

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister to the Treasurer, Parliamentary Secretary to the Treasurer

Census and Statistics Act 1905

Census and Statistics (Information Release and Access) Determination 2018

The *Census and Statistics Act 1905* (the Act) provides the framework for taking the Census and for the collection of statistical information by the Statistician.

Section 13 of the Act provides that the Minister may, by legislative instrument, make determinations in respect of the disclosure of information furnished in pursuance of the Act (subsection 13(1)). Such determinations may provide for the persons to whom information may be disclosed and the conditions under which disclosures may occur (subsection 13(2)). However, information of a personal or domestic nature relating to a person cannot be disclosed if the disclosure is done in a manner that is likely to enable the identification of the person (subsection 13(3)).

The purpose of the *Census and Statistics (Information Release and Access) Determination 2018* (the Determination) is to remake and improve the operation of the *Statistics Determination 1983* (the previous determination) before it ‘sunsets’ on 1 October 2018. The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, progressively sunset according to the timetable in section 50 of that Act.

The Determination remakes and improves the operation of the previous determination by modernising the existing framework under which the Australian Bureau of Statistics (ABS), as authorised by the Statistician or their delegate, can release information on a public or confidential basis. The key changes:

- allow the release of identifiable information about ‘Government Business Enterprises’, consistent with the release of identifiable information about other government entities;
- allow individuals and organisations to consent to their information being released to a broader group of users;
- allow the disclosure of unidentified information in respect of individuals and organisations to a broader group of users on a confidential basis;
- allow publicly available information to be used to provide enhanced information and commentary to support ABS statistical products;
- allow a greater range of information about business characteristics to be disclosed, in the form of lists, to a broader group of users; and
- simplify the Statistician’s notification obligations for the disclosure of business characteristics.

These changes provide a more flexible scheme under which business information can be released in sufficient detail to meet the analysis and decision-making needs of governments, businesses and other stakeholders. These changes do not substantially change the intent of the previous framework or the strict controls that govern the

circumstances under which information can be released. Importantly, nothing in the Determination alters, or is capable of altering, the requirement under the Act that information of a personal or domestic nature must not be released in a manner that is likely to enable the identification of an individual.

A number of other changes are also made to ensure that the Determination accords with contemporary drafting principles. These changes include simplifying language and restructuring provisions for ease of navigation. Changes of this nature are not intended to affect the substantive meaning or operation of the previous provisions.

Further details of the Determination are set out in Attachment A.

The Act does not specify any particular matters that the Minister must be satisfied of before making this Determination.

Public consultation about the changes to the previous determination was undertaken between 7 December 2017 and 16 February 2018. Consultation on the exposure draft version of the Determination was undertaken between 12 June and 6 July 2018.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Determination commences on the day after it is registered on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Census and Statistics (Information Release and Access) Determination 2018

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 Instrument remakes and improves the operation of the previous determination by modernising the existing framework under which the Australian Bureau of Statistics, as authorised by the Statistician or their delegate, can release information on a public or confidential basis.

These changes do not substantially change the intent of the previous framework or the strict controls that govern the circumstances under which information can be released. Importantly, nothing in the Instrument alters, or is capable of altering, the requirement under the Act that information of a personal or domestic nature must not be released in a manner that is likely to enable the identification of an individual.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

ATTACHMENT A

Details of the *Census and Statistics (Information Release and Access) Determination 2018*

This attachment sets out further details of the *Census and Statistics (Information Release and Access) Determination 2018* (the Determination). All references are to the Determination unless otherwise stated. References to a ‘corresponding provision’ are to the corresponding provision in the previous determination, as identified by the ‘finding table’ in Attachment B.

Changes of a minor or machinery nature, such as renumbering and restructuring of provisions and references to ‘section’ rather than ‘clause’ are generally not identified in this Attachment. Where changes are made that are intended to apply in a different way or require further explanation, these are identified and explained in this Attachment.

Part 1—Preliminaries

Section 1 – Name

This section provides that the title of the instrument is the *Census and Statistics (Information Release and Access) Determination 2018*.

Section 2 – Commencement

This section provides that the Determination commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Determination is made under the *Census and Statistics Act 1905* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Determination has effect according to its terms.

Section 5 – Definitions

This section contains the defined expressions that are used in the Determination.

The Determination includes a new expression of ‘Act’, which means the *Census and Statistics Act 1905*.

The Determination also updates the following expressions:

- ‘enactment’ — to apply a more principled reference to an ‘Act of the Commonwealth, a State, or Territory’ instead of specifically listing the *Australian Capital Territory (Self-Government) Act 1988* and the *Northern Territory (Self-Government) Act 1978* which were incorporated into the definition in the corresponding provision through an extension to the ordinary meaning of ‘State Act’. The previous carve-out for Ordinances that were made by the Northern Territory from the definition of ‘enactment’ has been removed because it had ceased to have practical effect (as the Northern Territory no longer makes ordinances);
- ‘official body’ — to clarify that all official bodies are ‘organisations’ for the purposes of the Determination, and to replace the specific references to various Commonwealth and State department entities with the general reference to ‘government entity’ within the meaning of section 41 of the *A New Tax System (Australian Business Number) Act 1999* (which covers departments, executive agencies and government organisations that are not entities). The definition continues to apply to other organisations or bodies that are established for a public purpose, with some updates to modernise the language. This part of the definition covers government entities that were covered by the previous definition of government business undertakings that do not fall within the definition of ‘government entity’;
- ‘responsible officer’ — to remove gender specific language; and
- ‘statistics’ — to clarify that the definition applies in respect of the results of compilation and analysis of any information collected under the authority of the Act.

The following definitions were not remade in the Determination:

- ‘Authority’ & ‘government business undertaking’ — these definitions are no longer required because the Determination does not distinguish between government business undertakings and other Government bodies;
- ‘Department’ — a separate definition is no longer required because it is incorporated into the definition of ‘official body’ through the reference to ‘government entity’;
- ‘Minister’ & ‘responsible Minister’ — these definitions are no longer required because the actions previously undertaken by a Minister in relation to an official body are now to be undertaken by a responsible officer of the body;
- ‘State Act’ — a separate definition is no longer required because the extensions in respect of the *Australian Capital Territory (Self-Government) Act 1988* and the *Northern Territory (Self-Government) Act 1978* are now incorporated into the definition of ‘enactment’ through the reference to an Act of a Territory.

Part 2—General requirements for disclosures

Part 2 contains rules that are generally applicable to any disclosures that are made under the Determination.

Section 6 – Information may be disclosed under this Determination

This section provides that, pursuant to section 13 of the Act, information may be disclosed under the Determination.

Subsection 6(1) makes it clear that where the disclosure of information is permitted under a particular section, it must also comply with all general requirements that are applicable under Part 2. Many of these provisions were replicated in the specific provisions of the previous determination that authorised the disclosure of information. Generalising these rules means that provisions that authorise disclosure under this Determination were able to be simplified.

Subsection 6(2) further clarifies that the disclosure of information can be authorised under any single section of the Determination, subject to the general requirements in Part 2. This provision replicates the corresponding provision of the previous determination but has been updated in accordance with modern drafting practices.

Subsection 6(3) also clarifies that, consistent with section 13 of the Act, the recipients of information disclosed under the Determination may be subject to obligations that are contained in a provision of the Determination or in another document made or issued under the authority of a provision of the Determination. This provision reflects that section 13 of the Act allows the Minister to determine a range of matters relating to the disclosure of information, including the terms and conditions subject to which disclosures are to occur. For the purposes of the Determination, the standard form that such obligations take are through the requirement that certain individuals (including the responsible officers of an organisation on behalf of the organisation) provide the Statistician with undertakings in relation to particular disclosures.

Section 7 – Disclosure of information of a personal or domestic nature

This section mirrors the prohibition in subsection 13(3) of the Act against the disclosure of information of a personal or domestic nature relating to a person where the disclosure is done in a manner that is likely to enable the identification of that person. The section refers to individuals rather than persons, which reflects the fact that the prohibition in the Act can only apply to natural persons. While this provision is not strictly required (as the Determination cannot authorise disclosures that would contravene subsection 13(3) of the Act), it makes it clear that the Determination does not rely on the limitation in the Act to prevent such disclosures from occurring.

Section 8 – Statistician must approve disclosure of information

For information to be disclosed under any section of the Determination, the Statistician must approve the disclosure in writing. As with the above requirement about the disclosure of information of a personal or domestic nature, this requirement mirrors the requirement in subsection 13(1) of the Act.

Section 9 – Consent must be given to the Statistician in writing

This section provides that any consent that is provided to the Statistician in accordance with a provision of the Determination must be in writing. This

requirement ensures that there is a record of the consent that is required in order for a disclosure to occur under a provision.

The section also changes the approach under the previous determination that allowed the responsible officer or the responsible Minister in relation to a government entity to consent to the disclosure. The reference to responsible Ministers has been removed from this section so that the responsible officer is always the one to provide consent.

Currently, section 13 of the Determination is the only provision that includes requirements about consent being given to the Statistician. However, if the Determination is amended to include other provisions that require consent, this rule will apply to such amendments by default.

Section 10 – Requirements for undertakings given to the Statistician

A number of the provisions that authorise disclosures are contingent on undertakings being given to the Statistician. This section makes it clear that such undertakings must be given to the Statistician in writing, which provides clear evidence about the particulars of the undertaking and was a standard feature of each such provision in the previous determination.

The section also standardises the requirements about who must give the Statistician an undertaking in order for a disclosure to occur.

Where an undertaking is required under the Determination, the undertaking must still be given by an individual who is to receive the information in their own capacity (that is, rather than as a member of an organisation). This general requirement applies to individuals who act as contractors or service providers to organisations and means that the specific rules about contractors that were contained in the previous determination are no longer required.

For disclosures of information to an organisation that require an undertaking, a responsible officer of the organisation must give an undertaking to the Statistician in all cases. This requirement makes it clear that the responsible officers of an organisation are ultimately responsible for access to, and the handling of, the information disclosed to the organisation.

This change also updates the approach under the previous determination that allowed the responsible officer or the responsible Minister in relation to a government entity to give an undertaking in relation to the disclosure. As with the change for providing consent, the reference to responsible Ministers has been removed from this section so that the responsible officer is always the one to provide an undertaking.

The Determination also authorises the Statistician to choose to require an undertaking from each individual in the organisation who will have access to the information. This requirement was a feature of a number of the provisions of the previous determination and is appropriate to be extended to all disclosures under this Determination as it ensures that individuals within an organisation can, in appropriate circumstances, be personally accountable for the way that information is used.

Subsection 19(3) of the Act makes it an offence for an individual or organisation to fail to comply with an undertaking that is given under a provision of this Determination. Subsection 19(3) of the Act applied to the undertakings given under a provision of the previous determination and the scope of the undertakings that must be given under this Determination remains substantially the same.

Part 3—Disclosures

Part 3 contains the provisions under which information may be disclosed under this Determination.

Section 11 – Disclosure of certain classes of statistics

This section updates the approach that was in the corresponding provision to remove the previous restriction on the release of information relating to government business undertakings. The change means that information about any official body (as per the updated definition in the Determination) can be disclosed.

Previously, such information could only be disclosed if a government business enterprise consented to the release of information through clause 5 of the previous determination. The new approach reverses this default position so that information in respect of a government business enterprise can be released unless the organisation objects.

This change allows users of information to improve their understanding of how government business organisations (which are now covered by the general definition of ‘official body’) contribute to the Australian economy.

The new provision also allows the responsible officer of an official body to object to the disclosure of information on the basis that it would be likely to enable the identification of a particular individual or organisation. This process replaces the approach under the corresponding provision which required a responsible Minister of an official body to make the objection.

Consistent with the previous determination, the objection must occur prior to the release of the information. This approach reflects that, in practice, objections that have been made after information has been disclosed cannot be taken into account at the time the disclosure is made. However, consistent with the ABS’s current practice, any objections that occur after information is disclosed will be taken into account by the ABS in publishing future information. The ABS also takes steps to modify or withdraw information that has been objected to after it has been disclosed, where it is reasonable to do so in the circumstances.

The changes are limited to business information of individuals and organisations and do not affect the restrictions about the handling or release of information of a personal or domestic nature.

Section 12 – Disclosure of information already available to the public

This section has been updated to remove the requirement in the corresponding provision about information that was already available to the public only being able to be released if it was in the form of statistics.

Removing that requirement enables the ABS to use publicly available information to provide enhanced information and commentary to support their statistical products. Allowing the ABS to release such information allows them to provide users with explicit references to drivers of statistical change, enhancing the value of the statistics that they provide, and facilitating more meaningful analysis.

The expanded provision now covers all information that could be disclosed under clause 4 of the previous determination. As a result, that clause was not required to be remade in the Determination.

The changes are limited to business information and do not affect the general restrictions about the handling or release of information of a personal or domestic nature.

Section 13 – Disclosure with consent

This section updates the approach in the corresponding provision to allow information that may identify an individual or organisation to be disclosed on a confidential basis to any entity where the individual or organisation has consented to the disclosure.

Under the corresponding provision, disclosures of this kind could only be made to a Department or Authority. The changes provide individuals and organisations with the opportunity to consent to their information being disclosed to other entities, such as universities and the broader research sector, where they choose to do so.

The particulars of the undertaking remain broadly the same as those that were required under the corresponding provision. However, the new provision also authorises the Statistician to require that the undertaking include compliance with any other conditions that are reasonably necessary in a particular case. This feature was present in some of the undertakings that were required under the previous determination and allows the Statistician to ensure that additional protections can be put in place in respect of the handling of information that is disclosed under this section, where it is appropriate to do so.

It remains a criminal offence for a person to breach these conditions and may attract penalties including a fine, imprisonment, or both.

The changes are limited to business information and do not affect the restrictions about the handling or release of information of a personal or domestic nature.

Section 14 – Disclosure of lists of business characteristics

This section updates the approach that was in the corresponding provision relating to the type of information that can be disclosed and the entities to which disclosures can be made.

While the corresponding provision applied to information in the form of lists that related to the business characteristics of an individual or organisation, such information could only be disclosed if it was of a kind specifically referred to in the previous determination. An issue with this approach is that the list in the corresponding provision had to be updated in order for new categories of information to be disclosed, even if those categories were similar in substance to those already listed.

The new provision adopts a principles-based approach about information relating to the ‘business characteristics’ of an individual or organisation. This approach will improve the relevance of the provision over time. The concept of ‘business characteristics’ is not defined in the Determination and therefore takes its ordinary meaning. While the information that can be disclosed under this section continues to cover each of the particulars that were previously referred to in the corresponding provision, it is also intended to include other characteristics, such as Australian Business Numbers.

On that basis, examples of information that would be ‘business characteristics’ include, but are not limited to, any of the following:

- the name of an individual’s business or the name of the organisation;
- an address (including geographic codes);
- a telephone number;
- an Australian Business Number;
- the legal entity type (for an organisation);
- the types of business activities engaged in;
- the types of industries engaged in;
- an indicator of the size of an individual’s business or the organisation.

These changes enable the ABS to better respond to future user demand, reduce duplication of work regarding information about businesses across governments and the research sector, and enable governments and the research sector to produce timelier and higher quality outputs.

The section also updates the approach in the corresponding provision to allow information in the form of lists to be disclosed to any organisation, provided that a responsible officer of the organisation has given an undertaking in respect of the receipt of the information. This change allows information to be disclosed to organisations that are not official bodies, such as universities and the broader research sector.

The section also allows information to be disclosed to an individual, provided that the individual has given the Statistician an undertaking. This means that the specific rules about contractors and their employees that were contained in the corresponding provision are no longer required because such disclosures are now dealt with through the standard requirements about undertakings.

The particulars of the undertaking that must be given remain substantially the same as those that were required under the corresponding provision. Although the specific rules in respect of undertakings that were required to be given by contractors and their employees under the corresponding provisions are no longer included, many of the

requirements were substantially the same as the standard undertaking requirements but adapted to reflect that the undertaking was given by a contractor. The Statistician is also authorised to require that the undertaking include compliance with any other conditions that are reasonably necessary in a particular case. This allows the Statistician to continue to impose any specific requirements for contractors and their employees that are not generally applicable to other individuals.

It remains a criminal offence for a person to breach these conditions and may attract penalties including a fine, imprisonment, or both. The changes are limited to business information and do not affect the restrictions about the handling or release of information of a personal or domestic nature.

Finally, the section updates the previous requirement in the corresponding provision that the Statistician table, before both Houses of Parliament, a description of each list that is to be released. The tabling was only for the information of Parliament, and the disclosure of the information did not require the approval of the Parliament and could not be disallowed.

In place of the previous requirement, the Determination now requires that the Statistician make a description of each list (but not the contents of such a list) publicly available within 28 days of the disclosure. This approach is consistent with contemporary public notification practices and reflects that the tabling of information before the Parliament was for information only. The ABS already makes available on its website the descriptions of each list it has released under the corresponding provision of the previous determination. In practice, it is expected that the Statistician will continue to publish the necessary information on the ABS website.

Section 15 – Disclosure of unidentified information

This section updates the approach that was in the corresponding provision to allow the release, on a confidential basis, of unidentified information that could enable the indirect identification of an organisation. Unidentified information is information with all direct identifiers, such as name and address, removed.

The ability for information to be released under the corresponding provision was substantially reduced by the previous requirement that the disclosure of information could not enable the identification of an organisation. This was particularly the case in respect of information related to sectors of the economy that are dominated by a small number of major contributors.

These changes improve the availability of detailed information for policy development and evaluation, statistical research purposes and decision making for all users.

The section continues to prohibit the disclosure of unidentified information that is likely to enable the identification of an individual.

Recipients of information under this section continue to be subject to strict requirements in respect of the undertakings that must be provided before they can receive information. The particulars of these undertakings remain broadly the same as

those that were required under the corresponding provision. As a result, the Statistician continues to have the authority to impose a number of conditions on users of this information (including limiting the purposes for which access is provided, the location where information may be accessed, and denying any on-disclosure of any identifying information).

Given the expanded scope of the disclosures permitted under this section, the purposes for which information can be used has been similarly expanded to include research purposes in addition to the original ‘statistical’ purposes that were covered by the corresponding provision. As with the undertakings that must be given in relation to disclosures with consent, the new provision also authorises the Statistician to require that the undertaking include compliance with any other conditions that are reasonably necessary in a particular case.

The various conditions ensure that information that is disclosed under this section can be restricted and can only be accessed through a safe and controlled environment. Currently, the ABS controls safe access to information in accordance with the ‘Five Safes Framework’ (the framework).

The framework is an internationally recognised framework that provides a structure for assessing and managing disclosure risk that is appropriate to the intended data use. This framework has been adopted by the ABS, as well as several other Australian government agencies and international National Statistical Organisations.

The framework takes a multi-dimensional approach to managing disclosure risk. Each ‘safe’ refers to an independent but related aspect of disclosure risk. The framework poses specific questions to help assess and describe each risk aspect (or safe) in a qualitative way. This allows the ABS to place appropriate controls, not just on the data itself, but on the manner in which data is accessed. The framework is designed to facilitate safe data release and prevent over-regulation.

The five elements of the framework are:

- Safe People – *Is the researcher appropriately authorised to access and use the data?*
- Safe Projects – *Is the data to be used for an appropriate purpose?*
- Safe Settings – *Does the access environment prevent unauthorised use?*
- Safe Data – *Has appropriate and sufficient protection been applied to the data?*
- Safe Outputs – *Are the statistical results non-disclosive?*

Further information about the operation of the framework is available on the ABS website.

It remains a criminal offence for a person to breach these conditions and may attract penalties including a fine, imprisonment, or both.

Section 16 – Disclosure of information to enable the Statistician to perform relevant functions

This section replicates the corresponding provision of the previous determination but has been updated in accordance with modern drafting practices and the general changes contained in Part 2 of the Determination.

The statistical functions of the Statistician are set out in sections 5 and 6 of the *Australian Bureau of Statistics Act 1975*, and include the collection, compilation analysis and dissemination of statistics.

Part 4—Transitional rules

Section 17 - Disclosures made under the *Statistics Determination 1983*

Section 17 contains a transitional rule to preserve the status of any disclosures that were made under the previous determination. The rule also preserves the status of anything relating to the disclosure that has been done, could be done, or is prevented from being done under the previous determination.

This rule ensures that any such disclosures continue to have effect under the Determination, despite having been made under the previous determination. Where particular actions are permitted or prohibited in relation to such disclosures under the previous determination, those actions continue to be permitted or prohibited under this determination. This transitional rule ensures that any ongoing obligations, conditions or terms and conditions (such as those contained in an undertaking provided to the Statistician), continue to have effect under this Determination, despite the repeal of the previous Determination.

Schedule 1

Schedule 1 to the Determination repeals the previous determination, which is remade by this Determination.

ATTACHMENT B

FINDING TABLES

As a result of some of the changes outlined in Attachment A it was necessary to renumber the provisions in the Determination. This explanatory statement includes finding tables to assist in identifying which provision in the Determination corresponds to a provision in the old law that has been rewritten or consolidated, and vice versa.

References to the old law are to the previous determination and references to the new law are to the *Census and Statistics (Information Release and Access) Determination 2018*.

Finding Table – Old to New Law

<i>Old Law</i>	<i>New Law</i>
1A	1
No equivalent	2
No equivalent	3
No equivalent	4
1	5
No equivalent	6(1)
8	6(2)
No equivalent	6(3)
No equivalent	7
No equivalent	8
No equivalent	9
No equivalent	10
2	11
3	12
4	Omitted
5	13
6	14

<i>Old Law</i>	<i>New Law</i>
7	15
7A	16
No equivalent	17

- in the Old Law column, 'no equivalent' means a new provision that has no equivalent in the old law; and
- in the New Law column, 'omitted' means that the section from the old law has not been remade.