

# EXPOSURE DRAFT

## EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

*Security of Critical Infrastructure Act 2018*

### *Security of Critical Infrastructure (Application) Rules 2021*

- 1 The instrument is made under section 61 of the *Security of Critical Infrastructure Act 2018* (the Act). The instrument commences on the day after registration on the Federal Register of Legislation, and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

#### *Purpose*

- 2 Part 2 of the Act provides that the Secretary of the Department must keep a non-public Register of Critical Infrastructure Assets containing information in relation to those assets. Under Part 2, the responsible entity for a critical infrastructure asset to which that Part applies must give the Secretary operational information in relation to the asset to be included in the Register.
- 3 Section 18A of the Act provides that Part 2 of the Act applies to:
  - an asset specified in the rules (paragraph (1)(a)); and
  - an asset that has been privately declared to be a critical infrastructure asset under section 51 of the Act, where the declaration determines that Part 2 applies to the asset (paragraph (1)(b)); and
  - an asset that was a critical infrastructure asset immediately before the commencement of section 18A of the *Security Legislation Amendment (Critical Infrastructure) Act 2021* (the Amendment Act), (paragraph (1)(c)).
- 4 Part 2B of the Act provides that if a cyber security incident has a relevant impact on a critical infrastructure asset, a responsible entity for the asset to which that Part applies is required to give a relevant Commonwealth body a report about the incident.
- 5 Section 30BB of the Act provides that Part 2B of the Act applies to:
  - an asset specified in the rules (paragraph (1)(a)); and
  - an asset that has been privately declared to be a critical infrastructure asset under section 51 of the Act, where the declaration determines that Part 2B applies to the asset (paragraph (1)(b)).
- 6 Part 2 and Part 2B of the Act constitute ‘positive security obligations’ for responsible entities for critical infrastructure assets. The purpose of these rules is to specify that the obligations in Part 2 and Part 2B of the Act are ‘switched on’ for a critical infrastructure asset or class of critical infrastructure assets.
- 7 The rules also provide a grace period of 6 months for the commencement of obligations under Part 2 and 3 months for the commencement of obligations under Part 2B.

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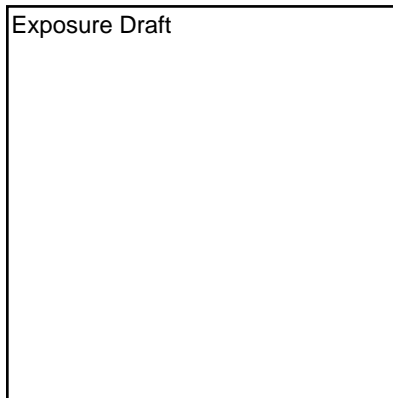
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## *Details of the instrument*

- 8 Details of the instrument are included at Attachment A.

## *Parliamentary scrutiny etc.*

- 9 The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in relation to the instrument, and provides that to the extent that the instrument impacts human rights, the impact is reasonable and proportional. The Statement is included at Attachment B to this explanatory statement.
- 10 The instrument was made by Karen Andrews, Minister for Home Affairs, in accordance with sections 18AA, 30BBA and 61 of the Act.



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## Attachment A

### **Details of the *Security of Critical Infrastructure (Application) Rules 2021***

#### **Section 1      Name**

This section provides that the name of the instrument is the *Security of Critical Infrastructure (Application) Rules 2021* (the instrument).

#### **Section 2      Commencement**

This section provides that the instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

#### **Section 3      Definitions**

Section 3 sets out definitions of terms used in this instrument.

#### **Section 4      Application of Part 2 of the Act**

Subsection (1) provides for the application of Part 2 of the Act to the critical infrastructure assets specified in paragraphs (a) to (n) for paragraph 18A(1)(a) of the Act.

Paragraphs 4(1)(m) and (n) of the instrument specify Part 2 as applying to critical electricity assets and critical gas assets that were not critical infrastructure assets prior to the commencement of section 18A of the Act. This is to ensure that Part 2 of the Act applies to assets that newly become a critical electricity asset or a critical gas asset as a result of the implementation of the *Security of Critical Infrastructure (Definitions) Rules 2021* (the Definitions Rules).

It should be noted that paragraph 18A(1)(c) of the Act provides that Part 2 of the Act continues to apply to critical infrastructure assets that were critical infrastructure assets immediately before the commencement of section 18A. For this reason, Part 2 of the Act continues to apply critical electricity assets and critical gas assets that were already critical infrastructure assets immediately prior to the commencement of section 18A. Part 2 of the Act also continues to apply to a critical port, a critical water asset and an asset privately declared under section 51 before the commencement of section 18A of the Amendment Act.

As a result of being listed in subsection 4(1), the responsible entities for these assets have an ongoing obligation to give the Secretary operational information and to notify the Secretary of notifiable events (see sections 23 and 24 of the Act in particular).

The opening words of subsection 4(1) of the instrument exclude the assets mentioned in subsection 4(2) from being specified. This means that Part 2 of the Act does not apply to assets owned or owned by the entities mentioned in subsection 4(2). The purpose of this provision is that sugar mills owned or operated by these entities may fall within the definition of *critical electricity asset* under the Definitions Rules. The exclusion will ensure that these entities do not have obligations under Part 2 of the Act.

The Department recognises that generators run by Mackay Sugar Australia, MSF Sugar Pty Ltd and Wilmar Sugar Pty Ltd are non-scheduled, seasonal generators, and would unlikely impact the electricity network in

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any significant way if they were unavailable. For this reason, the generators run at the following sugar mills will not be subject to the positive security obligations:

- Invicta Sugar Mill, Giru, Queensland
- Pioneer Sugar Mill, Brandon, Queensland
- Racecourse Sugar Mill, Racecourse, Mackay, Queensland, and
- South Johnstone Sugar Mill, South Johnstone, Queensland.

The exclusion will ensure that the entities mentioned in subsection 4(2) do not have obligations under Part 2 of the Act in relation to the assets mentioned in the table.

Subsection 4(3) provides that Part 2 of the Act does not apply to the critical infrastructure assets mentioned in subsection (1) in the period beginning at the time that the asset becomes a critical infrastructure asset and ending the later of 6 months after the commencement of this instrument and 6 months after the instrument becomes a critical infrastructure asset. For example, if an asset becomes a critical infrastructure asset on 1 April, the obligations in Part 2 will generally apply from the following 1 October.

At the time of commencement of this instrument, the time that an asset becomes a critical infrastructure asset may be determined by reference to the commencement of:

- Schedule 1 to the *Security Legislation Amendment (Critical Infrastructure) Act 2021* (the Amendment Act, which inserted the definitions of the terms listed in subsection (1)); or
- the *Security of Critical Infrastructure (Definitions) Rules 2021* (which prescribe detail relating to the definition of terms listed in subsection (1)).

The 6 month ‘grace period’ set out in subsection 4(3) for obligations under Part 2 of the Act does not apply to assets that were already critical infrastructure assets prior to the commencement of section 18A of the Act.

## **Section 5      Application of Part 2B of the Act**

Subsection (1) provides for the application of Part 2B of the Act to the assets specified in paragraphs (a) to (u) for paragraph 30BB(1)(a) of the Act.

Paragraph 5(1)(k) specifies that Part 2B of the Act applies to a *critical education asset*. Section 5 of the Act defines a *critical education asset* as ‘a university that is owned or operated by an entity that is registered in the Australian university category of the National Register of Higher Education Providers’. All Australian universities that fall within this definition are a *critical education asset* under the Act.

Paragraph 5(1)(q) specifies that Part 2B of the Act applies to a critical aviation asset mentioned in subsection (2). Subsection 5(2) mentions a number of aviation assets that fall within paragraph 5(1)(q). The terms used in subsection 5(2) are defined in section 3. The use of the word ‘Australian’ in paragraph 5(2)(b) means that this provision is not intended to include international airlines, but is intended to include domestic (Australian) airlines that conduct international operations in addition to their domestic routes.

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As a result of being listed in subsection 5(1), the responsible entities for these assets have an obligation to notify the relevant Commonwealth body about critical cyber security incidents within 12 hours (see section 30BC of the Act) or of other cyber security incidents within 72 hours (see section 30BD).

The opening words of subsection 5(1) of the instrument exclude the assets mentioned in subsection 5(3) from being specified. This means that Part 2B of the Act does not apply to assets owned or owned by the entities mentioned in subsection 5(3). The purpose of this provision is that sugar mills owned or operated by these entities may fall within the definition of *critical electricity asset* under the Definitions Rules. The exclusion will ensure that these entities not have obligations under Part 2B of the Act.

The Department recognises that generators run by Mackay Sugar Australia, MSF Sugar Pty Ltd and Wilmar Sugar Pty Ltd are non-scheduled, seasonal generators, and would unlikely impact the electricity network in any significant way if they were unavailable. For this reason, the generators run at the following sugar mills will not be subject to the positive security obligations:

- Invicta Sugar Mill, Giru, Queensland
- Pioneer Sugar Mill, Brandon, Queensland
- Racecourse Sugar Mill, Racecourse, Mackay, Queensland, and
- South Johnstone Sugar Mill, South Johnstone, Queensland.

The exclusion will ensure that the entities mentioned in subsection 5(3) do not have obligations under Part 2B of the Act in relation to the assets mentioned in the table.

Subsection (4) provides that Part 2B of the Act does not apply to the critical infrastructure assets listed in subsection (1) in the period beginning at the time that is the later of the commencement of Schedule 1 to the Amendment Act and when the asset becomes a critical infrastructure asset, and ending:

- for an asset that was a critical infrastructure asset immediately before the commencement of section 30BB of the Act—3 months after the commencement of this instrument; and
- for any other critical infrastructure asset—3 months after the asset became a critical infrastructure asset.

As Part 2B was newly inserted into the Act by the Amendment Act, the obligations will not apply to any critical infrastructure asset within 3 months of Schedule 1 to the Amendment Act commencing.

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Attachment B

## Statement of Compatibility with Human Rights

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

### Security of Critical Infrastructure (Application) Rules 2021

This Disallowable 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 Disallowable Legislative Instrument

- 1 The *Security of Critical Infrastructure Act 2018* (the Act) contains positive security obligations intended to enhance Government and industry's understanding of the threat environment faced by Australia's critical infrastructure, and build cyber situational awareness. The positive security obligations comprise of two aspects: reporting to the Register of Critical Infrastructure Assets (the Register) and mandatory cyber incident reporting.
- 2 The Security of Critical Infrastructure (Application) Rules 2021 (the Application Rules) prescribe the circumstances in which specified critical infrastructure assets are required to:
  - provide ownership and operational information to the Register under Part 2 of the Act; and
  - provide reports about cyber incidents to the Australian Cyber Security Centre (ACSC) under Part 2B of the Act.
- 3 To avoid doubt, each aspect of the positive security obligations will only apply once a rule is made in relation to that aspect for a critical infrastructure asset or class of critical infrastructure assets. The rules prescribe which aspects are 'switched on' for a critical infrastructure asset or class of critical infrastructure assets.
- 4 Under section 18A of Part 2 of the Act, direct interest holders and responsible entities for critical infrastructure assets are required to report ownership and operational information to the Register if any of the following apply:
  - the asset is specified in the Application Rules (paragraph (1)(a))
  - the asset is the subject or a declaration under section 51, and the declaration determines that this Part applies to the asset (paragraph (1)(b)), or
  - immediately before the commencement of section 18A of the Act, in accordance with item 2 of the Bill, the asset was a critical infrastructure asset (within the meaning of the Act prior to these amendments commencing) (paragraph (1)(c)).
- 5 Operational information is defined in section 7 of the Act as the information that a responsible entity, or an operator of the asset must provide to the Register in accordance with Part 2, Division 3 of the Act.

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This information is being collected to assist in the Government's understanding of who is in a position to influence the control and operation of critical infrastructure assets.

- 6 Paragraph 18A(1)(a) of the Act, given effect by the Application Rules, effectively works as an 'on switch' through which the Minister can ensure that the reporting obligations only apply in appropriate situations. For example, the Minister may choose not to apply Part 2 to a class of critical infrastructure assets, if the information that would be provided under the obligations is already available to government through other means and therefore the desired security objectives are being achieved. Importantly, this will be used to avoid duplicate reporting to Government and thus reduce regulatory burden.
- 7 Paragraph 18A(1)(b) provides that assets declared to be critical infrastructure assets under section 51 of the Act will be subject to Part 2 if the declaration determines that Part 2 applies to the asset, noting the private nature of those declarations due to the associated security vulnerabilities. This ensures responsible entities of assets declared under section 51 are aware of their obligations under Part 2 without disclosing the identity of these sensitive assets.
- 8 Paragraph 18A(1)(c) of the Act, given effect by the Application Rules, also provides a transitional provision to ensure the obligations in Part 2 will continue to apply, uninterrupted, in relation to those critical infrastructure assets that had existing obligations under the Part immediately prior to the commencement of section 18A of the Act.
- 9 Under Part 2B of the Act, responsible entities of specified critical infrastructure assets will be required to report cyber security incidents to the relevant Commonwealth body. Collecting this information will support the development of an aggregated threat picture to inform both proactive and reactive cyber response options – from providing immediate assistance to working with industry to uplift broader security standards
- 10 Section 30BB of the Act provides that the mandatory notification requirements in Part 2B apply to a critical infrastructure asset if:
  - the asset is specified in rules (Application Rules) made by the Minister under section 61 of the Act (paragraph (1)(a)), or
  - the asset is subject to a declaration under section 51 of the Act (which enables the Minister to make a private declaration that an asset is a critical infrastructure asset) and the declaration under section 51 determines that Part 2B applies to the asset (paragraph (1)(b)).
- 11 This effectively works as an 'on switch' through which the Minister can ensure that this particular aspect of the positive security obligations only applies in appropriate situations.
- 12 Similar to new section 18A of the Act, this section allows for a nuanced, sector-specific or asset-specific approach to be taken on the application of this obligation in new Part 2B. In determining whether to make rules to apply the obligations under Part 2B to certain critical infrastructure assets, the Minister is likely to consider the appropriateness of any existing arrangements or requirements for responsible entities of those assets to report to Government or regulators the occurrence of a cyber-security incident or incidents, or other arrangements to provide the required visibility of the threat environment. If existing arrangements are deemed to be appropriate and effective, the Minister is unlikely to activate the reporting requirements in relation to the relevant critical infrastructure assets.

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- 13 A note to sections 18A and 30BB indicates that specification by class is permitted by way of subsection 13(3) of the *Legislation Act 2003*. This subsection relevantly provides that a power to make a legislative instrument specifying a matter may identify the matter by referring to a class or classes of matters. This note has been included to clarify that the Minister has the discretion to specify in rules that Part 2 and Part 2B applies to:
- all critical infrastructure assets,
  - a category of critical infrastructure assets such as critical broadcasting assets,
  - a subset of assets within a category of critical infrastructure assets, such as liquid fuel pipelines that are critical liquid fuel assets, or
  - a specific asset that is a critical infrastructure asset.
- 14 Both sections 18A and 30BB provide for the ability to offer a delayed commencement or ‘grace period’ in the future when an entity becomes a critical infrastructure asset, allowing the entity a reasonable period to adjust their business.

## Human rights implications

- 15 This Disallowable Legislative Instrument engages the following human rights:
- the right to an adequate standard of living, including the right to adequate food in Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
  - the right to the enjoyment of the highest attainable standard of physical and mental health, including medical service and attention in the event of sickness in Article 12 of the ICESCR; and
  - the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

## The right to an adequate standard of living, including the right to adequate food

- 16 Article 11 of the ICESCR provides for the right of everyone to an adequate standard of living, including adequate food. Article 11 commits States Parties to the Covenant to improve methods of production and distribution of food.
- 17 Direct interest holders and responsible entities for critical infrastructure assets specified in the Application Rules will be required to report ownership and operational information to the Register to which Part 2 of the Act applies. Information obtained will inform Government and industry’s understanding of who has influence and control over infrastructure that is critical to the provision of essential services and supplies that maintain and sustain life throughout Australia. This includes, but is not limited to, food and grocery, and freight services.
- 18 Responsible entities for critical infrastructure assets specified in the Application Rules will also be required to report cyber security incidents to which Part 2B of the Act applies. Information obtained through cyber incident reporting will enable Government to identify and rapidly respond to emerging threats.



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- 19 Overall, an enhanced understanding of the evolving threat environment will improve Government's ability to work with industry to reduce the likelihood of a disruption to distribution networks and other key operations of Australia's major supermarkets, which could impact the availability of critical food and groceries.

## **The right to the enjoyment of the highest attainable standard of physical and mental health**

- 20 Article 12 of the ICESCR provides for the right of everyone to the enjoyment of the highest attainable standard of health. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health.
- 21 Hospitals are crucial to Australia's ability to fulfil this obligation as they provide critical care for patients with a variety of medical, surgical and trauma conditions, and are therefore integral to the sustainment of life.
- 22 The Application Rules require responsible entities of critical hospitals, and other specified critical infrastructure assets with a high degree of interdependency with critical hospitals (such as assets within the energy sector), to report ownership and operational information to the Register and report cyber security incidents to the ACSC.
- 23 An enhanced understanding of the evolving threat environment will improve Government's ability to work with industry to reduce the likelihood of a disruption to health and medical services that are essential for promoting the highest attainable standard of physical and mental health within Australia.

## **Right to privacy**

- 24 Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Interferences with privacy may be permissible provided that where it is authorised by law and is not arbitrary. For an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted 'reasonableness' in this context to mean that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.
- 25 The term unlawful means that no interference can take place except as authorised under domestic law.
- 26 The Application Rules may engage the right to privacy in relation to:
- responsible entity (owners or operators) for an asset
  - the responsible entity's employees, or
  - the responsible entity's customers/consumers.
- 27 For critical infrastructure assets specified in the Application Rules, responsible entities will be required to report ownership and operational information to the Register and cyber incidents to the ACSC. This will allow certain powers to be used in relation to those prescribed assets, and may engage the right to privacy of the asset's responsible entity, employees or customers. Such information is held securely by the Government and will not be made available on a public register.

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## *Responsible entities*

- 28 In ‘switching on’ the obligations under the Act for a critical infrastructure asset that is an individual, the following measures may engage the right to privacy under Article 17 of the ICCPR:
- mandatory notification of cyber-security incidents (Part 2B of the Act); and
  - the obligation of a reporting entity for a critical infrastructure asset to give information and notify of events for the Register of Critical Infrastructure Assets (Part 2, Division 2 of the Act).

## *Register of Critical Infrastructure Assets – obligations to give information and notify of events*

- 29 Whilst the collection of personal information will be rare, Part 2 of the Act requires the responsible entity of critical infrastructure assets to provide the Secretary of the Department administering the Act with certain interest and control information in relation to the entity and the asset, which is maintained in a Register.
- 30 The requirements for the Register may result in the incidental collection of personal information in relation to responsible entities who are individuals. The responsible entity for specified critical infrastructure assets is required to provide high-level information on who ultimately controls or influences an asset through ownership, including beneficial ownership, or through operation arrangements, such as outsourcing arrangements.
- 31 The Register is used by the Government to prioritise and inform risk assessments to identify and manage national security risks in critical infrastructure assets. The interest and control information and operational information on the Register provides the Government with a more comprehensive understanding of how the asset and sector operates, and where there may be vulnerabilities. The information on the Register also influences the Government’s ability to develop strategies to mitigate or reduce national security risk for assets which, if disrupted, would significantly impact the operations of large population hubs, economic interests and government operations.
- 32 The Government has taken sufficient steps to ensure that the limitations on the right to privacy are no more restrictive than necessary as the use and disclosure of information on the Register is restricted to purposes authorised under the Act. All information obtained under the Act, including the information provided for the Register, is protected information. It is a criminal offence to use or disclose protected information other than as authorised by Part 4, Division 3 of the Act. This Division enables disclosure for national security, foreign investment in Australia, taxation policy, industry policy, defence purposes or to assist regulatory bodies with oversight of any relevant industry for the critical infrastructure asset. Part 4, Division 3, Subdivision B of the Act provides criminal penalties to deter the disclosure of protected information.
- 33 The information on the Register may be shared with the relevant states and territories. This information may have broader policy implications for states and territories, particularly in relation to maintaining the security and resilience of critical infrastructure assets vital for their jurisdiction. This acknowledges that the states and territories, as owners and regulators of critical infrastructure assets share the responsibility with the Government to manage national security risks.
- 34 Further, safeguards for the protection of personal information specified in the Australian Privacy Principles (APP) under the *Privacy Act 1988* will apply to interest and control information, and operational information gathered under Part 2, and Part 2B of the Act. This includes requirements

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regarding the security of personal information specified under APP 11 and requirements regarding use or disclosure under APP 6.

- 35 To the extent that the Register may result in the incidental collection of personal information and limit the right to privacy in Article 17, this limitation is permissible as the collection of personal information would be lawful, would not be arbitrary and would be reasonable, necessary and proportionate to achieving a legitimate national security objective.

### *Secretary's powers to obtain information or documents*

- 36 The Secretary's information gathering power is a permissible limitation to the right to privacy. Subsection 37(1) of the Act empowers the Secretary to request certain information from reporting entities and operators of critical infrastructure assets. The Act allows for the Secretary to request information or documents that may be relevant to:
- the Secretary's duty and function to keep a Register under section 19
  - the Minister's power to issue a direction under subsection 32(2),
  - the Secretary's power to issue a direction under subsection 35AK(2), and
  - the Secretary's power to undertake an assessment of a critical infrastructure asset to determine if there is a national security risk under section 57.
- 37 The information requested may include procurement plans, tender documentation, contracts, name and citizenship of board members and other documents specifying business operations. The notice may require the provision of personal information, which may limit the right to privacy.
- 38 The information gathering power is limited to obtaining information or documents that are directly relevant to the purposes of the legislation, as stated in the objects of the Act, as well as the functions, duties, powers and purposes prescribed in the Act. Any personal information collected is incidental to the key objective of developing a more detailed understanding of possible national security risks.
- 39 This power was drafted with reference to the Administrative Review Council's best practice principles for implementing and exercising information gathering powers in its 2008 report, *Coercive Information Gathering Powers of Government Agencies*.
- 40 In practice, Government agencies will also engage with the relevant entity prior to issuing a notice to discuss the nature of the information required and, if necessary, the terms of the notice. Engagement with the relevant entity will ensure that prior to issuing a notice a range of matters including the impact on the right of privacy will be considered. This ensures the Secretary's notice is a proportionate response, balancing the impacts on privacy with the Government's objective of addressing national security risks to critical infrastructure.
- 41 The information and documents provided to the Secretary in response to a request are protected information and the use and disclosure of the information is restricted in line with provisions at Part 4, Division 3 of the Act. This Division enables disclosure for national security, foreign investment in Australia, taxation policy, industry policy, defence purposes or to assist regulatory bodies with oversight of any relevant industry for the critical infrastructure asset. Part 4, Division 3, Subdivision B of the Act provides criminal penalties to deter the disclosure of protected information.

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- 42 The information on the Register may be shared with the relevant states and territories. This acknowledges that the states and territories, as owners and regulators of critical infrastructure assets share the responsibility with the Government to manage national security risks.
- 43 Further, safeguards for the protection of personal information specified in the Australian Privacy Principles (APP) under the *Privacy Act 1988* will apply to interest and control information, and operational information gathered under Part 2, and Part 2B of the Act. This includes requirements regarding the security of personal information specified under APP 11 and requirements regarding use or disclosure under APP 6.
- 44 To the extent that the Secretary's information gathering powers may result in the incidental collection of personal information and limit the right to privacy in Article 17, this limitation is permissible as the collection of personal information would be lawful, would not be arbitrary and would be reasonable, necessary and proportionate to achieving a legitimate national security objective

### Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the objective of reducing national security risks, including those presented by cyber threats, to critical infrastructure.