

EXPLANATORY STATEMENT

Select Legislative Instrument No. , 2017

Issued by the authority of the Attorney-General

Privacy Act 1988 Privacy Amendment (Utility Credit Providers) Regulations 2017

The *Privacy Act 1988* (Cth) (the 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 Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The purpose of the *Privacy Amendment (Utility Credit Providers) Regulations 2017* (the Regulations) is to permit energy and water utilities (utilities) in the Australian Capital Territory (ACT) and the Northern Territory (NT) to disclose credit information between 1 January 2017 and 28 February 2017 (hereinafter referred to as the ‘gap period’). This will retrospectively allow those utilities to access the credit reporting system during the gap period without the requirement to be a member of an external dispute resolution (EDR) scheme recognised by the Australian Information Commissioner (the Commissioner).

External dispute resolution membership obligation for credit providers

Pursuant to subparagraph 21D(2)(a)(i) of the Privacy Act, credit providers are required to be members of an EDR scheme recognised by the Commissioner, or prescribed in the regulations, in order to disclose credit information about an individual to a credit reporting body and thereby participate in the consumer 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 to be credit providers under the Privacy Act.

Permitted disclosure of credit information by utilities during the gap period

The Regulations permit utilities in the ACT and the NT to disclose credit information during the gap period. The gap period developed due to a drafting error in the commencement provision in the *Privacy Amendment (Australian Government Solicitor and Energy and Water Utilities) Regulation 2016* (the 2016 Regulation), which meant an amendment intended to permit energy and water utilities in the ACT and NT to disclose credit information from 1 January 2017 until 1 January 2018 could not take effect. The *Privacy Amendment (Energy and Water Utilities) Regulations 2017* (the 2017 Regulations) were made in response to the drafting error in the 2016 Regulation. However, the 2017 Regulations did not commence until 1 March 2017.

The Senate Standing Committee on Regulations and Ordinances (in its Monitor No. 4 of 2017 and Monitor No. 5 of 2017) raised concerns with regards to the legality of any disclosures made between the cessation of the 2016 Regulation on 1 January 2017 and the commencement of the 2017 Regulations on 1 March 2017. The Regulations are being made with retrospective commencement in response to the Committee's concerns in order to permit disclosures made during the gap period. The Regulations will fill the gap period that previously existed from the start of January 2017 until the end of February 2017 when credit providers that were utilities operating in the ACT or the NT were not prescribed for the purposes of subparagraph 21D(2)(a)(i) of the Act to allow them to make disclosures of credit information in certain circumstances.

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*, consultation on the Regulations was undertaken with the Office of the Australian Information Commissioner. The NT Department of Treasury and Finance and the ACT Justice and Community Safety Directorate were also consulted and were supportive of the Regulations.

The Office of Best Practice Regulation was consulted on the Regulations and advised that no Regulation Impact Statement was required.

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

The Regulations commenced the day after registration, except for Schedule 1, items 1 and 2, which commenced retrospectively on 1 January 2017 and on 1 March 2017 respectively.

Items 1 and 2 of Schedule 1 engage section 12 of the *Legislation Act 2003*. Subsection 12(2) of that Act operates to prevent the Regulations being applied to the extent that it affects a person's rights so as to disadvantage that person. Therefore, the Regulations will not affect an individual's right to make a complaint under the Privacy Act or seek redress for disclosures of their credit information during the gap period. Accordingly, no person will be disadvantaged by the retrospectivity.

Privacy Amendment (Utility Credit Providers) Regulations 2017

Preliminary

Section 1 – Name of Regulation

This section provides that the title of the Regulations is the *Privacy Amendment (Utility Credit Providers) Regulations 2017*.

Section 2 – Commencement

This section provides that the Regulations commence the day after the instrument is registered, except for Schedule 1, item 1, which commenced on 1 January 2017 and Schedule 1, item 2, which commenced on 1 March 2017.

Section 3 – Authority

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

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

Section 14AA – Permitted disclosure of credit information by energy and water utilities

Item 1 inserts section 14AA. That section prescribes (for the purposes of subparagraph 21D(2)(a)(i) of the *Privacy Act 1988*) a credit provider that is an energy or water utility operating in the Australian Capital Territory and the Northern Territory. As a result, subsection 21D(1) of that Act does not apply to disclosure of credit information by such a credit provider if extra conditions in subsection 21D(2) of that Act are met.

Item 2 provides that section 14AA is repealed on 1 March 2017.

Section 7 of the *Acts Interpretation Act 1901* operates to ensure that the repeal of section 14AA of the *Privacy Regulation 2013* on 1 March 2017 does not undo the operation of section 14AA for the period starting on 1 January 2017 and ending at the end of 28 February 2017.

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 (Utility Credit Providers) 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 from 1 January 2017 to 28 February 2017.

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 by their jurisdiction of residence by time limiting, from 1 January 2017 to 28 February 2017, the permitted disclosure of credit information by utilities without those utilities being subject to the EDR membership obligation. The Regulations also limit the permission to disclose credit information to only those utilities operating in the prescribed jurisdictions. 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.

Conclusion

This Legislative Instrument engages with the right to privacy, through the use and disclosure of personal information. To the extent that the Legislative Instrument may limit the right to privacy, those limitations are reasonable, necessary and proportionate to achieve the legitimate aims of the Legislative Instrument.