

## NECS Privacy Commissioner Guideline 1 October 2021 *Reviewed October 2022*

### Guideline adopting parts of the Australian Information Commissioner's Australian Privacy Principles Guidelines

#### Terms

The following terms and acronyms are used in this Guideline:

**ACECQA** means the Australian Children's Education and Care Quality Authority.

**APP Guidelines** or the **Australian Privacy Principles Guidelines** mean the Australian Privacy Principles Guidelines issued by the Australian Information Commissioner under s28 of the *Privacy Act 1988* (Cth).

**Australian Information Commissioner or the Information Commissioner, or AIC** means the Australian Information Commissioner as defined in the Privacy Act and the *Australian Information Commissioner Act 2010* (Cth).

**ECS Agency/ies** means ACECQA and/or the Regulatory Authorities of the participating jurisdictions.

**ECSNL** means the *Education and Care Services National Law* as set out in the following provisions:

In respect of Australian Capital Territory - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education & Care Services National Law (ACT) Act 2011*.

In respect of New South Wales - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Children (Education and Care Services National Law Application) Act 2010* (NSW).

In respect of Northern Territory - Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services (National Uniform Legislation) Act 2011*.

In respect of the Queensland - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Queensland) Act 2011*.

In respect of South Australia – the Schedule 1 to the *Education and Early Childhood Services (Registration and Standards) Act 2011*.

In respect of Tasmania - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Application) Act 2011*.

In respect of Victoria – the Schedule to the *Education and Care Services National Law Act 2010* (Vic).

In respect of Western Australia - the Schedule to the *Education and Care Services National Law (WA) Act 2012*.

**ECSNL Regulations** means the *Education and Care Services National Law Regulations*.

**Privacy Act** means the *Commonwealth Privacy Act 1988*.

**NECS Privacy Commissioner** means the National Education and Care Services Privacy Commissioner.

**NECS Privacy Guideline** mean this Guideline.

**OAIC** means the Office of the Australian Information Commissioner

**Regulatory Authority** means the State or Territory early childhood education and care Regulatory Authority of each participating jurisdiction under the *Education and Care Services National Law*.

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## Preamble

Section 263 of the ECSNL applies the Commonwealth *Privacy Act 1988* (with modifications) as a law of a participating jurisdiction for the purposes of the National Quality Framework.

Section 263(2)(b) of the ECSNL modifies the Privacy Act so that a reference to the *Information Commissioner* is to be construed as a reference to the *National Education and Care Services Privacy Commissioner*.

Section 263(2)(c) of the ECSNL provides that the Privacy Act applies with any other modifications made by the ECSNL Regulations. Regulation 199(a) and (b) of the ECSNL Regulations provide that the Privacy Act only applies to the National Authority (which is ACECQA) and to the Regulatory Authority of each participating jurisdiction. In this Guideline, ACECQA and the Regulatory Authorities are referred to collectively as the ECS Agencies.

The Australian Privacy Principles (APPs) set out in Schedule 1 of the Privacy Act are legally binding principles which are the cornerstone of the privacy protection framework in the Act. The APPs set out standards, rights and obligations in relation to handling, holding, accessing and correcting personal information.

There are 13 APPs. The Privacy Act applies the APPs to APP entities; an APP entity is defined in s6 of the Act as an *agency* or organisation. National Education and Care Services regulation 199 states that the Privacy Act only applies to *agencies* - that is the NQF agencies, ACECQA and the state and territory regulatory authorities. APPs 1 to 6, 8, and 10 to 13 apply to agencies. The Privacy Act states that APPs 7 and 9 only apply to organisations and hence they do not apply to the NQF agencies.

Section 28(1)(a) of the Privacy Act (as modified by the ECSNL) enables the NECS Privacy Commissioner to issue guidelines to ECS Agencies on the Privacy Act for the purpose of the ECSNL.

The Australian Information Commissioner administers the Privacy Act in respect to APP entities, which cover most Australian Government agencies and some private sector organisations. Under s28(1) of the Privacy Act, the AIC has issued guidelines to the Australian Privacy Principles set out in Schedule 1 of the Privacy Act. The APP Guidelines outline:

- the mandatory requirements in the APPs;
- the AIC's interpretation of the APPs, including the matters that the AIC may take into account when exercising functions and powers relating to the APPs;

- examples that explain how the APPs may apply to particular circumstances; and
- good privacy practice to supplement compliance with the mandatory requirements.

The APP Guidelines have traditionally been referenced by the ECS Agencies in applying the Privacy Act for the purposes of the ECSNL, and by the NECS Privacy Commissioner when exercising functions under that Act.

## Purpose of this NECS Privacy Commissioner Guideline

The purpose of this NECS Privacy Commissioner Guideline is to:

- provide clarification as to the guidelines on the implementation of the Australian Privacy Principles that apply for the purposes of the ECSNL;
- ensure consistency in the interpretation and application of the Privacy Act; and
- remove any uncertainty for agencies or the public as to the expectations of the NECS Privacy Commissioner in the application of the Privacy Act for the purposes of the ECSNL.

## Adoption of Parts of the APP Guidelines

- Pursuant to section 28(1)(a) of the Privacy Act (as modified by the ECSNL), and **subject to the matters stated in paragraphs 2 to 18 below**, I hereby adopt the following Parts of the APP Guidelines as NECS Privacy Guidelines for the purposes of the ECSNL.

General matters Chapters A, B and C

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|--------|--|
| Part 1 | Consideration of personal privacy information      |
| Part 2 | Collection of personal information                 |
| Part 3 | Dealing with personal information                  |
| Part 4 | Integrity of personal information                  |
| Part 5 | Access to, and correction of, personal information |

- The APP Guidelines being adopted are those published in the combined July 2019 edition of the APP Guidelines, available at <https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines/>
- Revisions by the Australian Information Commissioner to the July 2019 edition of the APP Guidelines will be considered and, if relevant, included in updates to this NECS Privacy Commissioner Guideline. Pending any such updates, ECS Agencies should consider whether any revisions to the APP Guidelines are relevant, and if so, should be applied for the purposes of the ECSNL.
- References in the APP Guidelines to the Australian Information Commissioner exercising a power or performing a duty or function should generally be read to mean the NECS Privacy Commissioner exercising the power or performing the duty or function in relation to the ECS Agencies.
- ECS Agencies must note that the APP Guidelines are not legally binding and do not constitute legal advice about how an ECS Agency should comply with the Australian Privacy

Principles in particular circumstances. ECS Agencies may wish to seek independent legal advice where appropriate.

### **Exclusions - tax file numbers, credit reporting, and emergencies and disasters**

6. ECSNL Regulations 196(d) and 201(o) exclude the following matters from the functions of the NECS Privacy Commissioner. Accordingly, the APP Guidelines on those matters are excluded from this NECS Privacy Guideline. The excluded matters comprise the following:
  - (a) ECSNL regulation 196(d) excludes matters relating to tax file numbers (set out in s17 and s18 of the Privacy Act);
  - (b) ECSNL regulation 196(d) excludes matters relating to credit reporting (set out in s19 to s21W of the Privacy Act);
  - (c) ECSNL Regulation 201(o) excludes matters relating to emergencies and disasters (set out in s80F to s80T of the Privacy Act).

### **Exclusions - medical research, health information and genetic information**

7. The making of guidelines about medical research, health information and genetic information are also excluded from the functions of the NECS Privacy Commissioner by ECSNL Regulation 201(q). Accordingly, this NECS Privacy Guideline does not adopt the APP Guidelines on those matters.
8. ECS Agencies will nevertheless have to comply with the Privacy Act provisions on medical research, health information and genetic information, where those provisions apply to *Agencies, APP entities, or Entities*. For example, APP 3.3(a)(i) deals with the collection of *sensitive information by an agency*, and sensitive information is defined in s6 of the Privacy Act to include *health information*. ECS Agencies should therefore have regard to the APP Guidelines on medical research, health information and genetic information where the Privacy Act provisions (as modified by the ECSNL) apply to them. (See paragraphs 11 to 15 of this Guideline for more details).

### **Exclusion – Privacy Regulations made under the Privacy Act**

9. ECSNL Regulation 203 states that the regulations made under the Privacy Act do not apply. Accordingly, any APP Guidelines which implement or rely on those regulations do not apply to this NECS Privacy Guideline.

### **Exclusion - paragraphs A29 to A32 of the APP Guidelines**

10. Paragraphs A29 to A32 of the APP Guidelines are to be disregarded. Those paragraphs note that the ACT *Information Privacy Act 2014* regulates how personal information is handled by ACT public sector agencies, and that under an arrangement between the ACT Government and the Australian Government, the Australian Information Commissioner is exercising some of the functions of the ACT Information Privacy Commissioner.

## Provisions of the Privacy Act applying to an Agency, APP Entity or Entity will also apply to ECS Agencies.

11. ECSNL Regulation 199 states that the Privacy Act only applies to *agencies*, and the *agencies* are the *National Authority* and *each Regulatory Authority of a participating jurisdiction*. The Privacy Act uses the following definitional terms:
  - (a) **Agency** - which is defined in s6 of the Privacy Act to mean a Minister, or a Department (and includes a long list of other Government bodies).
  - (b) **APP entity**, which is defined in s6 of the Privacy Act to mean 'an **agency** or organisation".
  - (c) **Entity** - which is defined in s6 of the Privacy Act to mean 'an **agency**, organisation or small business operator.
  - (d) **Organisation** - which is defined in s6C of the Privacy Act to include a number of bodies, but most relevantly a person or body that is not a **small business**, namely a business that has an annual turnover of \$3million or less.
  
12. In applying ECSNL Regulation 199, ECS Agencies should note the following:
  - (a) The Privacy Act applies different parts of the Act to different bodies.
  - (b) Not all of the Privacy Act applies to **Agencies**.
  - (c) The definitions in the Privacy Act of *APP entity* and *entity* **include** an *Agency*.
  
13. The sections of the Privacy Act that apply to an Agency, APP Entity or Entity, will also apply to ECS Agencies. For example:
  - (a) Section 13(a) of the Privacy Act states that an act of an **APP entity** is an interference with the privacy of an individual if it breaches an Australian Privacy Principle, or breaches a registered APP code that binds that entity. As the definition of an APP entity includes an Agency, that section will apply to ECS Agencies.
  - (b) Section 15 of the Privacy Act states an APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle. As the definition of an APP entity includes an Agency, that section will apply to ECS Agencies.
  - (c) Section 16A of the Privacy Act lists some permitted general situations in relation to the collection, use or disclosure of personal information. The situations are listed in a table to that section, and column 1 of that table lists the entities that are given the relevant permissions. Items 1 to 6 list an *APP entity*. As the definition of an APP entity includes an Agency, those items will apply to ECS Agencies. Item 7 lists the Defence Force, which will not include an ECS Agency.
  - (d) The above points are illustrative examples only and are not intended as an exhaustive list of the sections of the Privacy Act that apply to the ECS Agencies.
  
14. The sections of the Privacy Act which **do not** apply to an Agency, APP Entity or Entity, will **not** apply to ECS Agencies. Whilst the following examples refer to the credit reporting matters excluded by ECSNL regulation 196(d) - and discussed in paragraph 6 above – they provide appropriate examples to illustrate this definition:

- (a) Part 111A of the Privacy Act (comprising s19 to 20ZA) applies to *credit reporting bodies*. Those bodies are defined in s6 to mean an organisation, or an agency prescribed by regulations (ie by the Privacy Regulations (Cth)) that carries on a credit reporting business. The first body is not an Agency. The second body (an agency prescribed by the regulations) will not include an ECS Agency, because (as stated earlier in paragraph 6) ECS regulation 203 states the Privacy Regulations do not apply.
  - (b) Division 3 of Part 111A of the Privacy Act (comprising sections 21 to 21W) applies to *credit providers*. Those bodies are defined in s6G to 6K to mean an organisation, a small business operator, or an agency prescribed by regulations. The first two bodies are not an Agency. For the same reason expressed in the previous example, the third body will not include an ECS Agency, because ECS regulation 203 states the Privacy Regulations do not apply.
  - (c) The above points are illustrative examples only and are not intended as an exhaustive list of the sections of the Privacy Act that do not apply to the ECS Agencies.
15. The approach in paragraphs 11 to 14 to determining the provisions of the Privacy Act which do, and do not, apply to the ECS Agencies also applies to the application of the Australian Privacy Principles listed in Schedule 1 to the Privacy Act. For example:
- (a) **Most** of the Australian Privacy Principles are expressed to impose obligations on *APP entities*. As the definition of an APP entity includes an Agency, those Principles which impose obligations on APP entities also apply to ECS Agencies.
  - (b) **Some** of the Australian Privacy Principles are expressed to **only apply to an organisation**. Some examples are APPs 3.2, 6.4 and 12.8, which only apply if the APP entity is an *organisation*. Similarly, APP 7 deals with direct marketing and only applies to *organisations*, as does APP 9 which deals with *government related identifiers*. The definition of organisation falls outside the meaning of agency, and therefore those APPs **do not** apply to ECS Agencies.

### Further modifications made by the ECSNL Regulations

16. In applying the APP Guidelines, ECS Agencies will need to be mindful of all the modifications made to the Privacy Act by the ECSNL Regulations, and in particular the following.
- (a) As required by ECSNL Regulation 201(i), a reference to a contracted service provider is to be applied as if it were a reference to a person who provides goods or services under a contract with the National Authority or a Regulatory Authority (of a participating jurisdiction), or a subcontract for that contract.
  - (b) As required by ECSNL Regulation 201(j), a reference to a Commonwealth contract, a government contract or a State contract, is to be applied as if it were a reference to a contract under which goods or services are to be, or were to be, provided to the National Authority or a Regulatory Authority (of a participating jurisdiction).

- (c) As required by ECSNL Regulation 201(h), a reference to the Ombudsman is to be applied as if it were a reference to the ECS Ombudsman.
- (d) As required by ECSNL Regulation 201(p), the provisions relating to transferring complaints to the Ombudsman do not apply to complaints made about a Regulatory Authority of a participating jurisdiction.
- (e) As required by ECSNL Regulation 201(e), a reference to the Administrative Appeals Tribunal is to be applied as if it were a reference to a *relevant administrative tribunal*. (Note: ECS Regulation 202 lists the relevant administrative tribunal of the participating jurisdictions).
- (f) As required by ECSNL Regulation 201(f), a reference to the Federal Court is to be applied as if it were a reference to the Supreme Court of a participating jurisdiction.
- (g) As required by ECSNL Regulation 201(g), a reference to the Federal Magistrates Court is to be applied as if it were a reference to the Magistrates Court or Local Court of a participating jurisdiction. (Note: Federal Magistrates Courts have been renamed Federal Circuit Courts.)

#### References in APP Guidelines to other OAIC guides and material.

- 17. The guides and material referred to in the APP Guidelines form part of this NECS Guideline. For example, footnote 1 to the APP Guidelines on APP1 refers to the *OAIC Guide to Undertaking Privacy Impact Assessments*, and footnote 2 refers to the *OAIC Data Breach preparation and Response*. The relevant guides and material can be found on the OAIC website at <https://www.oaic.gov.au> under the *Privacy Tab*.
- 18. The adoption of the APP Guidelines is not intended to preclude the NECS Privacy Commissioner from issuing further guidance material to ECS Agencies on the operations of the Privacy Act (as modified) as necessary.

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#### Document Currency

This Guide will be reviewed as necessary and at the latest every 6 months and may, by instrument in writing, be varied, amended, or revoked.

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