personal information. The Regulations ensure that consumers are not disadvantaged simply because of their jurisdiction of residence by time limiting, to 1 January 2018, the permitted disclosure of credit information by utilities without being subject to the EDR membership obligation, and by limiting the permission to disclose credit information to only those utilities operating in the Australian Capital Territory and the Northern Territory. The measures are time limited, reasonable, necessary and proportionate as they ensure that a discrete subset of personal data is used for the purpose of providing essential services to Australians. These are legitimate objectives consistent with the *Privacy Act 1988*.

**Conclusion**

This Legislative Instrument engages with the right to privacy, through the use and disclosure of personal data, and does so in a reasonable and proportionate way.