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## Explanatory Statement

# Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, courts and tribunals) 2021

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### General Outline of Instrument

1. This instrument is made under section 1270K of the *Corporations Act 2001* (Corporations Act).
2. The law authorises disclosure of protected information (Director Identification Number information) to a government entity in relation to the performance or exercise of its functions or powers. Some PGPA bodies, courts and tribunals do not fall within the definition of government entity but are part of the workings of government. This instrument provides for the disclosure of Director Identification Number (director ID) information to these bodies in the same way as government entities.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. In accordance with section 5C of the Corporations Act, the relevant version of the *Acts Interpretation Act 1901* that applies to the Corporations Act is the version as at 1 November 2005. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### Date of effect

5. This instrument commences on the later of:
  - (a) the day after it is registered on the Federal Register of Legislation; and
  - (b) the day on which section 1270K of the Corporations Act commences.

### What is the effect of this instrument

6. This legislative instrument authorises the disclosure of director ID information to PGPA bodies, courts and tribunals.
7. This instrument uses terms defined in section 5 of this instrument. All other terms take their meanings from the Corporations Act.
8. The Registrar may make a disclosure framework that provides, among other things, for the disclosure of protected information under the Corporations Act, in this case director ID information. The disclosure of director ID information under paragraph 1270L(3)(f) of the Corporations Act must meet any requirements of this instrument.
9. A person, who is or has been in official employment is prohibited from disclosing protected information if the protected information was obtained by the person in the course of their official employment unless one of the exceptions in subsection 1270L(3) of the Corporations Act applies.
10. Subsection 1270L(3) of the Corporations Act authorises disclosure of protected information to a government entity in relation to the performance or exercise of its functions or powers. However, there are bodies, being Commonwealth entities and Commonwealth companies within the meaning of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), which do not fall within the meaning of government entity within section 9 of the Corporations Act.



11. PGPA bodies include, but are not limited to, non-corporate Commonwealth entities, Corporate Commonwealth entities and Commonwealth companies.

12. It is appropriate to ensure that director ID information may be disclosed to PGPA bodies to enable those bodies to exercise their functions or powers. This instrument provides the ability to disclose director ID information to PGPA bodies. The disclosure of director ID information is authorised by this instrument and under paragraph 1270L(3)(f) of the Corporations Act if the disclosure is:

- (a) made to a person in official employment of a PGPA body for use, in the course of the performance of duties of the person; and
- (b) in relation to performing or exercising functions and powers of that PGPA body.

13. Disclosure of director ID information to multi-agency taskforces will also be authorised where the agencies included in that taskforce are a government entity, PGPA body, court or tribunal. Multi-agency taskforce means any taskforce established by the Government including Commonwealth, State and Territory agencies.

14. The PGPA Act is a framework covering governance, accountability, performance and the use of resources across Commonwealth bodies. Commonwealth entities and companies are government bodies that are subject to the PGPA Act. As at 1 July 2020 the Department of Finance identified a list of 187 Commonwealth entities and companies whose financial governance was found under the PGPA Act. This list forms the starting point for identifying Commonwealth entities and companies for the purpose of providing director ID information collected under the Corporations Act.

15. Subject to section 1270Q of the Corporations Act, the disclosure of director ID information to a court or tribunal is authorised by this instrument. Section 1270Q of the Corporations Act exempts a person from being required to provide protected information to a court or tribunal except where the disclosure is necessary for giving effect to a taxation law or an Australian business law.

16. The disclosure of director ID information to PGPA bodies, courts or tribunals will not require payment of a fee and will generally be provided electronically.

17. While this instrument permits and authorises the disclosure of director ID information to PGPA bodies, courts or tribunals nothing in the instrument requires or compels such a disclosure.

18. Subsection 1270N(2) of the Corporations Act provides that the disclosure framework may provide for how applications under subsection 1270N(1) of the Corporations Act (application for particular protected information not to be disclosed) may be made or decided.

19. This instrument provides that individuals making such an application must demonstrate how the detrimental consequence to the individual of disclosure outweighs the benefit of the disclosure by PGPA bodies, courts or tribunal performing their functions. Requiring individuals to establish this is necessary as it is generally not appropriate to suppress director ID information from PGPA bodies courts and tribunal given the importance of these agency to the function of government and to the Australian community.

20. Subsection 1270K(3) of the Corporations Act allows that the disclosure framework may provide differently in relation to different functions or powers of the Registrar. This ensures that the disclosure framework can be tailored to particular functions and powers of the Registrar.

### **Risks and benefits**

21. Subsection 1270K(5) of the Corporations Act provides that the disclosure framework must only provide for the disclosure of protected information if the Registrar is satisfied that the benefits of the disclosure would outweigh the risks of the disclosure (taking into account any mitigation of those risks in accordance with the disclosure framework).



22. The introduction of a director ID requirement is one of the Commonwealth Government initiatives to promote good corporate conduct, and to deter and penalise illegal phoenixing in order to protect those who are negatively affected by such fraudulent behaviour.

23. The new director ID regime will also offer benefits beyond combating illegal phoenixing. For instance, simpler more effective tracking of directors and their corporate history will reduce time and cost for administrators and liquidators, thereby improving the efficiency of the insolvency process. In addition, the new regime will improve data integrity and security. For example, it would be possible to allow directors to be identified by a number rather than by other more personally identifiable information.

24. This instrument authorises the disclosure of director ID information to PGPA bodies (essentially Government bodies), courts and tribunals to allow these bodies to continue to undertake their functions and powers. Each body will have their own mechanisms for the prevention of misuse of this information which addresses any risk of the misuse of director ID information by these bodies or individuals in their employ.

25. Broader public benefits include reduced operating costs because each individual body will not be required to determine if they are a government entity or a PGPA body and to apply to the Registrar for access to Director ID information. This will provide for greater efficiency of PGPA bodies and enhancements to regulation and community support activities which includes the detection of fraud and business misconduct which will result in a level playing field for individuals and businesses.

26. On balance the benefits of the disclosure of Director ID information to enable PGPA bodies, courts or tribunals to undertake their functions and powers are significant and outweigh potential risks of the misuse of director ID information.

### **Compliance cost assessment**

27. [\[Include the compliance cost assessment statement from the Revenue Analysis Branch minute here.\]](#)

### **Background**

28. The Australian Government has committed to simplifying its interactions with business to support growth, innovation and employment. As part of this initiative, the Government is developing a modern approach to managing Commonwealth registers to provide more flexible, user-friendly and streamlined registry services.

29. *The Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* inserts disclosure provisions into the Act which largely mirror those provisions included within the *Commonwealth Registers Act 2020* and includes provisions designed to replace existing registry law secrecy provisions, serving to protect information held by the registrar.

30. The new law provides that a recording or disclosure is authorised in the following circumstances:

- (a) the recording or disclosure is for the purposes of the new regime or happens in the course of the performance of the duties of a person's official employment;
- (b) the disclosure is to another person for use, in the course of the performance of the duties of the other person's official employment, in relation to the performance of the functions of a government entity;
- (c) the disclosure is to a State or Territory official for use in the course of their duties of employment in relation to the performance or exercise of functions or powers of a government entity, under an intergovernmental agreement with the Commonwealth;
- (d) each person to whom the information relates consents to the disclosure; or
- (e) the disclosure is in accordance with the disclosure framework made by the Registrar.



31. The Registrar must not make a disclosure framework authorising the disclosure of protected information unless the Registrar is satisfied that the benefits outweigh the risks.
32. The law authorises disclosure of protected information to a government entity in relation to the performance or exercise of its functions or powers.
33. Government entity is defined at Section 9 of the Corporations Act as having the meaning given by section 41 of the *A New Tax System (Australian Business Number) Act 1999*. That section defines government entity as including: a department of state of the Commonwealth, a state or a territory; a department of the Parliament established under the *Parliamentary Services Act 1999*; an Executive Agency, or Statutory Agency, within the meaning of the *Public Service Act 1999*; and certain organisations established by the Commonwealth, a state or a territory to carry on an enterprise or established for a public purpose by an Australian law.
34. Explicit authorisations to disclose protected information in accordance with intergovernmental agreements to State or Territory officials for the performance of their official duties are contained in section 1270L of the Corporations Act.
35. There are a number of bodies that do not fall within the definition of government entity. While these PGPA bodies are not government entities, it would appear to be an unintended consequence that a disclosure to PGPA bodies for use in the course of PGPA duties of employment would not be considered an authorised disclosure.
36. PGPA bodies may include, but are not limited to:
- (a) Australian Securities and Investment Commission (ASIC);
  - (b) Australian Prudential Regulation Authority (APRA);
  - (c) Reserve Bank of Australia;
  - (d) Commonwealth Scientific and Industrial Research Organisation (CSIRO);
  - (e) Australian Institute of Health and Welfare (AIHW)
  - (f) Australian Postal Corporation;
  - (g) Defence Housing Australia.

## Consultation

### 37. Pre consultation

- (1) Subsection 17(1) of the *Legislation Act 2003* requires, before the making of a determination, that the Commissioner is satisfied that appropriate and reasonably practicable consultation has been undertaken.
- (2) As part of the consultation process, you are invited to comment on the draft determination and its accompanying draft explanatory statement.

Please forward your comments to the contact officer by the due date.

<b>Due date:</b>	1 April 2021
<b>Contact officer:</b>	Matthew Sedgwick
<b>E-mail address:</b>	<a href="mailto:regmod@treasury.gov.au">regmod@treasury.gov.au</a>

### 38. Post consultation

[Insert here a detailed description of the consultation undertaken. Subsection 17(1) of the *Legislation Act 2003* requires that the rule-maker undertake an appropriate level of consultation that is reasonably practicable to undertake before making a legislative instrument.



***Legislative references***

*A New Tax System (Australian Business Number) Act 1999*

*Acts Interpretation Act 1901*

*Business Names Registration Act 2011*

*Commonwealth Registers Act 2020*

*Corporations Act 2001*

*Human Rights (Parliamentary Scrutiny) Act 2011*

*Legislation Act 2003*

*National Consumer Credit Protection Act 2009*

*Parliamentary Services Act 1999*

*Public Governance, Performance and Accountability Act 2013*

*Public Service Act 1999*

*Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020*



## **Statement of compatibility with Human Rights**

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

### **Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, courts and tribunals) 2021**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The introduction of a director ID requirement is a Commonwealth Government initiative to promote good corporate conduct, and to deter and penalise illegal phoenixing in order to protect those who are negatively affected by such fraudulent behaviour. The director ID will require all directors to confirm their identity and it will be a unique identifier for each individual who consents to being appointed a director.

The law authorises disclosure of protected information (Director ID information) to a government entity in relation to the performance or exercise of its functions or powers. However, there are bodies that are part of the workings of government, and to which the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) applies, which do not fall within the meaning of government entity

This instrument provides for the disclosure of Director ID information to PGPA bodies, courts and tribunals in the same way as director ID information is disclosed to government entities. It is appropriate to ensure that relevant PGPA bodies, courts and tribunals have access to the director ID information they require in order to exercise their functions or powers. This instrument provides the discretion to disclose director ID information with PGPA bodies, courts and tribunals.

#### **Human rights implications**

##### *Engagement of the right to privacy*

Article 17 of the International Covenant on Civil and Political Rights provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation. The right to privacy is not an absolute right. In some circumstances, it must be weighed against the equally justified right of others and against matters that benefit society as whole.

The introduction of a director ID requirement is one of the Commonwealth Government initiatives to promote good corporate conduct, and to deter and penalise illegal phoenix activity in order to protect those who are negatively affected by such fraudulent behaviour. The new director ID regime will also offer benefits beyond combating illegal phoenixing. For instance, simpler more effective tracking of individuals and their corporate history will reduce time and cost for administrators and liquidators, thereby improving the efficiency of the insolvency process. In addition, the new regime will improve data integrity and security. For example, it would be possible to allow individuals to be identified by a number rather than by other more personally identifiable information.



The disclosure of director ID information as authorised by this instrument will engage the right to privacy because it provides for the disclosure of information including personal information within the meaning of the *Privacy Act 1988*.

To any extent to which the disclosure of this information constitutes a limitation on the individual's right to be protected from interference with their privacy, the limitation is justified because the disclosure of information is in pursuit of the legitimate objective identified and is rationally connected and proportionate to the objective sought, being the administration of the director ID regime and the functioning of government.

The instrument itself will be a disallowable instrument and therefore subject to proper Parliamentary oversight and the consultation requirements contained in the *Legislation Act 2003*.

For these reasons, this instrument authorising the disclosure of director ID information to PGPA bodies, courts or tribunals does not unnecessarily and unreasonably restrict an individual's right to privacy. Information is only disclosed to the extent required to achieve the legitimate objective of administering the director ID requirement or the functioning of government, with the limitation reasonable, necessary and proportionate.

### **Conclusion**

This Legislative Instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Accordingly, while the right to privacy are engaged, the limitations are:

- (a) aimed at achieving a legitimate objective;
- (b) rationally connected with the objective; and
- (c) reasonable, necessary and proportionate.

The objective of introducing a director ID requirement is to promote good corporate conduct, and to deter and penalise illegal phoenixing. Therefore, the disclosure of director ID information to PGPA Bodies, courts and tribunals represents a lawful interference with an individual's human rights that is rationally connected with the objective. This interference is justified from the viewpoint of being reasonable, necessary and proportionate to provide the assurance for administering the director ID regime and the functioning of government.