

NATIONAL EMERGENCY DECLARATION REGULATIONS 2020

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under section 19 of the *National Emergency Declaration Act 2020*

PURPOSE AND OPERATION OF THE INSTRUMENT

Authority

The National Emergency Declaration Regulations 2020 (the NED Regulations) are made under the *National Emergency Declaration Act 2020* (the NED Act).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act), and accordingly, are subject to its disallowance and sunset provisions.

Overview of the NED Act

The NED Act establishes a legislative framework for the declaration of a national emergency by the Governor-General, on the advice of the Prime Minister. The Act provides a framework for the Commonwealth to declare a national emergency, in circumstances where an emergency has occurred, is occurring or is likely to occur, and it has caused, is causing or is likely to cause nationally significant harm.

The Act will enable the Governor-General to declare a national emergency on the advice of the Prime Minister. The Bill will establish two pathways for the Prime Minister to request a national emergency declaration:

- a power for the Prime Minister to request the declaration at the request of the relevant jurisdiction or jurisdictions, and
- a power for the Prime Minister to unilaterally request the declaration where he or she is satisfied that:
 - because of the emergency, it is not practicable to make a declaration at the request of the relevant jurisdiction or jurisdictions
 - the emergency has affected, is affecting or is likely to affect Commonwealth interests, or

- the Prime Minister is satisfied that it is appropriate in all of the circumstances to make the declaration without a prior request from the relevant jurisdiction or jurisdictions.

Once made, a declaration will enliven the ability for Ministers to use alternative, streamlined tests for the exercise of these powers while a national emergency declaration is in force. These alternative tests are provided for in the *National Emergency Declaration (Consequential Amendments) Act 2020*.

The NED Act also creates new emergency powers that will be available where the Governor-General has declared a national emergency. Relevantly, the Act includes a power for ministers to suspend, vary or substitute ‘red tape’ requirements in laws that they administer, where doing so would be of benefit to the public, or a section of the public, during a national emergency. This power enables Ministers to suspend, vary or substitute procedural requirements that may be a barrier to people in emergency-affected areas accessing payments, benefits or services—such as requirements to produce particular kinds of identification, or have their signature witnessed.

Subsection 15(8) of the Act exempts certain Acts and parts of Acts from being waived—these generally relate to law enforcement and intelligence agencies’ powers, oversight bodies and parliamentary committees. Paragraph 15(8)(h) provides that additional laws or provisions of laws may be prescribed to be exempt from the power to suspend, vary or substitute procedural requirements.

Purpose of the NED Regulations

The Regulations will prescribe the following laws for the purposes of paragraph 15(8)(h):

- the *Australian Information Commissioner Act 2010*
- the *Freedom of Information Act 1982*, and
- the *Privacy Act 1988*.

The effect of these Regulations will be to exclude requirements contained in those Acts from being able to be waived pursuant to section 15 of the NED Act. Consistent with the current exemptions, it would not be appropriate to enable the Attorney-General to waive, suspend or modify procedural requirements under those Acts, as those Acts provide for the Commonwealth privacy and freedom of information apparatus. In addition, these Acts provide for independent oversight in relation to privacy and freedom of information matters. It would not be appropriate to substitute, suspend or modify any requirements or functions under these Acts.

CONSULTATION

Before the Regulations were issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Attorney-General's Department (the department) consulted with the Office of the Australian Information Commissioner (OAIC), as an affected agency, on the policy objective and draft of the NED Regulations. No objections were raised in respect of the Regulations.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) advised that because the NED Regulations contain measures that are machinery in nature, a Regulation Impact Statement is not required. The OBPR identification number is 42741.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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

Right to privacy and reputation

The Regulations engage the right to privacy and reputation in 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 their privacy.

The Regulations engage with this right insofar as they prescribe the *Australian Information Commissioner Act 2010*, the *Freedom of Information Act 1982*, and the *Privacy Act 1988*. These Acts deal with, and regulate, the collection, use, security, disclosure and publication of personal information, and provides for the independent oversight of privacy and freedom of information matters.

The Regulations promote this right by excluding these Acts from the operation of clause 15, which enables Ministers to suspend, substitute or modify procedural requirements. It is necessary to exclude these Acts from the operation of this clause to ensure the appropriate collection, use, security, disclosure and publication of personal information, in line with the framework provided under the *Privacy Act 1988*. The Regulations also preserve the ability for individuals to access certain information pursuant to the *Freedom of Information Act 1982*, even if a national emergency has been declared. This ensures that individuals can continue to access and correct certain information, including personal information and reasons for decisions, held by government agencies.

Where it is necessary to divulge such information in an emergency context, Part VIA of the *Privacy Act 1988* already enables the Prime Minister or Minister to make a declaration (known as an emergency declaration) that provides for a modified framework for the collection, use and disclosure of personal information in emergencies and disasters (including an emergency to which a national emergency declaration made under the NED Act relates). The Regulations will not affect the operation of Part VIA of the Privacy Act.

Conclusion

As the Regulations will preserve the existing operation of these Acts, the Regulations do not limit the right to privacy. The Regulations compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act.

NOTES ON SECTIONS

PART 1 – Preliminary

Section 1 – Name

Section 1 provides that the title of the instrument is the *National Emergency Declaration Regulations 2020*.

Section 2 – Commencement

The instrument commences on the day after the instrument is registered.

Section 3 – Authority

Section 3 provides that the instrument is made under the *National Emergency Declaration Act 2020*.

Section 4 – Definition

Section 4 provides that in the instrument, Act means the *National Emergency Declaration Act 2020*.

PART 2 – Modification of administrative requirements during a national emergency

Section 5 – Laws that cannot be modified during a national emergency

Section 5 provides that for the purposes of paragraph 15(8)(h) of the Act, the following laws are prescribed:

- (a) the *Australian Information Commissioner Act 2010*;
- (b) the *Freedom of Information Act 1982*;
- (c) the *Privacy Act 1988*.

The effect of this section is to provide that the Minister may not suspend, vary or substitute requirements or permissions that are of a kind listed in subsection 15(1) of the Act, and that are contained in these Acts, while a national emergency declaration is in force.