

# Guidelines to Public Interest Determinations, Temporary Public Interest Determinations, Information Usage Arrangements and Certification

Issued under Sections 103 and 104  
of the *Privacy and Data Protection Act 2014*

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# **Guidelines to Public Interest Determinations, Temporary Public Interest Determinations, Information Usage Arrangements and Certification**

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of the *Privacy and Data Protection Act 2014***

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# Overview

The *Privacy and Data Protection Act 2014* (**the Act**) commenced operation on 17 September 2014. It repealed both the *Information Privacy Act 2000* (**IP Act**) and the *Commissioner for Law Enforcement Data Security Act 2005*. The Act creates a single Commissioner for Privacy and Data Protection (**the Commissioner**) who has responsibility for the oversight of the privacy and data protection regime in Victoria.

In Australia overall as in Victoria, legal protection of privacy takes many forms, including via the protections afforded in regulatory schemes, criminal laws and civil or private law. A brief but comprehensive survey of the existing legal regulation and remedies is set out in the recent Australian Law Reform Commission's report, 'Serious Invasions of Privacy in the Digital Era'.<sup>1</sup>

The Act is designed to 'strengthen the protection of citizens' private information that is held by the Victorian public sector',<sup>2</sup> while simultaneously providing public sector agencies greater clarity about the appropriate use of personal information. The Act does not affect the regulation of health information privacy by the *Health Records Act 2001*, and is compatible with and supports the *Charter of Human Rights and Responsibilities Act 2006*.<sup>3</sup>

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1 ALRC, 'Serious Invasions of Privacy in the Digital Era', Report 123, June 2014, Part 3

2 Victoria, Parliamentary Debates, Legislative Assembly, 12 June 2014, 2108 (2nd Reading speech, Robert Clark, Attorney-General)

3 See the Explanatory Memorandum clause 18, and Statement of Compatibility dated 12 June 2014

# Introduction

This document is designed to give guidance about the meaning, function and application/approval processes for Public Interest Determinations, Temporary Public Interest Determinations, Information Usage Arrangements and Certifications.

The following is a brief comparison of the *Information Privacy Act 2000* (repealed) and the *Privacy and Data Protection Act 2014*, with regard to privacy provisions.

## What stays the same?

Many of the provisions of the IP Act are taken to be re-enacted in the new legislation.<sup>4</sup> These include:

- the 'organisations' to which the IP Act applied, in relation to the information privacy provisions of the Act
- the Information Privacy Principles (IPPs), in Schedule 1
- the requirement that public sector organisations generally must not do an act or engage in a practice that contravenes an IPP in respect of personal information they collect, hold, manage, use, disclose or transfer
- provisions relating to codes of practice and
- complaint-handling in relation to information privacy.<sup>5</sup>

For comprehensive guidance to the IPPs, see the *Guidelines to the Information Privacy Principles* published by the former Office of the Victorian Privacy Commissioner.<sup>6</sup>

## What's changed?

A significant departure from the IP Act is the new provision in s 20(3) whereby an organisation is not required to comply with the IPPs in relation to an act or practice that is permitted under:

1. a public interest determination (PID), or a temporary public interest determination (TPID) or
2. an approved information usage arrangement (IUA).

Similarly, under s 16, for the purposes of this Act, an act done or a practice engaged in by an organisation interferes with an individual's privacy *only* if it is contrary to or inconsistent with an IPP or applicable code of practice, or a PID or TPID, or an IUA, or a current certificate issued pursuant to s 55.

These Guidelines will now examine in detail four key concepts, and the three new mechanisms introduced in Part 3 of the Act.

Diagram 1 will help organisations to decide which of these mechanisms may address their needs.

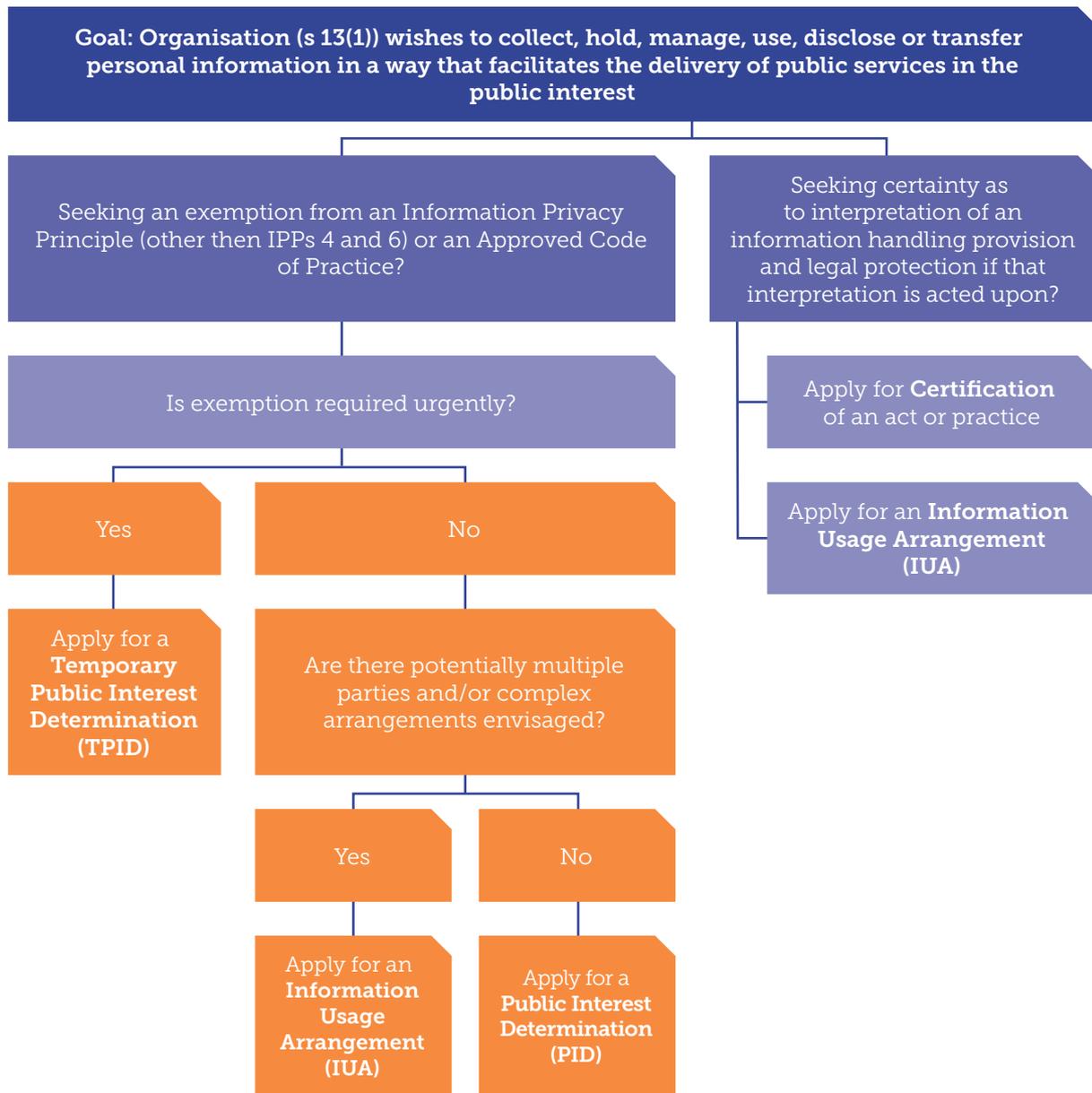
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4 All provisions deemed to be re-enacted are set out in Schedule 2 of the Act

5 The Victorian Government Solicitor's Office blog 'Privacy Bill goes public' dated 13 June 2014 is acknowledged as the source of this material: see <http://blog.vgso.vic.gov.au/2014/06/privacy-bill-goes-public.html>

6 Office of the Victorian Privacy Commissioner, *Guidelines to the Information Privacy Principles*, (3rd ed, 2011)

**Diagram 1: Which mechanism is needed?**



# Application

This document is intended for the guidance of organisations regulated by the *Privacy and Data Protection Act 2014* (s 13). These include Victorian public sector agencies and local councils.

## Use of specific terms in these guidelines

### Public interest

#### Relevance to the Act

The term 'public interest' appears in the objects of the Act in s 5 as follows:

- (a) to balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information in the public sector and
- (b) to balance the public interest in promoting open access to public sector information with the public interest in protecting its security.

'Public interest' is also used in the context of the two mechanisms in the Act that, in specified circumstances, permit organisations to do acts or engage in practices that do not comply with the IPPs (except IPPs 4 and 6) or an approved code of practice.

These are:

1. in Part 3, Division 5, PIDs and TPIDs and
2. in Part 3, Division 6, IUAs.

#### General interpretation

There is an important preliminary distinction to be drawn between something that is 'of interest to the public', which for example might include information concerning matters of a private or confidential nature in relation to public figures, and something that is 'in the public interest', which is our focus here.<sup>7</sup>

The High Court considered the meaning of the term 'public interest' in *O'Sullivan v Farrer*,<sup>8</sup> and described it as follows:

**... the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view' ...**

Who may be considered the relevant 'public' when public interest is at issue has also been considered by the High Court, which found that the public need not include the entire population, but rather, that it may include only the interests of a substantial section of the public.<sup>9</sup>

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7 *Johansen v City Mutual Life Assurance Society Ltd* [1904] HCA 43; (1904) 2 CLR 186 at 188 (Griffith CJ)

8 [1989] HCA 61; (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ), quoting *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505 (Dixon J)

9 *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 480 (Barwick CJ)

It is important to note that the interests of the government may be distinct from those of the public.<sup>10</sup> This distinction is a significant one where a public sector organisation may be able to conduct its work more conveniently and efficiently if granted a PID or TPID, or an IUA. The distinction means that the Commissioner will carefully distinguish those effects that flow through to the public from those effects that benefit only the organisation or organisations in question, and will take account only of the benefits to the public in considering the public interest.

## Weighing of opposing public interests

In the Act, the determination of where the 'public interest' lies is, with one exception, an exercise in weighing the public interest in one specified matter against the public interest in another specified matter. The following table sets these instances in the Act:

	the public interest in ...	weighed against the public interest in ...
Section 5(a) (objects)	'the free flow of information'	'protecting the privacy of personal information in the public sector'
Section 5(b) (objects)	'promoting open access to public sector information'	'protecting its security'
Sections 31(1), 35(1)(a), 39(1)(a), 41(1)(a) (PIDs)	'the organisation doing the act or engaging in the practice'	'complying with the specified Information Privacy Principle or approved code of practice'
Sections 47(3), 49(1) (IUAs that modify the application of, or provide for non-compliance with, an IPP or an approved code of practice)	'handing personal information under the information usage arrangement in the way specified'	'complying with the specified Information Privacy Principle or approved code of practice'
Sections 47(4), 49(2) (IUAs for the purposes of an information handling provision)	'treating the handling of personal information as being permitted for the purpose of the information handling provision'	'treating that handling of information as not being permitted for the purpose of the information handling provision'

Where the Commissioner is required to weigh the specific matters in each of the above situations in order to make a discretionary value judgment, consideration must therefore be given to the two relevant objects of the Act which set out opposing public interests, and which the above specific opposing public interest factors reflect.

In each relevant category of public interest, the Commissioner will make a value judgment as to identification of the matters that are relevant and the weight to be given to each. The Commissioner's decision concerning the relevant public interest will accordingly be 'predicated on fact-value complexes, not on mere facts, to be applied by the decision-maker.'<sup>11</sup>

## 'Public interest' as a stand-alone term

In s 43, the term 'public interest' stands alone rather than being used in the context of a weighing of opposing public interests. In this section, in the context of IUAs, one of the meanings of 'public purpose' is said to be:

**the provision of a service in the public interest to the public or a section of the public.**

<sup>10</sup> *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659

<sup>11</sup> *Osland v Secretary to the Department of Justice* [2010] HCA 24; (2010) 241 CLR 320 at 330 [14] (French CJ, Gummow and Bell JJ), quoting Stone, *Legal System and Lawyers' Reasonings* (1964) at 264

This definition is relevant to ‘public purpose’ in the context of s 45, which in s 45(1)(a) defines an IUA to include an arrangement that:

**sets out acts or practices for handling personal information to be undertaken in relation to one or more public purposes.**

In addition, under s 45(2)(c), IUAs must include a description of how the arrangement would facilitate one or more public purposes.

How should public interest be interpreted in this context? We consider that the concept of public interest standing alone in s 43 is also a limited one, that is, limited to the particular type of public interest at issue, when read in the context of the entire definition of ‘public purpose’ and its use in the Act. Accordingly, in s 43, the ‘public interest’ is the public interest in the particular service being provided to the public or a section of the public.

In s 45(1)(a) and s 45(2)(c), the ‘public purpose’ is the purpose of the public function identified in paragraph (a) or (b) of the definition of public purpose in s 43 of the Act, or the purpose of the service to the public identified in paragraph (c) of the definition.

Given the wide variety of potential parties to IUAs under s 46, ‘public purpose’ should be interpreted broadly to mean not only those services associated with traditional categories of governmental functions.

Therefore, in deciding whether a service is provided ‘in the public interest’ under s 43, the Commissioner will again be making a judgment ‘predicated on fact-value complexes’ as to what matters are relevant (within the subject matter limits described above) and the weight to be given to those matters, at the Commissioner’s discretion.

## Substantially outweighs

### Relevance to the Act

The term ‘substantially outweighs’ appears in Divisions 5 and 6 of Part 3 of the Act as an element in the public interest tests for PIDs, TPIDs, and IUAs.

### General interpretation

‘Substantially outweighs’ cannot be given a precise legal definition, though it has been judicially considered. Two interpretations were considered by Justice Deane in *Tillmanns Butcheries Pty Ltd v AMIEU*:<sup>12</sup>

**The word ‘substantial’ is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase ‘substantial loss or damage’, it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size. The difficulties and uncertainties which the use of the word is liable to cause are well illustrated by the guidance given by Viscount Simon in *Palser v Grinling* where, after holding that, in the context there under consideration, the meaning of the word was equivalent to ‘considerable, solid or big’, he said: ‘Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case ...’**

The Commissioner considers that, because it is used in a weighing exercise in this Act, the word ‘substantially’ must be interpreted in the second sense identified by Deane J, that is, ‘large, weighty or big’ relative to the competing interest under consideration. There is no fixed standard of comparison.<sup>13</sup>

Accordingly, once it has been established that there is a substantial difference between the weight of matters being compared, the Commissioner will decide how to balance the respective weights and when one’s weight prevails. This judgment will again be ‘predicated on fact-value complexes’ and within the Commissioner’s discretion.

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<sup>12</sup> [1979] FCA 85; (1979) 42 FLR 331 (quoting *Palser v Grinling* [1948] AC 291 at 317)

<sup>13</sup> See *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 at 528; and *HML v The Queen* [2008] HCA 16; (2008) 235 CLR 334 at 355 [14]

## Information handling provision

### Relevance to the Act

The term 'information handling provision' is defined in s 3 to mean a provision of an Act that permits the handling of personal information:

- as authorised or required by law or by or under an Act or
- in circumstances or for purposes required by law or by or under an Act.

Information handling provisions appear in the Act in two contexts:

- as the second potential type of an IUA - see ss 47(4) and 49(2) and
- as one of the items for which the Commissioner can provide certification that a specified act or practice is consistent - see s 55.

An example of an information handling provision by or under an Act may be seen in s 104ZY of the *Corrections Act 1986*:

#### Authorisation to use or disclose information

- (1) A relevant person may use or disclose personal or confidential information if the use or disclosure is reasonably necessary for the performance of the relevant person's official duties.
- (2) A relevant person may also use or disclose personal or confidential information in the following circumstances—
  - (a) if the use or disclosure is reasonably necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or to public health
  - (b) with the authorisation, or at the request, of the person to whom the information relates;
  - (c) if the use or disclosure is authorised by the Minister
  - (d) if the disclosure is to the Ombudsman or the Ombudsman's officers
  - (e) if the information is disclosed to a person included on the victims register for the purpose of making a victim submission
  - (f) if the information is the current location of a prisoner and the disclosure is to the prisoner's lawyer
  - (g) if the use or disclosure is in accordance with the Health Records Act 2001
  - (h) if the disclosure is to the Department of Human Services and the information is reasonably necessary to ensure the proper care, or housing, of a person who is or is likely to be provided with services by or on behalf of that Department
  - (i) if the disclosure is to the Department of Health and the information is reasonably necessary to ensure the proper care or treatment of a person who is or is likely to be provided with services by or on behalf of that Department

Clearly, while some of the above sub-provisions give little scope for doubt as to their meaning, others can give rise to differences of opinion as to the interpretation of key terms such as 'reasonably necessary'.

### General interpretation

The Attorney-General's second reading speech indicates that the intention behind the two processes concerning information handling provisions is to provide 'two new avenues for a public sector agency to determine whether a particular use of personal information is authorised or required by law.'<sup>14</sup>

The explanatory memorandum to the Act provides further context:

**Information handling provisions are intended to address the situation where organisations are uncertain about the interpretation of information sharing provisions in their legislation, or there is disagreement between relevant organisations as to the correct interpretation of or interaction between information management provisions in relevant statutes.<sup>15</sup>**

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<sup>14</sup> Victoria, Legislative Assembly, Debates, 12 June 2014, p 2108 (Robert Clark, Attorney-General)

<sup>15</sup> Explanatory Memorandum, Privacy and Data Protection Bill 2014 (Vic), p 14 (clause 45)

This explanation raises the question of what exactly the Commissioner's functions and powers are in so far as they concern information handling provisions. This is especially the case since the Act itself does not restrict the circumstances in which information usage provisions can be approved to those where there is uncertainty or disagreement as to their interpretation.

## Commissioner's functions and powers

The intention of the Act as conveyed in the Second Reading Speech and Explanatory Memorandum is achieved by means of the provisions that specify the legal effect of an approved IUA and a section 55 certification.

- in the case of an approved information usage arrangement, 'the handling of that information in accordance with the arrangement is *taken to be permitted* for the purposes of that [information handling] provision': s 51(2) of the Act [emphasis added]
- in the case of a section 55 certification, a person acting 'in good faith in accordance with a current certificate *does not contravene* ... the relevant information handling provision': s 55(4) of the Act [emphasis added].

These provisions could be interpreted to mean that the privacy provisions within other Acts may be overridden, in that the provisions operate to deem compliance with the information handling provision, whether or not the information handling provision has been complied with according to its own terms. That is, the permissions and requirements of the information handling provision are, in effect, replaced by the permissions and requirements of the IUA or the s 55 certification.

It would follow from this interpretation that the Act does more than provide 'avenues to determine whether a particular use of personal information is authorised or required by law', it would actually provide avenues to deem that a particular use of personal information is authorised or required by law.

### Information usage arrangements

It is therefore appropriate to recognise that there is a two-step process to the approval of an IUA. The first step is the issuing by the Commissioner of a report and a certificate. If an information handling provision is concerned, any certificate issued is relevantly to the effect that:

**the Commissioner is satisfied that the public interest in treating the handling of personal information as being permitted for the purpose of the information handling provision would substantially outweigh the public interest in treating that handling of information as not being permitted for the purpose of the information handling provision...(s 49(2)(b))**

In considering whether to issue a certificate in respect of an IUA under s 49(2) of the Act, the Commissioner will need to consider the intent, purpose and effect of privacy provisions in the other Act that would in effect be replaced by the IUA, if approved. This is implicit in the requirement to weigh the public interest in 'treating the handling of personal information as being permitted for the purpose of the information handling provision' against the public interest in not so treating it.

Nevertheless, it is important to note that the Commissioner does not 'approve' the IUA in which a specific information handling provision is considered. Rather, the discretion to 'approve' lies with the responsible Minister or Ministers for each organisation that is a party to the IUA and to whom the Commissioner's report and certificate were issued. (See s 50(2)) It should be noted that the Commissioner's report and certificate is also sent to the Minister or Ministers responsible for the information handling provision concerned (see s 50(1)(b)).

In this way the mechanism may be seen to resemble mechanisms in legislation that permit variation from information handling provisions if they are approved by the relevant Minister. See for example s 33(3)(b) of the *Emergency Services Telecommunications Authority Act 2006*, which permits the disclosing or communicating of confidential information as defined in accordance with the written authority of the Minister.

It should also be noted that the relevant Minister as defined has obligations and discretions to revoke IUAs in the circumstances set out in s 53.

### Certification

In the case of certification under Division 7 of the Act, the Commissioner's certificate under s 55(1) may certify that a specific act or practice is consistent with an information handling provision, and as such does provide an avenue to deem that a particular use of personal information is authorised or

required by law. Section 55(2) suggests that it is the intention of the provision that the Commissioner's interpretation of an information handling provision as applied to a particular fact situation will prevail over alternative interpretations until successfully challenged in a court or VCAT, or until the certification expires. It is for this reason that the certificate affords the protection provided in s 55(4).

## Adverse action

### Relevance to the Act

In s 43 of the Act, the term 'adverse action' is defined to mean 'any action that may adversely affect the rights, benefits, privileges, obligations or interests of a specific individual'. The term is used in Division 6, in s 45(2), in relation to required content of an IUA.

Paragraph (g) of s 45(2) provides that the arrangement must, relevantly, for every organisation that is party to the arrangement:

- (i) state adverse actions that an organisation could reasonably be expected to take as a result of handling personal information under the arrangement and
- (ii) specify the procedure that an organisation must follow before taking adverse action as a result of handling of personal information under the arrangement.

### General interpretation

The s 43 definition of 'adverse action' frames the term by reference to the *effect* of the proposed action on the specific individual's rights, benefits, privileges, obligations or interests. In this context 'individual' means a natural person.<sup>16</sup> It is the effect on specific individuals that must be considered here, rather than the effect of a proposed action on a person as a member of the public at large,<sup>17</sup> or of a class of the public.

An adverse effect is a negative one. The Commissioner considers that an effect will be relevantly 'adverse' if it:

- diminishes or destroys a right, benefit, privilege or interest, or
- creates or increases an obligation

in respect of a specific individual.

Here the Commissioner understands 'right', 'benefit', 'privilege', or 'obligation' to be intended to be interpreted according to their ordinary meaning. An individual's 'interests' are a less certain matter. The term has potentially very wide application in this Act. The 'interests' of an individual person may include the person's person, property or finances, as well as intangible interests such as reputation.<sup>18</sup>

Clearly then, a very broad range of actions will fall within the description of 'adverse action', provided the potential adverse effect also falls within it. Finally, in relation to breadth of application, it is important to note that these provisions should not be interpreted as applying to omissions as well as actions. The Commissioner considers that only positive acts are intended to be considered here. This interpretation is supported by the substantive use of the term 'adverse action' in s 45(2)(g), which speaks only of adverse action which is or might be *taken* by an organisation.

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<sup>16</sup> *Interpretation of Legislation Act 1984* (Vic), s 38

<sup>17</sup> *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 619-620 (Brennan J); see also at 584 (Mason J)

<sup>18</sup> *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 577-578 (Mason CJ, Dawson, Toohey and Gaudron JJ); see also at 592 (Brennan J)

# Public interest determinations

## What is a public interest determination?

A public interest determination made by the Commissioner is a written determination that, where a specified act or practice of an organisation might otherwise breach an IPP (other than IPPs 4 – Data Security – or 6 – Access and Correction) or an approved code of practice, it will not be regarded as having done so while the PID is in force.

If the Commissioner makes a relevant PID, in doing the act or engaging in the practice the organisation is not required to comply with the specified IPP or approved code of practice to the extent specified in the determination.

## Relationship to temporary public interest determinations

As their names suggest, PIDs and TPIDs are closely related mechanisms. For this reason, if an applicant so requests, under s 30(1) of the Act the Commissioner may first deal with an application for a PID as if it were an application for a TPID.

Key differences between PIDs and TPIDs are that:

- whereas PIDs remain in force until any expiry date specified, revocation or disallowance by Parliament, TPIDs can last no more than 12 months and
- PIDs have a lengthier application process than TPIDs, consistent with the intention that TPIDs be sought in circumstances where an application raises issues that require an urgent decision.

## Rationale

Parliament's overarching intention as to the rationale for PIDs, IUAs and certification was articulated in the Attorney-General's second reading speech as follows:

**The availability of these mechanisms is expected to significantly assist in the delivery of public services in the public interest, in particular in areas such as the implementation of child protection programs where multiple agencies hold information, the performance of various land management functions, and the control of organised crime.<sup>19</sup>**

Accordingly, PIDs and TPIDs are likely to be particularly useful where waiver or variation of one or more of the IPPs by one or more organisations in specified circumstances is thought to be warranted in light of the weight of the public interest in that non-compliance.

## Relevant considerations for Commissioner

Section 31(1) of the Act provides that the Commissioner may make a PID on application under s 29 if satisfied that the public interest in the organisation doing the act or engaging in the practice substantially outweighs the public interest in complying with the specified IPP or approved code of practice. The meaning of the terms 'public interest' and 'substantially outweighs' is discussed above in the Use of specific terms in these guidelines section.

In deciding whether to exercise this discretion, the Commissioner must have regard to the following factors:

- whether *not* permitting the organisation to do the act or engage in the practice would be in the public interest and
- the objects of the Act and
- any submissions received under s 29 of the Act from interested persons and
- any matters raised before the Commissioner in a conference under s 29.<sup>20</sup>

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<sup>19</sup> Victoria, Parliamentary Debates, Legislative Assembly, 12 June 2014, 2108 (2nd Reading speech, Robert Clark, Attorney-General) p 2109

<sup>20</sup> Act s 31(2)

## Application process and procedure

### Who can apply for a determination?

A public sector organisation to which Part 3 of the Act applies may apply in writing for a PID.<sup>21</sup>

### Consultation with the Commissioner

While the Act does not require that organisations consult with the Commissioner prior to making an application for a PID, preliminary consultation with the Commissioner concerning the basis for the application is strongly encouraged. This will enable the parties concerned to consider whether a PID may in fact be necessary, or whether some alternative act or practice could be pursued in order to avoid breaching an IPP or approved code of practice.<sup>22</sup>

### What must an application include?

The Commissioner will be assisted to make a timely determination if all material necessary to make a determination is provided at an early stage. The minimum requirements that an application for a PID must specify are set out in s 29(2) as follows:

- the act or practice to which the determination would apply
- the relevant IPP or approved code of practice
- the reasons for the organisation seeking the determination

Organisations must also state whether any of the information or documents included in their application are considered exempt under Part IV of the *Freedom of Information Act 1982* (FOI Act). The Commissioner will only make these documents available to interested parties with the organisation's consent.

An application should also include the legal name of the applicant, be signed by an Executive Officer at Level 2 or above, and provide a contact at Executive Officer at Level 2 or above, with contact details, and the duration for which the PID is sought.

### What other information could assist?

Depending on the circumstances behind particular applications, the Commissioner is likely to be assisted by additional information.

Organisations' descriptions of the act or practice to which the determination would apply should generally include details of:

- what it involves:
  - the nature of the act or practice
  - the context in which it will take place
  - the anticipated extent and frequency of the act or practice
  - why it is considered that a PID is required
- the type(s) of personal information used in the act or practice, including:
  - the class of individuals to whom the act or practice relates, including the approximate number of individuals whose personal information may be involved in that act or practice
  - any other agencies, organisations or bodies involved and their role in relation to the act or practice
  - any other entities, or class of entities, that may be in a similar situation and that could be included in a general PID
- where one or more parties are involved, a statement of agreed facts and legal issues and those in dispute with reasons and reference to any legal advice

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<sup>21</sup> Act s 29

<sup>22</sup> See also OAIC, *Privacy Public Interest Determination Guide*, June 2014

- why non-compliance with a relevant IPP or approved code of practice is necessary and why the application is being made, including:
  - detailed arguments demonstrating why the public interest in doing the act or practice outweighs, to a substantial degree, the public interest in adhering to the relevant IPP or approved code of practice
  - alternative courses of action that have been considered that would not lead to a breach of an IPP or approved code of practice, with explanations as to why such alternatives are not feasible
- a detailed description of how the organisation will manage the specified act or practice, including:
  - governance arrangements
  - an outline of an organisation’s capacity to manage and oversee the PID, having regard to the seven foundation principles of Privacy by Design (**PbD**)
- an undertaking by the organisation (in addition to annual reporting obligations) to advise the Commissioner of any material changes which may affect the PID
- any other information or evidence requested by the Commissioner
- where possible, a proposed draft determination

## Determination process after application

### Receipt of application

On receipt of an application for a PID, the Commissioner must publish, as the Commissioner thinks fit, a notice stating that (a) an application has been received, and (b) inviting persons whose interests would be affected by the determination to make submissions in relation to the application and (c) stating a time period for making submissions in relation to the application.<sup>23</sup>

### Draft determination

Following receipt and an assessment of the application, the Commissioner must prepare a draft determination and send a copy to the applicant and each interested person who has made a submission.<sup>24</sup> The determination will include an evaluation of the public interest arguments against which the determination has been assessed to date.

The intention of the draft determination is to engage interested parties to consult with the Commissioner before the final determination is made.

### Conference

Section 29(6) of the Act provides that the Commissioner may invite the applicant, and any person who has made a submission, to attend a conference about the draft determination.

Unless there are clear reasons not to do so, the Commissioner will generally hold a conference before making a determination under s 31 of the Act.

### Determination

The Commissioner may make a PID with regard to an application made under s 29 only if satisfied that the public interest test is met, that is:

**if satisfied that the public interest in the organisation doing the act or engaging in the practice substantially outweighs the public interest in complying with the specified Information Privacy Principle or approved code of practice.**<sup>25</sup>

After considering the factors to which the Commissioner must have regard under s 31(2), the Commissioner will make a determination or dismiss the application. The Commissioner must give reasons for approving or declining the application as part of a PID.<sup>26</sup>

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<sup>23</sup> Act s 29(4)

<sup>24</sup> Act s 29(5)

<sup>25</sup> Act s 31(1)

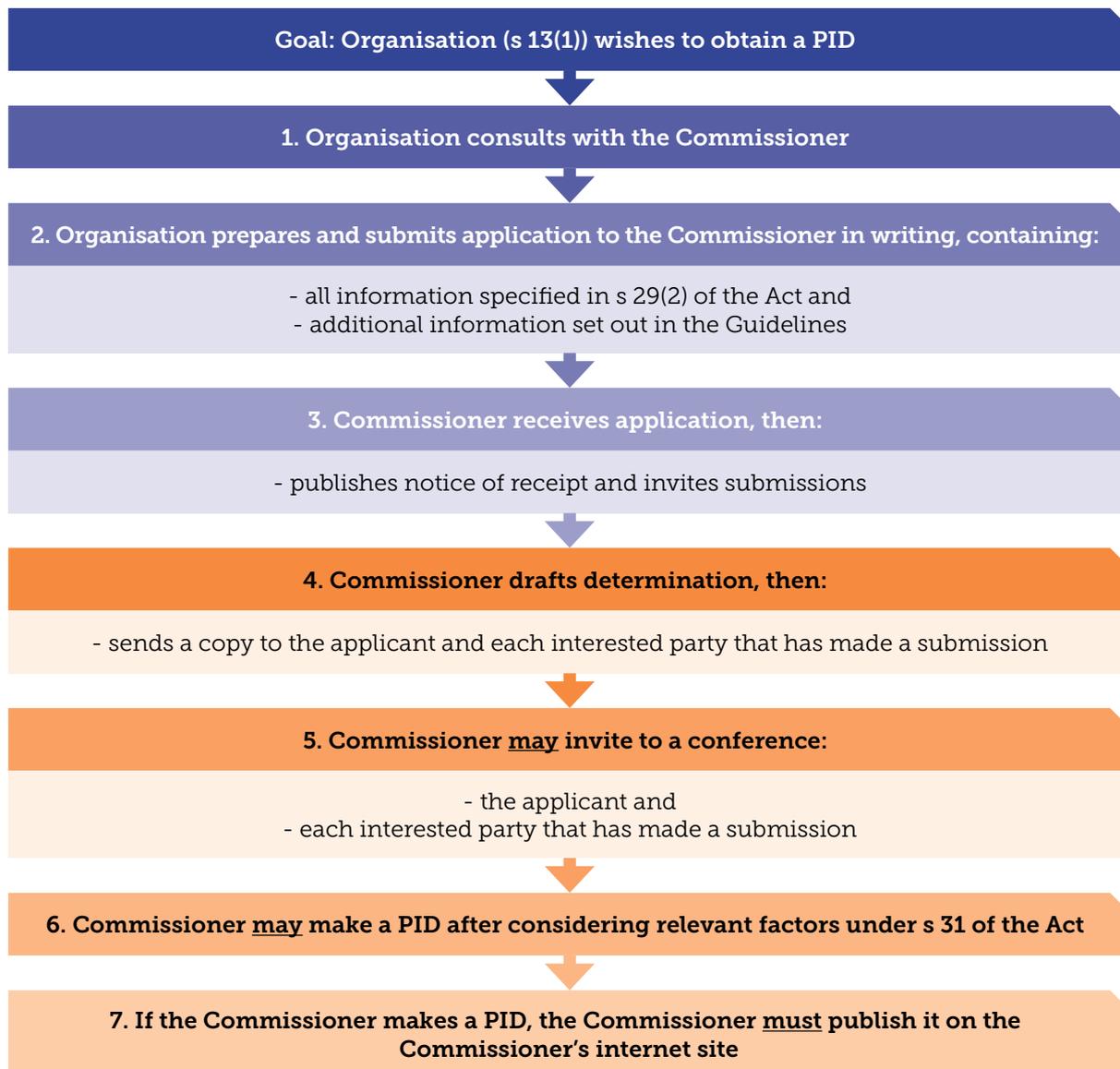
<sup>26</sup> Act s 31(3)

## Publication

Section 31(4) provides that a PID must be published on the Commissioner's internet site. The determination will remain in place until (a) the expiry date, or (b) the determination is revoked, or (c) the determination is disallowed by Parliament.

Diagram 2 shows the application and determination process for a PID.

**Diagram 2: Application and Determination Process for a PID**



## Reporting and review requirements

An organisation that is subject to a PID of more than 12 months' duration must report to the Commissioner annually and at any other time as requested by the Commissioner.

It is important to note that within 60 days after receiving such a report under s 36, the Commissioner must review the public interest determination and consider whether to revoke or amend it.

## Effect of a PID

Generally, under s 20 of the Act, an organisation must not do an act or engage in a practice that contravenes an IPP in respect of personal information collected, held, managed, used, disclosed or transferred by it. However, if a PID (or TPID) is current, s 16 of the Act relevantly modifies the force of s 20 so that for the purposes of this Act, an act done or practice engaged in by an organisation is an interference with the privacy of an individual if, and only if, the act or practice is contrary to, or inconsistent with, a PID or TPID (or an IPP, code of practice, approved IUA or a current certificate).

## PIDs and privacy complaints

Although the complaints process in the Act is essentially re-enacted from the IP Act, it now provides scope for complaints arising from the operation of PIDs (and TPIDs). However, that scope is somewhat limited due to the effect of s 57(2) of the Act. Although s 57(1) enables an individual in respect of whom information is, or has at any time been, held by an organisation to complain to the Commissioner about an act or practice that may be an interference with the privacy of an individual, s 57(2) relevantly confines the scope of a complaint to matters concerning IPPs only – that is, not any accompanying arrangements that might be included in a PID or TPID. As discussed below, this limitation has greater impact in respect of IUAs.

## Amendment and revocation

Organisations that wish to amend their existing PIDs may apply to the Commissioner for approval.<sup>27</sup> The requirements of s 34(2) mean that, in order to amend, they must effectively go through the same application process as for their original PID application, with any necessary modifications in light of the amendments sought.

The Commissioner *must* revoke a PID if satisfied that (a) the public interest in the organisation doing the act or practice no longer substantially outweighs the public interest in complying with the IPP or approved code of practice specified in the determination; or (b) the reasons set out in the application for the determination no longer apply.<sup>28</sup> In light of the reporting requirements set out in s 36, it is anticipated that a report will largely inform such consideration. However, it is conceivable that machinery of government changes and the like between receipt of reports by the Commissioner could also give rise to such consideration.

Section 35(2) of the Act requires the Commissioner, before revoking a PID, to give the organisation written notice of intention to revoke, with reasons, and allow the organisation an opportunity to make submissions outlining why the PID should not be revoked. These submissions must be considered within any period stated in the notice before effecting a revocation.

## Disallowance of determinations

Under s 42 of the Act, *both* PIDs and TPIDs may be disallowed by either House of Parliament. The means by which this may be achieved, that is, treating the determination as a statutory rule for the purpose, is set out in s 42(2).<sup>29</sup> This provision for disallowance is consistent with Parliament's appropriate oversight of the Commissioner's power to make PIDs and TPIDs that modify the operation of Victorian legislation. The power of disallowance 'may be considered as a substitute in the case of delegated legislation for the requisite of a prior assent in the case of direct legislation.'<sup>30</sup>

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<sup>27</sup> Act s 34(1)

<sup>28</sup> Act s 35

<sup>29</sup> Section 15 and Part 5 of the *Subordinate Legislation Act 1994* apply for the purposes of Section 42 subsection (1) as though (a) a determination were a statutory rule and (b) notice of the making of the statutory rule had been published in the Government Gazette when the determination was published on the website of the Commissioner

<sup>30</sup> *Dignan v Australian Steamships* (1931) 45 CLR 188, 208, per Dixon J

# Temporary public interest determinations

## What is a temporary public interest determination?

A TPID is effectively a PID of no longer than 12 months' duration, made in circumstances that required that a determination be made urgently.

## Application process and procedure

### Who can apply for a determination?

Organisations that may apply for a PID may also apply for a TPID, that is, public sector organisations to which Part 3 of the Act applies. As for a PID, the application is to be signed by an Executive Officer at Level 2 or above, and provide a contact at Executive Officer at Level 2 or above, with contact details.

### What must an application include?

Since an application for a TPID is likely to be sought in urgent circumstances, it may be initiated by telephone or other oral means, but the application itself must still be in writing pursuant to s 38(1).

The application must specify:

- the act or practice to which the determination would apply and
- the relevant IPP or approved code of practice and
- the reasons for the organisation seeking the determination, and why the determination is required urgently.<sup>31</sup>

A TPID application should aim to provide all material necessary for the Commissioner to make a determination. Where it is not practicable for all information to be initially provided in writing, such information should be furnished to the Commissioner as soon as reasonably practicable. Organisations should refer to the information concerning requirements for applications for a PID when determining what additional information to provide.

## Determination process after application

### Receipt of application

On receipt of a TPID, the Commissioner must publish, as the Commissioner thinks fit, a notice stating that an application has been received.<sup>32</sup>

### Assessment of application

For TPIDs, in view of the presumed urgency of the circumstances of an organisation's application, there are no equivalents in the Act to the conference provisions contained in s 29 in respect of PIDs. However, after considering a TPID application and where time allows, the Commissioner might invite the applicant or any interested parties to make submissions in respect of the TPID.

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<sup>31</sup> Act s 38

<sup>32</sup> Act s 38(4)

## Determination

The Commissioner may make a TPID under s 38 if satisfied that (a) the public interest in the organisation doing the act or engaging in the practice substantially outweighs the public interest in complying with the relevant IPP or approved code of practice and (b) the application raises matters that require that a determination be made urgently.

In deciding whether to make a TPID, the Commissioner must have regard only to:

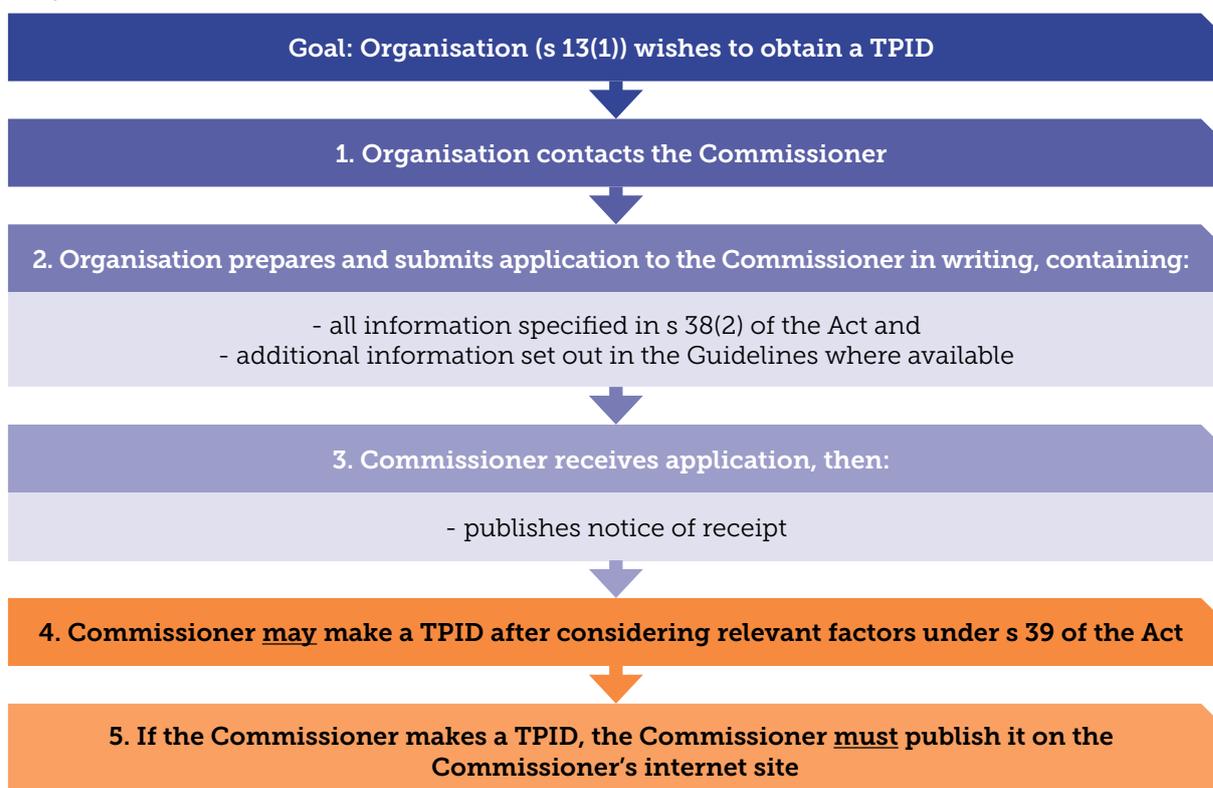
- whether *not* permitting the organisation to do the act or engage in the practice is in the public interest; [emphasis added] and
- the objects of the Act.<sup>33</sup>

The Commissioner's determination, if made, must include a statement of reasons, and must be published on the Commissioner's internet site. The determination has effect until (a) the expiry date, or (b) the determination is revoked under s 41, or (c) the determination is disallowed by Parliament, or (d) if a PID is made, the day that determination takes effect.<sup>34</sup>

While a determination allowing the specified act or practice is in effect, the organisation will not be considered to have contravened the relevant IPP or approved code of practice to the extent specified in the determination if the acts or practices are undertaken.

Diagram 3 shows the application and determination process for a TPID.

**Diagram 3: Application and Determination Process for a TPID**



## Revocation

The reasons and process for revocation of a TPID by the Commissioner under s 41 mirror those in respect of a PID under s 35 of the Act.

33 Act s 39(2)

34 Act s 40

# Information usage arrangements

## What is an information usage arrangement?

An IUA is defined in s 45 to mean an arrangement that:

- sets out acts or practices for handling personal information to be undertaken in relation to one or more public purposes and
- for any of those acts or practices, does any one or more of the following:
  - modifies the application of a specified IPP (other than IPPs 4 or 6) or an approved code of practice
  - provides that the practice does not need to comply with a specified IPP (other than IPP 4 or 6) or an approved code of practice
  - permits handling personal information for the purposes of an information handling provision.

‘Public purpose’ is defined in s 43 to mean:

- (a) compliance with a law or
- (b) the performance of functions by a public sector agency or a Council, or an agency of the Commonwealth, another State or a Territory or
- (c) the provision of a service in the public interest to the public or a section of the public.

As indicated above in discussion of the key term ‘public interest’, ‘public purpose’ should be interpreted broadly to mean not only those services associated with traditional categories of governmental functions.

IUAs can modify the application of IPPs or codes of practice or provide that the practice does not need to comply with them (except IPPs 4 and 6). IUAs can also permit handling personal information for the purposes of an information handling provision.<sup>35</sup>

It is anticipated that organisations will most frequently seek approval of IUAs in respect of allowing personal information to be used or disclosed for new purposes or to a broad range of entities. The IUA would document arrangements for ongoing and systematised transfer of information between parties. An IUA can of course also document an arrangement undertaken by a single organisation relating to systemic information handling practices.

If the Commissioner considers that, in the circumstances, a PID would be a more appropriate mechanism than an IUA, the Commissioner may refuse to issue a certificate in respect of the IUA.<sup>36</sup>

## Rationale

The first two objects of the Act are to balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information in the public sector, and to balance the public interest in promoting open access to public sector information with the public interest in protecting its security.<sup>37</sup> The discussion of ‘public interest’ above considered how this balancing is achieved in the Act in respect of IUAs.

A similar mechanism was considered by the New Zealand Law Commission prior to its recommendation that an information sharing mechanism be inserted into New Zealand privacy legislation. The New Zealand Law Commission recognised that information sharing can have a number of benefits, in particular that:

- individuals are relieved of having to supply the same information to several agencies and
- information sharing can better enable different organisations to work together to understand an individual’s circumstances broadly, rather than through a narrowly focused lens, so that the public receives integrated services across government.<sup>38</sup>

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<sup>35</sup> Act s 45(1)

<sup>36</sup> Act s 49(4)

<sup>37</sup> Act s 5(a)(b)

<sup>38</sup> New Zealand Law Commission, *Ministerial Briefing: Information Sharing*, 5, 29 March 2011

As indicated above, potential uses of IUAs by organisations and other parties include improving and coordinating multiple services in relation to domestic violence situations, or for youth or families with complex service needs.

However, the privacy risks to individuals of such sharing can be considerable and need to be carefully managed, as proposed information sharing practices may run counter to some of the IPPs, notably IPPs 2 and 7. Accordingly, the application and approval process for IUAs seeks to ensure that an approved IUA maintains appropriate privacy protections and safeguards.

## Application procedure

### Who can apply for approval?

IUAs can consist of either a single party or multiple parties. The 'lead party' as defined in s 43 submits the IUA to the Commissioner.

If there is only one party, that party must be an 'organisation' as defined in s 13 of the Act, other than a contracted service provider, and that organisation as lead party may apply for approval of an IUA.

Where more than one party is specified in an IUA, at least one party must be an 'organisation' other than a contracted service provider, and the lead party may apply for approval of an IUA.

### Arrangements between parties

In addition to an organisation, other parties to an IUA may be other organisations including contracted service providers, a person or body that is an agency of the Commonwealth, another State or a Territory, or any other person or body (including a private sector body) whether or not located within Victoria.<sup>39</sup>

The parties should agree between themselves which organisation, other than a contracted service provider, is to be the 'lead party' for the purposes of the proposed arrangement. It is recommended that, before submitting an IUA to the Commissioner, all parties meet to discuss each component of the proposed arrangement, using the elements of an application set out in s 45(2) of the Act as a guide. Parties should work to identify and resolve any risks to privacy identified, and are encouraged to undertake a Privacy Impact Assessment to assist with this process.

### What must an application include?

Under s 45(2) of the Act, an application for an IUA must:

- specify the party (or parties) to the arrangement and
- specify the personal information or type of personal information to be handled under the arrangement and
- describe how the arrangement would facilitate one or more public purposes and
- if handling personal information under the arrangement involves the modification or noncompliance with an IPP or an approved code of practice, the application must:
  - identify the IPP or code of practice and
  - state how the IPP or code of practice will be modified or not complied with and
- if the arrangement would be for the purposes of an information handling provision, the application must:
  - identify the provision and
  - describe the effect of the provision and
- for every party to the arrangement, the application must:
  - describe the personal information or type of personal information that the party could disclose or transfer to other parties to the arrangement and
  - state the manner in which a party could use personal information, including whether a party could disclose that information to another person or body and in what circumstances and

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<sup>39</sup> Act s 46

- for every organisation that is party to the arrangement:
  - state adverse actions that an organisation could reasonably be expected to take as a result of handling personal information under the arrangement and
  - specify the procedure that an organisation must follow before taking adverse action as a result of handling of personal information under the arrangement.

A proposed expiry date may also be included in the application, but if not, a reason why not must be included.<sup>40</sup>

In addition, the Commissioner encourages the provision of:

- a copy of legal advice that the parties may have received as to aspects of the arrangements proposed in the IUAs and
- a statement as to how a copy of the approved IUA can be accessed from the lead agency.

### *Voluntary provision of legal advice*

If legal advice is voluntarily provided to the Commissioner for the purpose of an application, it should be accompanied by express instructions to keep the documents confidential.<sup>41</sup> Parties should be aware that the question of whether legal professional privilege is waived by implication due to their conduct will be determined by the circumstances of each disclosure. For this reason they must assess for themselves whether voluntarily providing legal advice with an application to the Commissioner is inconsistent with the reason why legal advice was obtained. If the advice was obtained for a purpose that is inconsistent with it being provided to the Commissioner as part of an application, then the privilege could be waived by implication.<sup>42</sup>

## Determination process

### Receipt of application

Upon receipt of the IUA from the lead party, under s 47(2) the Commissioner may direct each organisation that is a party to consult with any person that the Commissioner considers appropriate. The Commissioner may also consult with any person that the Commissioner considers appropriate.

### Consideration of the proposed arrangement

If the IUA would modify or provide for noncompliance with an IPP or approved code of practice, the Commissioner must consider whether the ‘public interest test’ specified in s 47(3) is met, that is, whether the public interest in handling personal information under the IUA in the way specified under s 45(2)(d) would substantially outweigh the public interest in complying with the specified IPP or approved code of practice.

Similarly, under s 47(4), if the IUA is for the purposes of an information handling provision, the Commissioner must consider whether the public interest treating the handling of personal information as being permitted for the purposes of the information handling provision would substantially outweigh the public interest in treating that handling of information as *not* being permitted for the purpose of the information handling provision.

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40 Act s 45(2)

41 See *Goldberg v Ng* (1995) 185 CLR at 84

42 *Ibid* and *Mann v Carnell* (1999) 201 CLR 1 at 2

## Commissioner's report

The Commissioner must issue a report about an IUA sought under s 47.<sup>43</sup> The report may include the Commissioner's consideration of the appropriateness of all other aspects of the IUA, including the proposed parties. The report must state whether in the Commissioner's opinion a provision stated under s 45(2)(e) is an information handling provision, if the proposed IUA includes arrangements in respect of an information handling provision.

The Commissioner's report is sent to:

- the responsible Minister for each organisation that is a party to the arrangement and
- the Minister responsible for that provision, if the arrangement authorises the handling of personal information for the purposes of an information handling provision.<sup>44</sup>

## Commissioner's certificate

If the Commissioner is satisfied that the IUA meets the public interest tests set out in subsections 49(1) and (2), the Commissioner must issue a certificate to that effect. The Commissioner must send a copy of the certificate with the report to the relevant Ministers under s 50(1).

The Commissioner must refuse to issue a certificate if not satisfied as to the public interest matters set out in subsections 47(3) or (4) or both. If the Commissioner refuses to issue a certificate under subsections 49(4) or (5), the Commissioner must give written notice to the lead party to the IUA as soon as practicable, and an application for approval under s 47 is taken to be refused on the day the lead party is notified.

## Ministerial approval of proposed arrangement

An IUA cannot be approved by relevant Ministers under s 50 unless the Commissioner has issued a certificate in respect of it.<sup>45</sup> After receiving the Commissioner's report and certificate, approval may be given:

- in the case of a single party, by the responsible Minister for the lead party or
- otherwise by agreement of the responsible Ministers for each organisation that is party to the arrangement.

## Publication

The Commissioner must publish an approved IUA on the Commissioner's internet site, however exceptions to this requirement apply under subsection 50(5) in respect of disclosure of personal information and certain information that, if contained in a document, would be exempt under the *Freedom of Information Act 1982*.

In light of the relevant objects of the Act, consideration should also be given to publication of the IUA on the lead party's website, with redaction or summarisation as appropriate in line with the exceptions stated in s 50(5).

Diagram 4 shows the application and determination process for an IUA.

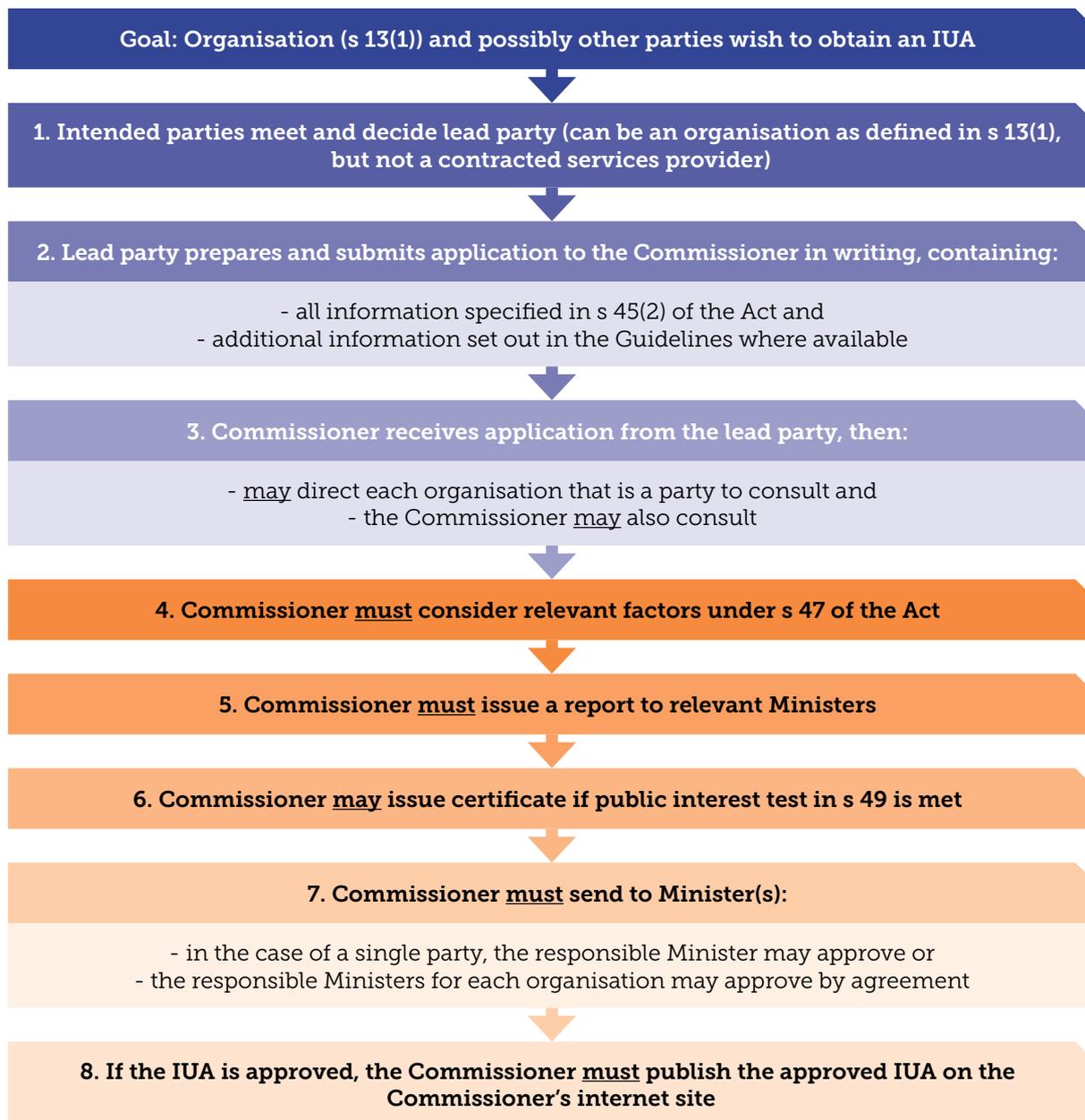
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43 Act s 48

44 Act s 50(1)

45 Act s 50(3)

**Diagram 4: Application and Determination Process for IUAs**



## Effect of an approved IUA

Where an approved IUA provides for acts or practices that modify or do not comply with an IPP or approved code of practice specified in the Commissioner's certificate under s 49, the parties to the arrangement are not required to comply with the IPP or approved code of practice in respect of those acts or practices, to the extent specified in the certificate.<sup>46</sup>

If the IUA provides for the handling of personal information for the purposes of an information handling provision, the handling of that information in accordance with the IUA is taken to be permitted for the purposes of that provision.<sup>47</sup>

46 Act s 51(1)

47 Act s 51(2)

## IUAs and compliance notices

Division 9 of Part 3 concerns the enforcement of IPPs and approved IUAs. Section 78 provides that the Commissioner may serve a compliance notice on an organisation in respect of an IUA if it appears to the Commissioner that two criteria are met:

- 1 the organisation has done an act or engaged in a practice in contravention of an IPP...or an approved IUA and
- 2 the act or practice:
  - constitutes a serious or flagrant contravention or
  - is of a kind that has been done or engaged in by the organisation on at least five separate occasions within the previous two years.

A compliance notice requires the organisation to take specified action within the specified period for the purpose of ensuring compliance. It is an indictable offence under s 82 of the Act not to comply with a compliance notice. The Commissioner's decision to serve a compliance notice may be reviewed by VCAT under the provisions of s 83 of the Act.

## IUAs and privacy complaints

As indicated above in relation to PIDs and TPIDs, although the complaints process in the Act is deemed to be re-enacted from the IP Act, it now provides scope for complaints arising from the operation of the PID, TPID and IUA mechanisms. However, that scope is somewhat limited due to the effect of s 57(2) of the Act. Although s 57(1) enables an individual in respect of whom information is, or has at any time been, held by an organisation to complain to the Commissioner about an act or practice that may be an interference with the privacy of an individual, s 57(2) relevantly confines the scope of a complaint to matters concerning IPPs only: that is, not any accompanying arrangements that might be included.

It is anticipated that, like agreements made under a Memorandum of Understanding, IUAs may contain a plethora of detailed arrangements to which individuals potentially may take exception, on privacy or other grounds. However, because s 57(2) relevantly confines the scope of a complaint to matters concerning IPPs only, IUA arrangements other than those directly concerning the IPPs addressed in the IUA may not be the subject of complaints to the Commissioner.

## Amendment or revocation of an IUA

The lead party may apply to the Commissioner for the approval of an amendment.<sup>48</sup> The process for amendment is governed by s 52(2) which provides consistency with original applications.

Revocation by the relevant Minister is provided for by s 53. The relevant Minister must revoke the approval when he or she becomes aware of, or following notification from the Commissioner, that:

- if the IUA modifies or provides for noncompliance with a specified IPP (or code of practice) the Commissioner is no longer satisfied that the public interest in information handling under the arrangement substantially outweighs the public interest in complying with the IPPs or
- the reasons for seeking approval of the IUA as set out in the application no longer apply.

The relevant Minister may also revoke the approval of an IUA on request of the Commissioner or any party that is an organisation.<sup>49</sup> The Commissioner must notify the parties in writing before notifying the Minister, and the relevant Minister must give written notice to the parties to the IUA before revoking it.<sup>50</sup>

## Reporting requirements

The lead party to an approved IUA must report to the Commissioner about the IUA annually, and at any other time as requested by the Commissioner.<sup>51</sup> The Commissioner must also report to any relevant Minister about an IUA on request of the Minister, and may report at any other time.<sup>52</sup>

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48 Act s 52(1)

49 Act s 53(2)

50 Act s 53(1), (3)

51 Act s 54(1)

52 Act s 54(3), (4)

# Certification

## What is certification?

The certification mechanism in Division 7 of Part 3 of the Act provides that the Commissioner may certify that a specified act or practice of an organisation is consistent with an IPP, an approved code of practice, or an information handling provision of another Act.<sup>53</sup> Certificates will generally specify an expiry date, but may end sooner if set aside by a court or VCAT.<sup>54</sup>

## Rationale

Parliament's intention as to the rationale for certification was made clear in the Attorney-General's second reading speech:

**This mechanism is intended to provide certainty to organisations where there may be doubt as to the legality of a proposed action, and to afford statutory protection to persons who act in good faith in reliance on the PDP Commissioner's certification while it remains in force.<sup>55</sup>**

Accordingly, certification is particularly useful where:

- organisations, or individual units or departments within organisations, are uncertain about the interpretation of information sharing provisions in their legislation or
- there is a disagreement between relevant organisations as to the correct interpretation of or interaction between provisions or
- where organisations are reluctant to risk acting upon their own understanding of relevant information handling provisions, even where they have sought legal advice.

In addition, it is the Commissioner's view that external validation of an organisation's privacy practices can help to ensure the rigor of those practices, identify and address the gaps, help prioritise resources, and contribute to consumer confidence and trust. External validation can support transparency.

External validation can also, when appropriately designed, serve as a mechanism for assessing compliance with the principles of Privacy by Design, including the extent to which appropriate processes and tools are in place, and are being leveraged, to support a full-fledged organisational commitment to privacy. PbD is a series of internationally endorsed policies, approaches and benchmarks that was formally adopted by the Office of the Victorian Privacy Commissioner on 1 July 2014.<sup>56</sup>

## Effect of certification

Section 55(4) of the Act provides that 'a person' who does an act or engages in a practice in good faith in accordance with a current certification does not contravene the relevant IPP, or approved code of practice, or information handling provision of another Act.<sup>57</sup> Here 'person' should be interpreted to include a body politic or corporate as well as an individual.<sup>58</sup>

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53 Act s 55

54 Act s 55(2)

55 Victoria, Parliamentary Debates, Legislative Assembly, 12 June 2014, 2108 (2nd Reading speech, Robert Clark, Attorney-General)

56 For more information about PbD, see the Commissioner's InfoSheet 02.14 (September 2014). See also Dr Anne Cavoukian, *Privacy by Design in Law, Policy and Practice* August 2011, 16. Note: There are already several privacy seal and certification programs in existence. In the American context, these include TRUSTe, WebTrust, and BBBOnline. Similar programs exist in other jurisdictions, including Europe's *Europrise* Privacy Seal and Japan's *Privacy Mark*

57 Act s 55(4)

58 S 38, *Interpretation of Legislation Act 1984*

## Application process

### Who can apply?

Because s 55(1) provides that certification is available as to the acts or practices of 'organisations', public sector organisations to which s 13 of Part 3 of the Act applies have standing to apply for a certificate.

### Consultation with the Commissioner

As the Act does not specify an application process in respect of certification, organisations are encouraged to consult with the Commissioner at an early stage if they are considering applying for certification that a specified act or practice of an organisation is consistent with an IPP, an approved code of practice, or an information handling provision of another Act.

### What information should be provided?

The full information to be provided in support of an application for certification will be identified in consultation with the Commissioner. This information will include:

- the legal name of the applicant and their contact details with a statement outlining the below, signed off by an Executive Officer at Level 2 or above
- identification of the relevant IPP or approved code of practice to which the certification would apply
- a statement setting out the basis for the application including an explanation as to why the applicant believes that a specified act or practice of an organisation is consistent with an IPP, an approved code of practice or an information handling provision
- a description of the act or practice to which the certification would apply
- the duration for which certification is sought.

Further information that may also be sought by the Commissioner includes:

- a detailed and precise description of:
  - the type(s) of personal information used in the act or practice
  - what the act or practice involves
  - the context in which that act or practice will take place
  - the class of individuals to whom the act or practice relates, including the approximate number of individuals whose personal information may be involved in that act or practice
  - any other agencies, organisations or bodies involved and their role in relation to the act or practice and
  - the anticipated nature, extent and frequency of the act or practice in question
- a description of how the relevant organisation or organisations will manage the specified act or practice if the certificate is issued, incorporating the foundation principles of PbD and
- any grounds in support of the application including governance arrangements, an outline of an organisation's capacity to manage and oversee the certification
- an undertaking by the organisation (in addition to annual reporting obligations) to advise the Commissioner of any material changes which may affect the certification
- any other information or evidence requested by the Commissioner.

Please also refer to the guidance above concerning provision to the Commissioner of legal advice concerning relevant information handling provisions that organisations may have obtained.

## Determination process

The timeframe for the determination process is not set out in the Act. However, organisations should note that the time taken to determine the outcome of an application will reflect both the quality of preparation of the initial application and whether applicants respond to information requests or issues raised by the Commissioner in a timely fashion.

### Receipt of application

Upon receipt of an application for certification, the Commissioner will make an initial assessment as soon as is practicable. The Commissioner will then write to the applicant to provide information about the Commissioner's assessment process, including an indicative timetable, and, if relevant, seeking further information in support of the application. Subject to receipt of any such further information sought, the Commissioner will then proceed to determination.

### Decision to issue the certificate

The Commissioner has a discretion to issue a certificate under s 55 of the Act. If the Commissioner decides not to issue the certificate, the Commissioner will notify the applicant accordingly.

## Publication

A certificate issued under s 55 must be published on the Commissioner's internet site.<sup>59</sup>

Diagram 5 shows the application and determination process for certification.

**Diagram 5: Application and Determination Process for Certification**



59 Act s 55(5)

## Review

Under s 56 of the Act, an individual or organisation whose interests are affected by the decision to issue the certificate may apply to VCAT for review of the decision.

Section 48 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) is relevant here in respect of an application by such a person or organisation, in that the review jurisdiction of the VCAT is invoked:

(a) by a person who is entitled to do so by or under an enabling enactment applying to the Tribunal in accordance with section 67 for review of a decision under that enactment; ...

A person who is entitled to apply to VCAT for review of a decision, or to have a decision referred to VCAT for review, may request the decision maker – here the Commissioner – to give the person a written statement of reasons for the decision. This request must be made in writing within 28 days after the day on which the decision is made.<sup>60</sup>

Following a request under s 45 of the VCAT Act, under s 46 the Commissioner must then give to the person a written statement of reasons for the decision to issue the certificate, as soon as practical or otherwise no later than 28 days after receiving a request. The statement of reasons must set out both the reasons for the decision and the findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based.

The Commissioner is party to the proceeding on a review.<sup>61</sup> It should be noted that there is no review provision in respect of a decision *not* to issue a certificate.

## Expiry

A certificate issued under s 55(1) of the Act remains in effect until any expiry date specified in the certificate, unless set aside by a court or VCAT.<sup>62</sup> The certificate must include an expiry date, unless it is inappropriate to do so.<sup>63</sup>

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60 *Victorian Civil and Administrative Tribunal Act 1998* s 45

61 Act s 56(2)

62 Act s 55(2)

63 Act s 55(3)

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