

Explanatory Notes

FOR

Amendments To Be Moved During Consideration In Detail By The Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence

Information Privacy and Other Legislation Amendment Bill 2023

Objectives of the Amendments

Information Privacy and Right to Information amendments

The objective of the amendments to be moved during consideration in detail of the Information Privacy and Other Legislation Amendment Bill (the Bill) are to:

- ensure that extension by an agency to conduct an assessment of a data breach under the mandatory data breach notification (MDBN) scheme may only be for a period of time reasonably required for the assessment to be conducted – to implement recommendation 2 of the Education, Employment and Training Committee's (the Committee's) *Report No. 40, 57th Parliament – Information Privacy and Other Legislation Bill 2023*, tabled on 24 November 2024 (the Committee's Report);
- more comprehensively exclude an APP entity that is subject to the *Privacy Act 1988* (Cth) ¹ (Commonwealth Privacy Act) from being an agency that is subject to the IP Act, rather than excluding APP entities from the QPPs and the MDBN scheme;
- clarify that before an authorised officer exercises powers under Chapter 3A, part 5 of the *Information Privacy Act 2009* (IP Act), they must first give a notice of entry and seek consent, before entering an agency's place of business without consent;
- allow an authorised officer exercising powers under Chapter 3A, part 5 of the IP Act to observe, via audio visual link, a demonstration of the data handling

¹ Under the Commonwealth Privacy Act, an APP entity means an agency or organisation (as defined by that Act).

systems and practices of the agency that relate to the mandatory data breach notification scheme;

- clarify that the functions of the Information Commissioner under the IP Act include reviews in relation to the mandatory data breach notification scheme and promoting understanding of and compliance with the IP Act generally;
- remove the exclusion in the Bill of entities established by letters patent from the definition of ‘public authority’ in both the *Right to Information Act 2009* (RTI Act) and the IP Act, to retain the status quo – in response to the concerns raised in the Committee’s Report. While it is still considered that the majority of the entities established by letters patent, including those established under the *Religious, Educational and Charitable Institutions Act 1861*, should not be subject to the RTI Act or the IP Act, the omission of the exclusion will allow further consideration to be given to the issues raised and ensure that there are no unintended consequences as a result of the exclusion. It will also remove any limitation on human rights as a result of the omission of the exclusion;
- expand the situations when the Information Commissioner can require searches to be conducted in relation to any external review process relating to access decisions under the *Right to Information Act 2009* (RTI Act);
- provide that the Information Commissioner may direct agencies and Ministers to make a decision on an application for amendment of personal information in certain circumstances;
- provide that before the Information Commissioner directs an agency or Minister to make a decision on an application for access or amendment of personal information, the Information Commissioner must be satisfied it is reasonably likely that the agency or Minister would be able to make a decision which is consistent with the primary object of the Act;
- provide that if the Information Commissioner becomes aware of new documents during an external review, then before the Information Commissioner refers the documents to an agency or Minister for decision about access to the documents, the Information Commissioner must be satisfied it is reasonably likely that the agency or Minister would be able to make a decision which is consistent with the primary object of the Act;
- ensure that whenever an agency or Minister makes a decision about whether access is to be given to documents, the applicant can review whether the agency or Minister has taken reasonable steps to identify and locate documents the applicant has applied for; and
- address other minor technical issues in the Bill, including ensuring internal consistency in terminology.

Coal Mining Safety and Health Act amendments

The objectives of the *Coal Mining Safety and Health Act 1999* (CMSH Act) include to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations; and to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level.

The objective of the amendments to the CSMH Act is to update the definition of 'union' as the Mining and Energy Union (MEU) will withdraw from the Construction Forestry Maritime and Mining Union (CFMMEU) on 1 December 2023.

The definition of 'union' is relevant to the appointment by the union of industry safety and health representatives (ISHRs) and procedural matters related to ISHRs. The functions of ISHRs include inspecting coal mines to assess whether the level of risk to the safety and health of coal mine workers is at an acceptable level.

Achievement of the Objectives

Information Privacy and Right to Information amendments

The objective of the amendments to be moved during consideration in detail of the Bill will be achieved by:

- amending clause 33, new section 49, to provide that where an agency cannot reasonably complete an assessment of a data breach within 30 days, the agency may only extend the period to conduct an assessment of a data breach for a period of time reasonably required for the assessment to be conducted;
- inserting a new clause including an APP entity under the Commonwealth Privacy Act in Schedule 2, Part 1 of the IP Act, and making consequential amendments in view of this change;
- amending clause 33, new sections 67 and 68, to clarify that an authorised officer must first give a notice of entry and seek consent, before entering an agency's place of business without consent, when the business is open for carrying on business or otherwise open for entry;
- amending clause 33, new Chapter 3A, Part 5, to allow an authorised officer to observe, via audio visual link, a demonstration of the data handling systems and practices of the agency that relate to the mandatory data breach notification scheme, in certain circumstances;
- amending clause 35 to clarify that the functions of the Information Commissioner under section 135 of the IP Act include reviews in relation to the mandatory data breach notification scheme and promoting understanding of and compliance with the IP Act generally;
- amending clauses 19 and 84 to remove the exclusions of entities established by letters patent from being a 'public authority' under the IP Act or RTI Act, and to renumber subsections as a consequence;
- amending clause 117 to permit the Information Commissioner to require searches to be conducted in relation to any external review relating to a decision about access;
- inserting a new section in clause 123 permitting the Information Commissioner to direct agencies and Ministers, in certain circumstances, to make a decision about whether amendment of a document should be permitted or refused;
- deleting the requirements in section 105A(1)(c)(ii) and section 110A(1)(c) (in clauses 119 and 123 respectively) and substituting, for each section, a requirement for the Information Commissioner to be satisfied it is reasonably

likely that the agency or Minister would be able to make a decision which is consistent with the primary object of the Act;

- amending the definition of ‘reviewable decision’ in clause 139, Schedule 4A, section 1(h) and the related example to provide that a reviewable decision, for the purposes of section 1(h) is a decision about whether access is to be given to a document where the decision purports to, but may not, give access to all documents; and
- making other minor technical amendments to clause 4, clause 14, new section 48 inserted by clause 33, and clause 41.

Coal Mining Safety and Health Act amendments

The objective of amendments to the CMSH Act is achieved by updating the definition of ‘union’ in the dictionary of the CMSH Act from meaning the Construction Forestry Mining and Energy Union – Mining and Energy Division Queensland District Branch to meaning the Mining and Energy Union, Queensland District Branch.

This is due to the withdrawal of the MEU from the CFMMEU on 1 December 2023. ISHRs have important coal mining safety and health functions. The amendments also confirm that any appointments of ISHRs are not affected by the withdrawal of the union from 1 December 2023 until commencement by assent of the amended definition of ‘union’.

The amendments are of a minor clarifying and updating nature. The word ‘union’ is used in sections of the CMSH Act which cover procedures including appointing ISHRs, funding ISHRs, and filling any temporary vacancy.

Alternative Ways of Achieving Policy Objectives

There are no alternative ways to achieve the policy objectives of the Information Privacy and Right to Information amendments.

The definition of ‘union’ is included in the CMSH Act and can only be altered by amending the CMSH Act. There are no alternative ways of achieving the policy objectives of the CMSH Act amendments.

Estimated Cost for Government Implementation

There may be minor costs to agencies arising from obligations to comply with the Information Commissioner’s directions and requirements, but these are expected to be very minimal. To the extent that there are any additional costs to government for implementing the proposed amendments to the Bill, they will be absorbed by agencies.

There will be no cost for government in implementing the CMSH Act amendments.

Consistency with Fundamental Legislative Principles

Information Privacy and Right to Information Amendments

Impacts on human rights are relevant to consideration of whether legislation has

sufficient regard to individuals' rights and liberties. These are addressed in the Statement of Compatibility with Human Rights for the amendments to be moved during consideration in detail of the Bill.

The amendments are otherwise consistent with fundamental legislative principles and do not raise additional potential inconsistencies with fundamental legislative principles.

A full consideration of the Bill's consistency with the fundamental legislative principles is set out in the Explanatory Notes for the Bill.

Coal Mining Safety and Health Act amendments

The CMSH Act amendments are consistent with fundamental legislative principles other than the principle that legislation should not be retrospective.

The CMSH Act amendment of the definition of 'union' is consistent with fundamental legislative principles in the *Legislative Standards Act 1992*. However, clause 2B inserts section 327 which is a transitional provision that applies retrospectively so that the definition of 'union' as in force from the commencement is taken to have applied from 1 December 2023 for all purposes.

The *Legislative Standards Act 1992*, section 4(3)(g) provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

The retrospectively applying amendments are beneficial as they remove any doubt about whether any appointments of ISHRs are valid between 1 December 2023 and the date of commencement by assent of the amendments.

The retrospectively applying amendments do not adversely and retrospectively affect rights or liberties, or retrospectively impose obligations. They do not have any significant effects on rights and liberties of individuals and are justified in order to confirm any appointments of ISHRs following the name change of the union that appoints ISHRs on 1 December 2023.

Consultation

A number of the amendments to be moved during consideration in detail of the Bill result from consideration of issues raised through the parliamentary committee process, and in submissions made to the Education, Employment and Training Committee during its inquiry into the Bill. No additional consultation has occurred on the Information Privacy and Right to Information amendments.

The amendments to the CMSH Act are a result of information provided by the MEU.

NOTES ON PROVISIONS

Amendment 1 amends clause 2 (Commencement) of the Bill to provide that amendments of the CSMH Act in part 1A commence on assent. This is achieved by specifying that part 1A amendments are among the amendments that do not commence on a day to be fixed by proclamation.

Amendment 2 inserts new Part 1A in the Bill to provide a Part for amendments of the CSMH Act. Section 2A provides that this part amends the CSMH Act. Section 2B inserts new Part 20, division 11 to provide for new section 327 in the CSMH Act.

Section 327 sets out the retrospective application of the amendment of the definition of ‘union’ in the schedule 3 dictionary of the CSMH Act. Section 327 subsection (1) provides that the definition *union*, as in force from the commencement on assent, is taken to have applied from 1 December 2023 for all purposes.

Subsection (2) then states that to remove any doubt, it is declared that the amendment of the definition *union* (a) has effect only to reflect a change of the union’s name; and (b) does not affect the appointment or funding of industry safety and health representatives before the commencement.

This removes any doubt about whether the union name change from 1 December 2023 can affect in any way an appointment of an ISHR before the amendment commences sometime after 1 December 2023. Previously appointed ISHRs are not affected by the union name change as they have been appointed under previous legislative provisions and appointments are not invalidated by subsequent name changes.

Once an ISHR has been appointed, the change in the name of the union is not relevant. ISHRs continue in office until they finish their term, resign or have their appointment terminated by the Minister.

Section 2C amends the schedule 3 (Dictionary) definition of union by omitting the previous definition and inserting the new definition of union which is ‘means the Mining and Energy Union, Queensland District Branch’.

Amendment 3 amends clause 4 of the of the Bill by omitting an incorrect reference to ‘Section 408(1)’ and replacing it with a reference to ‘Section 408E(1)’.

Amendment 4 amends clause 14 of the Bill to update the heading to section 16 of the IP Act to refer to ‘principle’ rather than ‘principles’.

Amendments 5 and 6 amend clause 16 of the Bill to replace references to ‘entity to which the privacy principle requirements do not apply’ with ‘excluded entity’ to better reflect the content of the definition without altering its effect.

Amendment 7 to 10 amend clause 19 of the Bill to omit new subsection 21(1A) which provides that a ‘public authority’ does not include an entity established by letters patent, and make consequential changes to numbering.

Amendment 11 amends clause 23 of the Bill to omit reference to ‘other than an APP entity’ as a consequence of amendment 38.

Amendment 12 amends clause 23 of the Bill to omit the definition of ‘APP entity’ as a consequence of amendment 38.

Amendments 13 and 14 amend clause 33 of the Bill to omit reference to new Chapter 3A not applying to an ‘APP entity’ as a consequence of amendment 38, and remove numbering due to the omission.

Amendments 15 and 16 amend clause 33 to:

- require, under new section 48(2) of the IP Act, an agency that knows or reasonably suspects that a data breach is an eligible data breach of an agency to immediately, and continue to, take all reasonable steps to contain a data breach and mitigate the harm caused by the data breach;
- omit requirements for an agency to contain and mitigate the harm caused by a data breach in new section 48(4) of the IP Act to address overlap with new section 48(2).

Amendment 17 amends clause 33 to provide that an agency may only extend the period within which an assessment of a suspected eligible data breach must be completed under new section 49 of the IP Act by no longer than the period reasonably required for the agency to complete the assessment. This implements recommendation 2 of the Committee’s Report.

Amendment 18 amends clause 33, new section 51(2)(e)(i), to provide that a notice for the Information Commissioner under new section 51 of the IP Act must include the total number, or if it is not practicable to work out the total number, an estimate of the number of individuals whose personal information has been accessed, disclosed or lost. This is to ensure clarity and consistency with terminology in new section 53(1)(a).

Amendments 19 and 20 amend clause 33 to:

- apply requirements for an authorised officer to produce and display an identity card under new section 65 of the IP Act where they are exercising a power by audio visual link, as a consequence of amendment 31; and
- omit new section 65(3) as a consequence of amendment 27.

Amendments 21 and 22 amend clause 33:

- to provide that, if an agency has failed to consent to the commissioner’s request for entry under section 68 of the IP Act, entry may only be made in compliance with a notice given for entry under section 68(2).
- remove numbering as a consequence.

Amendments 23 to 27 amend clause 33 to provide, under new section 68 of the IP Act, that:

- the Information Commissioner must ask for consent before an authorised officer enters a place occupied by an agency under section 67;
- the reasonable time stated in a notice at which an authorised officer may enter an agency's place of business without written consent may only be when the place is open for carrying on the business or is otherwise open for entry; and
- the agency's place of business which an authorised officer may enter with notice rather than written consent does not include a part of the place where a person resides.

Amendment 28 amends clause 33 so that the division heading for Chapter 3A, part 5, division 3 of the IP Act reflects its content as a consequence of amendment 31.

Amendment 29 amends clause 33 to insert numbering as a consequence of amendment 31.

Amendment 30 amends clause 33 to refer to section 67, as a consequence of amendments 21 and 22.

Amendment 31 amends clause 33 to allow, under new section 69, an authorised officer to require a person at the place who has the necessary skills and knowledge to demonstrate the data handling systems and practices that relate to the agency's compliance with chapter 3A, or inspect a document that is relevant to the systems, policies and practices of the agency that relate to the agency's compliance with chapter 3A, by an audio visual link provided by the agency if the agency agrees. The amendment also provides a definition of 'audio visual' link.

Amendment 32 amends clause 33 to replace a reference to 'section 69(1)' to 'section 69' as a consequence of amendment 31.

Amendments 33 and 34 amend clause 35 to provide that the functions of the Information Commissioner under section 135 of the IP Act include conducting reviews of acts or practices of agencies in relation to compliance with chapter 3A, including data handling systems and practices, to identify data breach related issues of a systemic nature generally or to identify particular grounds for the issue of compliance notices.

Amendment 35 amends clause 35 to provide that the functions of the Information Commissioner under section 135 of the IP Act include leading the improvement of public sector administration in Queensland by taking appropriate action to promote understanding of and compliance with the Act.

Amendment 36 amends clause 33 to replace a reference to 'an agency' to 'a relevant entity' to ensure consistency with section 157 (as amended by clause 40 of the Bill).

Amendment 37 amends clause 41 to correct an incorrect paragraph number.

Amendment 38 inserts new clause 73A into the Bill. The clause amends Schedule 2 to the IP Act to:

- replace references to ‘entities to which the privacy principles do not apply’ with ‘excluded entities’, as a consequence of amendment 5; and
- include an APP entity under the *Privacy Act 1988* (Cth) (Commonwealth Privacy Act) as an excluded entity which is not an agency under the IP Act. This will mean that entities that are APP entities under the Commonwealth Privacy Act, and must comply with obligations under that Act, will not be regulated by the IP Act.

Amendment 39 amends clause 75 to insert a new definition of ‘excluded entity’ into the IP Act, as a consequence of amendment 5.

Amendments 40 and 41 amend clause 84 to omit new subsection 16 (1A) which provides that a ‘public authority’ does not include an entity established by letters patent, and make consequential changes to numbering.

Amendment 42 amends clause 117 to replace ‘relevant reviewable decision’ with ‘decision relating to an access application’ in section 102 to permit the Information Commissioner to require searches to be conducted in relation to any external review relating to a decision about access.

Amendment 43 amends clause 117 to omit the definition of ‘relevant reviewable decision’ from section 102(2) as a consequence of amendment 42.

Amendment 44 amends clause 119 to replace ‘satisfactory to the access applicant’ with ‘consistent with the primary object of the Act’ in new section 105A. This will require the Information Commissioner to be satisfied that it is likely an agency or Minister would be able to make a decision ‘consistent with the primary object of this Act’ before the Information Commissioner refers a particular document to an agency or Minister for decision.

Amendment 45 amends clause 122 to add a reference to new section 110B (direction to decide whether documents to be amended) in section 110(1)(d) as a consequence of amendment 48.

Amendment 46 amends clause 123 to include a reference to section 110B in the heading of the clause as a consequence of amendment 48.

Amendment 47 amends clause 123 to replace ‘satisfactory to the access applicant’ with ‘consistent with the primary object of this Act’ in section 110A(1)(c). The Information Commissioner must be satisfied that it is likely an agency or Minister would be able to make a decision consistent with the primary object of the RTI Act in giving directions to an agency or Minister to make a decision.

Amendment 48 amends clause 123 to insert a new section 110B (Direction to decide whether documents to be amended). New section 110B applies in relation to an external review of a relevant decision (as defined by the section) made by an agency or Minister in relation to an amendment application, if the Information Commissioner:

- would otherwise have decided to set aside the relevant decision and make a decision in substitution under section 110(c);
- believes it would be more efficient and effective for the agency or Minister to

consider whether amendment of the subject documents is to be permitted or refused than for the commissioner to make a decision in substitution for the relevant decision under section 110(1)(c); and

- believes that if the agency or Minister were to consider whether amendment of the subject documents is to be permitted or refused, it is reasonably likely the agency or Minister would be able to make a decision that is consistent with the primary object of the Act.

The Information Commissioner may, after consulting with the agency or Minister about stated matters, set aside the relevant decision and notify the agency or Minister that the decision has been set aside and direct the agency or Minister to decide whether the document should be amended as if the ground for making the relevant decision did not apply in relation to the documents.

A new amendment application is taken to have been made on the day that is 21 business days after the Information Commissioner gives notice to the agency or Minister, and evidence of identity and evidence of the agent's authorisation (if the same agent is acting) need not accompany the new application.

Amendment 49 amends clause 139 to replace 'giving access to documents that purports to, but may not, give access to all documents the subject of the application' with 'about whether access is to be given to documents that purports to, but may not, be a decision on' in the definition of reviewable decision in Schedule 4A, section (1)(h).

The effect is to extend the definition of a reviewable decision for the purposes of section (1)(h) of new Schedule 4A to be a decision about whether access is to be given to a document, rather than a decision giving access to documents, where the decision purports to, but may not, give access to all documents.

Amendment 50 amends clause 139 to change the wording preceding the example for section 1(h) for consistency with amendment 49.

Amendment 51 amends the long title of the Bill to insert 'the *Coal Mining Safety and Health Act 1999*' into the title.