

Submission to the Senate Standing Committee on Finance
and Public Administration Inquiry into the –



Human Services (Enhanced Service Delivery) Bill 2007

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Office of the
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TABLE OF CONTENTS

Summary	1
1 Commencement (Part 1, Division 1: clause 2)	3
2 Interpretation (Part 1, Division 3)	3
Definitions (clause 5)	3
‘benefit’	3
‘benefit card’	3
‘chip’	4
3 Objects and purposes of the Act (Part 1, Division 4)	5
Objects of the Act (clause 6)	5
Purposes of the Act (clause 7)	6
Power of the Minister to issue policy statements (clause 8)	6
4 Application of the Act (Part 1, Division 5: clause 9)	7
5 Getting registered (Part 2, Division 2)	7
Applying for registration on behalf of another (clause 13)	7
Secretary’s discretion to register individuals (clauses 13-15)	7
6 The Register (Part 2, Division 3)	8
Manner and form of the Register (clause 16)	8
Information included on the Register (clauses 17-19)	9
7 Getting an access card (Part 3, Division 2)	12
Eligibility (clause 22)	12
Applying for an access card on behalf of another (clause 23)	13
Secretary’s discretion in relation to the access card (clauses 23-26)	13
8 Information on the Access card (Part 3, Division 4)	14
Information on the surface (clause 30)	14
Signature	14
Card number	15
Date of birth	15
Information in the chip (clause 33)	15
Information in the Commonwealth Area of the chip (clauses 34-35)	16
9 Ownership of the access card (Part 3, Division 5: clauses 37-38)	17
10 Use of the access card (Part 3, Division 6: clauses 40-42)	17
11 Offences (Part 4)	18

Offences for requiring production of an access card (clauses 45-46)	18
Offences for doing things to access cards (clause 48)	19
Other access card offences (clauses 54 and 57)	19
12 Delegations and authorisations (Part 5, Division 3: clause 72)	20

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Summary

1. For the first time, Australia is to have the equivalent of a national population register. Although the federal government claims that registration for the 'access card' is voluntary, the reality is that since the card is the means to claim Medicare benefits only the most financially privileged are likely to have such a choice. The creation of such a register has enormous privacy and security implications. Yet the scheme is being introduced in haste, with the legislation underpinning it being introduced in an incoherent, piecemeal fashion. The present Bill does not address administrative review or privacy issues. Other important areas that are missing are how dependants, carers and other linked persons are dealt with, issues relating to the cardholder's area of the chip and the protection of information. The Privacy and Consumer Taskforce is yet to report on important issues such as registration and concessions. These omissions mean that those attempting to assess the scheme and the effectiveness of the legislative safeguards are required to do so as if blindfolded.
2. In summary, the proposed scheme raises significant privacy and security concerns because:
 - a. The present Bill does not address major areas including privacy. If passed in its present form the scheme could proceed without those matters ever being addressed. The present federal *Privacy Act 1988* does not adequately protect a national population data base. It does not regulate all the potential authorised users of the card, such as state and territory governments. The protections need to be stronger and purpose-built. The legislation should not be passed until the Fels Taskforce has produced all its reports and all proposed legislation underpinning the scheme is introduced.
 - b. The card will not only be required for individuals to access Commonwealth benefits such as Medicare, unemployment benefits and pharmaceutical benefits but may be required to be produced to any organisation giving concessions to Commonwealth benefit recipients. This includes the health sector, state public transport systems, driver licensing authorities and private sector entities providing concessions. Organisations giving concessions will require readers since the individual's particular concession status will no longer be recognisable on the face of the card.
 - c. 'Authorised users', as currently drafted, include officers from any prescribed Commonwealth and non-Commonwealth organisations. This can include state agencies and private sector agencies that provide concessions. Authorised users have considerable powers to access information on the Commonwealth part of chip of the card and to alter it. The richness of the data will be of great attraction to many. The creation of criminal offences and audit logs will not protect it from unauthorised access and misuse.

- d. The proposed use of the card to obtain emergency payments means that the information on the chip will be capable of being read by ATMs, thus increasing the risk of unauthorised access. These are notoriously vulnerable to misuse and attack.
 - e. Cards will be used at EFTPOS facilities (eg at doctors, pharmacists and various retail outlets). EFTPOS is another source of potential misuse and unauthorised access. The proliferation of places where cards can be read creates an unacceptable level of security risk.
 - f. The chip on the card is said to be ‘at least’ 64 kilobytes. If a higher capacity (128 kilobytes) can be supplied with little extra cost it is likely to be chosen to embrace potential changes in technology. Representatives from the Office of the Access Card (OAC) advised in briefings that the Commonwealth only requires 40 kilobytes, potentially leaving substantial capacity for the customer-controlled area of the chip.
 - g. The Bill states that an individual can use the customer-controlled part of the chip in whatever way they choose. This raises the potential for state and territory governments and the private sector seeking individuals’ ‘consent’ to populate the customer-controlled part of the chip, for example with drivers’ licences, public transport ticketing and banking information. The more personal information held in the chip, the greater the attraction for those that wish to misuse it. Enabling the card to carry out a multiplicity of functions creates the need for stronger protections to protect the information.
 - h. In OAC briefings and public statements, it is said that card holders will be able to access, change and update information in the customer-controlled part of the chip from home computers through the internet. The internet is not a secure environment for access to such a rich source of information, and home computers are notoriously vulnerable to security breaches (eg through the use of spyware). The ability for card holders to access and change their own information raises data quality issues. For example is it safe to give individuals the right to update their own health information that might be acted on in an emergency?
3. The desire to create one card that is “all things to all people” creates unacceptable privacy risks that far outweigh any benefits that a single card might bring. The Bill in its present form does not address those risks. It is impossible to judge whether the proposed legislative scheme is capable of addressing those risks, as it is incomplete.

1 Commencement (Part 1, Division 1: clause 2)

4. **Clause 2** provides that the main portions of the Bill will commence within 18 months of Royal Assent or sooner by Proclamation. The Bill does not yet address significant issues, such as the registration of individuals by their parents or carers and the management of the cardholder's area of the chip. Privacy and other safeguards have not yet been included. If passed in its current form, this Bill will establish the framework and authority that compels individuals to register and obtain a card in order to access health and other benefits – but without the necessary details and protections set out under law.
5. **Recommendations:**
 - a. The Bill should not be passed by Parliament until the safeguards and other matters have been entrenched in legislation to a standard acceptable to the community through its Parliamentary representatives.
 - b. If Parliament decides to proceed with this Bill's passage, then the commencement clause should be amended to expressly link the commencement of this Bill with the related Bills which are yet to be considered and enacted by Parliament.

2 Interpretation (Part 1, Division 3)

Definitions (clause 5)

'benefit'

6. "Benefit" is defined broadly to include any concession, grant or payment and any card or voucher entitling its holder to a concession or a payment of any kind. This definition potentially appears to extend the scheme to include any concession etc a person might have, whether for government services (state or federal) or for goods or services obtained from private sector entities. The Explanatory Memorandum (EM) p 8 states that this definition is relevant to the definition of 'Commonwealth benefit' and 'participating agency' and these definitions will limit the scope to benefits provided by 'participating agencies'. However it is not apparent how it limits it, or why, in that case, it is necessary to have a separate definition of 'Commonwealth benefit' if the intention is to limit the scope in the way stated. (see also comments on Clause 7 below).
7. **Recommendation:** The definition of 'benefit' should be amended to clarify the intention that cards and vouchers to be prescribed by regulations are only those that are issued by a participating agency administering a Commonwealth benefit.

'benefit card'

8. The list of cards included within the definition of "benefit card" is open-ended. In addition to cards relating to health and social welfare services (eg Pensioners Card and Health Care Card), the definition includes 'a card or voucher prescribed by the regulations'. The Bill does not appear to require such a card to relate to

Commonwealth health or social services, although the EM (p 8) suggests that is the intention and it is there only in the event of another benefit card being issued by a participating agency before the scheme takes effect. However, the definition leaves it open to include any card or voucher in yet-to-be drafted regulations.

9. **Recommendation:** The definition of ‘benefit card’ should be amended to clarify that the term is intended to be limited to payments and other allowances relevant to accessing Commonwealth health and social services.
10. The breadth of the definition is significant in that it allows the operation of the access card regime to be vastly expanded by extending:
 - a. the amount and nature of information collected on the Register (clause 17, item 7);
 - b. the amount and nature of information included in the Commonwealth area of the card’s chip (clause 34, item 10); and
 - c. the circumstances in which it is lawful for persons (other than delegates and other authorised persons) to demand production of the access card for the purposes of identification (clauses 45(1)(d)(i) and 45(2)(d)(i)) and for the supply of goods and services (clause 46(1)(d)(i) and 46(2)(d)(i)).

‘chip’

11. The term ‘chip’ is intentionally defined in a broad way to keep up with technological changes (EM p 8). The reference in the definition to “any other device that stores or processes information” is quite broad and can include a range of existing and emerging technologies that carry potential privacy risks.
12. As drafted, the definition would authorise the use of Radio Frequency Identification (RFID) chips to be included in each card. RFID chips (or ‘tags’) not only store data about a person but can also transmit their location to a remote device. The use of RFID or other location-tracking technologies in the access card would clearly raise privacy risks that would require further assessment and community debate. An open-ended definition designed to enable the adoption of new technologies leaves open the possibility of function creep and may raise new privacy issues.
13. **Recommendations:**
 - a. The definition of ‘chip’ should be expressly limited to ensure that new technologies are not introduced without public and Parliamentary scrutiny.
 - b. If the Bill is to allow new technologies to be adopted and inserted into the card, there should be a requirement for a Privacy Impact Assessment (PIA) to be carried out. The PIA should be a public process and involve input by the community and Parliament.

3 Objects and purposes of the Act (Part 1, Division 4)

Objects of the Act (clause 6)

14. **Clause 6(2)** expressly states that it is an object that the access cards are not to be used, and do not become, a national identity card. In spite of these claims, the practical outcome is that the access card is an identity card because:
- a. except in exceptional circumstances, it will be mandatory from 2010 to present the card in order to access Commonwealth benefits, including Medicare (EM p3);
 - b. virtually every resident of Australia, from birth, will need to access Medicare;
 - c. it is in fact an ‘identity card’ because the whole purpose of registering is to ensure (as far as possible) that people are correctly identified (EM p3). The card is intended to allow the person presenting the card to be identified by the card with name, photograph, signature and other optional information about themselves;
 - d. the Bill takes the additional step not taken in the exposure draft of referring expressly, in the Register and in the card’s chip, the extent to which a person has satisfied the Secretary of their identity (clause 17(1), items 8(c) and (d); and clause 34(1), item 14) – without any explanation or indication as to how this information is relevant to eligibility of access to health and social services;
 - e. one of the permitted uses of the card is to identify individuals for the purpose of confirming their concession status. This potentially means that it can be required to be produced as a means of identification by state and territory governments, local government and private enterprise which are offering concessions to those in receipt of Commonwealth or other benefits (see EM p 44 and 45, and clause 45(1)(d)(i) and clause 46(1)(d)(i)); and
 - f. an express object of the Act is to allow card holders to use the access card for any lawful purpose they choose (clause 6(1)(e), and see clause 40). As expressly stated (EM p14), ‘if individuals choose to use the card for identity purposes they may do so’. The use of the card as an identity card is being expressly promoted through the mechanism of ‘consent’ and ‘choice’.
15. **Recommendation:** If the intent expressed in clause 6(2) is genuine, then the card should not be permitted to be used as identity card outside of the health and social services context. Organisations should not be permitted to request that individuals ‘consent’ to using the card as a form of identity outside of this context. There should be no need to distinguish whether someone has ‘fully’ satisfied the Secretary as to his/her identity, or whether identification has been verified to a lesser status.
16. It is questionable whether other objects of the Act set out in **clause 6** will be achieved on information provided to date:
- a. the scheme will not ‘reduce the complexity of accessing Commonwealth benefits’ or make it ‘more convenient and user-friendly’ for the majority of the population who only hold a Medicare card and receive health and

pharmaceutical benefits. In fact the registration and application for the card processes are far more onerous than the present scheme;

- b. the rigorous registration and application process is likely to increase the complexity of accessing Commonwealth benefits for the most vulnerable, such as persons with limited English and homeless persons;
 - c. apart from sweeping claims, no evidence has been produced as to the likely effectiveness of the scheme in reducing fraud, or whether the saving in the claimed reduction will outweigh the cost of the scheme; and
 - d. it has not been explained how having the access card will improve access to Australian Government emergency relief, particularly if individuals' cards are lost or destroyed in the disaster.
17. **Recommendation:** The Explanatory Memorandum accompanying the Bill should provide a reasoned basis for how the proposed legislative scheme is going to achieve the objects set out in clause 6.

Purposes of the Act (clause 7)

18. **Clause 7** sets out the purposes of the Act. As noted at EM p15, this is tied to the offence provisions. The purposes on the face of it may appear narrow, but in fact may be interpreted broadly. The EM (p15) states that the words “to facilitate the provision of benefits, services, programs or facilities” is intended to ensure that the purpose extends to preventing obtaining of Commonwealth benefits by persons not entitled to them. But the wording is sufficiently broad to encompass activities such as data linkage and research as well as investigation and prosecution of fraud.
19. **Recommendation:** If the purposes (and consequently, authorised uses) are intended to extend to investigation and prosecution of fraud, or facilitation of research to better target service delivery, then these purposes (and uses) should be expressly stated. Otherwise the purpose clause and the accompanying explanatory note needs to be more precisely drafted.

Power of the Minister to issue policy statements (clause 8)

20. **Clause 8** authorises the Minister to issue policy statements setting out the Australian Government's policy in relation to administration of the Bill. Although it is said that this clause does not authorize the Minister to issue policy statements inconsistent with the Act (EM p 16), it is noted this provision:
- a. is not a legislative instrument; and
 - b. allows there to be a change in policy in the administration of the card without the matter going back to Parliament, even though the changes will need to be tabled.
21. Given the breadth of discretion proposed to be given to the Secretary and his or her delegates (discussed later in this Submission), policy statements governing the manner in which the scheme will be administered take on greater significance. These documents may also affect individuals' review rights, should they be denied registration or an access card.

22. **Recommendation:** Clarification is sought about the effect of the Minister’s policy statements on individuals’ eligibility and rights of review.

4 Application of the Act (Part 1, Division 5: clause 9)

23. **Clause 9** states that, although the Act binds the Crown, the Crown is not liable to be prosecuted for an offence. If Crown immunity protects Commonwealth agencies from being prosecuted for misusing the information on the Register or the access card, or requiring the card to be used as an identity card for purposes other than permitted by the Act, then the offence provisions provide a limited assurance.
24. **Recommendation:** Clarity is sought about how the offence provisions in Part 4 will act as a deterrent or accountability mechanism if officers of Commonwealth agencies breach the Act but are immune from prosecution.

5 Getting registered (Part 2, Division 2)

Applying for registration on behalf of another (clause 13)

25. **Clause 13** allows an application for registration to be made on behalf of another person. This potentially raises significant data security and privacy issues that need to be addressed to ensure an application can only be made on behalf of another by a person who is properly authorised to do so, and proper safeguards are in place to ensure false applications are not made and persons with a legal incapacity are protected.
26. The Consumer and Privacy Taskforce has yet to consult with the community about these issues, and legislation has yet to be drafted setting out the necessary details.
27. **Recommendation:** The Bill should not authorise applications to be made on another’s behalf without providing the necessary detail as to who is authorised, how that authority is established and verified, and what protections are in place to prevent unauthorised registration or access cards from being issued. The Bill should not be passed in its current form until these matters are addressed.

Secretary’s discretion to register individuals (clauses 13-15)

28. The registration process throughout Part 2 gives wide discretion to the Secretary, leaving the boundary of the scheme administratively open-ended. The Secretary has the discretion to determine:
- a. the manner and form of applying for registration (clause 15(1)(b) and (2)(a)).
 - b. the information and documents required to satisfy the Secretary of a person’s identity when applying for registration (clause 13(2)(b));
 - c. any additional information and documents required to allow the Secretary to assess the application for registration (clause 13(4));
 - d. whether he or she is satisfied as to a person’s identity such that the person must be registered (clause 14(c)); and

- e. when registration takes effect, including a date that is before (or a date that is *after*) the date of application (clause 15(2)), thereby affecting when a person is able to access Commonwealth benefits.
29. Although the Secretary is now required to consult with the Privacy Commissioner regarding the form of application and take into account any comments, failure to do so does not affect the validity of the approval. While on the face of it, this may seem to be of benefit to the applicant, the provision provides little incentive for the Secretary to comply with the requirement.
 30. **Recommendation:** The Act should require the Minister or the Secretary to publish the Privacy Commissioner's advice and provide reasons why the advice was not followed if that is the case.
 31. While such discretion allows the Secretary (or his or her delegate) to have some flexibility in dealing with exceptional cases where an individual may not be able to meet the formal requirements expected of most applicants, the breadth of discretion also permits the process to be made more onerous or the collection of information more intrusive.
 32. **Recommendation:** The discretions given to the Secretary should be limited. Determining the boundaries of eligibility for access to health and social welfare benefits is more appropriately a matter for Parliament. Where flexibility is desired, safeguards must be included to ensure privacy is protected for example, by expressly limiting the amount and nature of personal information collected to what is necessary for determining eligibility.
 33. **Clause 14** requires the Secretary to register a person only if satisfied of his/her identity. There is no provision in the present legislation as to rights of appeal should the Secretary decide not to register a person. These matters need to be addressed. Given the impact on a person (especially the most vulnerable) should the Secretary refuse registration it is vital the appeal process is accessible and independent of the Secretary.
 34. **Recommendation:** The Bill should include provisions dealing with individuals' rights of review in the event that the Secretary refuses to register them. The Bill should not be passed without addressing this issue.

6 The Register (Part 2, Division 3)

Manner and form of the Register (clause 16)

35. **Clause 16** gives the Secretary wide discretion to determine the form and manner in which the Register is kept. The manner and form that the Register is kept will not be subject to Parliamentary scrutiny or disallowance, as the Register is not a legislative instrument (clause 16(3)).
36. It is stated (EM p 20) that it is proposed that the Register be kept in electronic form and that clause 16 is drafted in such a way as to allow the Register to keep pace with future technological developments. The EM also states that the Register will be separate from other databases maintained by Centrelink and other Commonwealth agencies and there would be no centralised database holding a person's information in one place. However the Bill does not expressly prohibit this, or prohibit those databases (and the

information on them) being linked or aggregated where it would enable participating agencies to facilitate the delivery of health and other benefits. The creation of a unique identifier (the Access Card number) creates the potential for such linkage and aggregation. Clause 16 leaves it up to the Secretary.

37. The form and manner in which the Register is to be kept will have a significant impact on the privacy interests of individuals and the necessary security and other safeguards that must be considered and established.
38. **Recommendation:** The form and manner in which the Register is to be kept should be set out in the legislation or regulations. Prohibitions such as keeping the Register separate from other databases should be expressly included in the Bill.

Information included on the Register (clauses 17-19)

39. **Clause 17** lists information that must be included on the Register. The Register will contain a significant amount of personal information which, if unlawfully accessed, may have serious consequences for individuals, including identity fraud and theft. The Register will be a population database, containing personal information about the identity of almost all citizens/residents of Australia and some overseas visitors. The Bill is silent as to who will be able to access or use information on the Register, and for what purpose.
40. **Recommendation:** The Bill should address who has access to the information on the Register, and for what purposes. The Bill should not be passed without addressing this issue.
41. As with the application process, the Secretary is given a broad discretion to determine what is on the Register. Clause 17 allows the Secretary to decide:
 - a. whether or not a person's date of birth is included on the Register (clause 17(1), item 2);
 - b. information about a person's citizenship or residency (clause 17(1) item 3(b) & (c));
 - c. what information about a particular benefit card should be included on the Register (clause 17(1), item 7));
 - d. whether an applicant's proof of identity is 'full' or 'interim' (clause 17(1), items 8(c) and (d)). Apart from this reference and a later reference in relation to the Access Card (clause 34(1), item 14), there is no information as to how the Secretary decides whether proof of identity is 'full' or 'interim', what the impact of such a determination is, or whether there are any rights of appeal against the decision;
 - e. to include copies of identity and other related documents on the Register (clause 17(1) item 12(a)) and information about that document (item 12(b)); and
 - f. to include any technical or administrative information the Secretary thinks is reasonably necessary to administer the Register or the person's access card (clause 17(1), item 17). The only qualification to this provision is that the information does not *expressly* identify the person by name or other personal

identifier. This does not preclude information from which a persons identity can be reasonably ascertained.

42. **Recommendations:**

- a. The references to ‘full’ and ‘interim’ status should be deleted if, as suggested earlier in this Submission, the intent is to distinguish between those individuals who have satisfied a higher standard of identity verification without having any relevance to eligibility for health and social services.
- b. If the distinction is relevant, then the Explanatory Memorandum should provide an explanation of the intent and effect of including ‘full’ or ‘interim’ registration status on the Register.

43. Each of the determinations by the Secretary is not subject to Parliamentary scrutiny or disallowance, as they are not legislative instruments (clause 17(2)).

44. **Recommendation:** The discretion given to the Secretary should be limited in such a way as to ensure that excessive or intrusive information or documents are not collected and/or included on the Register.

45. Other matters of particular concern include:

- a. the mandatory inclusion of a residential address on the Register (clause 17(1) item 6(a)), which may only be excluded from the Register where a person is included on the National Witness Protection Program or such inclusion is inconsistent with a Commonwealth law (clause 18 (1)). There is no other provision allowing for an exemption for other persons at high risk of personal security if their residential address is known;

Recommendation: The Bill should provide for a person’s details to be excluded or suppressed in additional circumstances, such as where there are concerns for the individual’s or their family’s safety. The Bill may also need to be amended to take into account the potential for exposing assumed identities adopted by law enforcement officers.

- b. every cardholder’s photograph and digitised signature must be included on the Register (clause 17(1) items 9(f) and (g)), which are capable of being misused for identity theft/fraud purposes if there is unauthorised access to the Register;

Recommendation: The Bill should not authorise the creation of a population database of photographs and digital signatures. If these details are to be collected, they should be stored separately and access more strictly limited to minimise the inherent risks of function creep and misuse.

- c. the inclusion on the Register of email address and phone numbers, at the cardholder’s request (clause 17(1) items 6(c) and (d)), appears unnecessary and likely to quickly go out of date – such details would be better provided to individual agencies with whom the cardholder has an ongoing or current relationship. Agencies that do not have such a relationship with the cardholder do not need to know their current contact details;

Recommendation: Email and phone details should not be included in the Register but instead be left to the administrative collection by agencies who have an ongoing relationship with the cardholder.

- d. the retention of copies of identity and other documents on the Register (clause 17(1) item 12,) creates risks of unauthorised reproduction to commit identity theft or other fraud. Through those copies, the collection of other agencies' unique identifiers (such as drivers licence and passport numbers) itself creates risks of unauthorised linkage and profiling or other misuses;

Recommendation: Identity documents should not be copied and included on the Register. Sighting identity documents at the time of registration may be adequate. Where copies are required, these should be held separately, with appropriate security and disposal measures in place.

- e. the access card number, which must be included on the Register (clause 17(1) item 9(a)), is a unique identifier that can be used to facilitate data linkage. As discussed earlier, although the Register is intended to be separate from the databases maintained by the various delivery agencies, the access card number creates a system that allows for information on the Register to be linked or aggregated with the information contained on any or all of those databases;

Recommendation: As discussed elsewhere in this Submission, the Bill should more expressly detail who has access to information on the Register, and what uses of the access card number are permitted or prohibited.

- f. reference is made to a personal identification number (PIN) (item 9(d)) and/or a password (item 9(e)) for the access card. These appear to be optional requirements.

Recommendation: Clarification is sought as to why or when a PIN number or password would be required. If they are needed for security reasons, they should not be optional.

- g. an emergency payment number is to be included (Clause 17(1), item 15). The EM (p 24) provides no explanation as to why it needs be included save to say that the number does not include an individual's personal banking details. It is, however, the means by which a card holder obtains emergency relief in a variety of situations;

Recommendation: The Explanatory Memorandum should be amended to clarify why the emergency payment number is included in the Register.

- h. there is no provision regarding the removal of information from the Register. If anything, it appears to be intended that information will be retained even after a person dies (clause 17(1) item 16);

Recommendation: The Bill should set address disposal and destruction obligations for the information and documents included in the Register.

- i. the inclusion on the Register of optional information such as whether a person is Aboriginal or Torres Strait Islander. This item was not included in the exposure draft bill, and the EM does not explain why it has been included.

Recommendation: If information about indigenous status is not necessary for the purposes of registration, it should not be included. The more personal information held on the Register, the more vulnerable it is to unlawful access and misuse.

46. **Clause 18** provides the Secretary must not include information that would be inconsistent with a Commonwealth law. This takes no account of state or territory legislation that may, for instance, provide for protection of a persons' identity (such as in the case of assumed identities for law enforcement purposes) or other circumstances where a person may have safety or other concerns about the inclusion of their identities and contact details on the Register. This is of particular concern, given that the Bill does not deal with who may access or use information contained on the Register, for what purposes, or under what circumstances.
47. **Recommendation:** As proposed earlier, the Bill should provide for personal details on the Register to be excluded or suppressed where there are personal safety or other concerns.
48. **Clause 19** permits the temporary inclusion of information (such as Medicare number) on the Register before being transferred to the Commonwealth area of the chip on the access card and is docked It is said to be privacy enhancing (EM p25).
49. **Recommendations:** Clarification is sought as to why it is necessary to put information on the Register that it is not ordinarily included rather than retained in the relevant agency that holds it. In principle, temporary information should be held and disposed of separately from permanent information kept on the Register.

7 Getting an access card (Part 3, Division 2)

Eligibility (clause 22)

50. **Clause 22** sets out who is eligible for an access card. A person must be registered on the Register before being eligible for a card. Only persons who are at least 18 are entitled to apply for an access card unless exempted by the Secretary, the Minister or DVA Secretary or Minister (Clause 65). The requirement to be at least the age of 18 raises significant issues, including privacy issues, for persons under the age of 18 who may wish to access medical services under Medicare, but are not able to do so because they do not have an access card. Apart from the discretion to provide an exemption, the Bill does not otherwise address this.
51. Under the present Medicare scheme, persons aged 15 can obtain their own Medicare card. Persons aged 12 and over can attend a doctor/health carer without their parent or guardian present and their attendance is confidential. The proposal to not allow persons under 18 to have an access card removes the safeguards on young people's privacy. The EM (p 26) states that the Minister who has the power to exempt classes of individuals will be able to exempt persons under 18. If this is the intention it is not clear why the age limit of 18 is set in the legislation.
52. **Recommendation:** Provision needs to be made in the Bill to enable young persons under 18 to obtain medical and other services without the knowledge of the person who

applies and holds an access card on their behalf, without having to seek an exemption from the Secretary.

Applying for an access card on behalf of another (clause 23)

53. **Clause 23** provides that person may apply on behalf of another person for an access card. As previously discussed in relation to an application to be placed on the Register, this potentially has significant data security risks. The Consumer and Privacy Taskforce has yet to consult with the community about these issues, and legislation has yet to be drafted setting out the necessary details.
54. **Recommendation:** The Bill should not authorise applications to be made on another's behalf without providing the necessary detail as to who is authorised, how that authority is established and verified, and what protections are in place to prevent unauthorised registration or access cards from being issued. The Bill should not be passed in its current form until these matters are addressed.

Secretary's discretion in relation to the access card (clauses 23-26)

55. As with the Register, the Secretary has wide discretion to:
 - a. decide the manner and form of an application (Clause 23 (1)(b) and (2)(a)). As with the Register the Secretary must consult with the Privacy Commissioner and take into account any comments before approving the form, but failure to comply does not affect validity of approval of the form (Clause 23(3));
 - b. require information or documents needed to be satisfied of an individual's identity (Clause 23(2)(b));
 - c. require information or documents needed to obtain information necessary to be placed on the card or register (Clause 23(2)(b));
 - d. require additional information or documents for the Secretary to be satisfied of a person's identity or eligibility for an access card (Clause 23(4)(a) and (b));
 - e. require production of additional information or documents that the Secretary determines is necessary for him or her to obtain information needed to be included on the access card or the Register (Clause 23(4)(c));
 - f. decide the manner of interview, photograph and signature to be undertaken, or whether a person is exempt from these requirements (Clause 24(1)(c) (d) and (e));
 - g. refuse to issue an access card if not satisfied of the person's identity (clause 24(1)(f)) or of any of the other matters listed in Clause 24, without any provision to appeal against such refusal; and
 - h. specify a date earlier than ten years for the expiration of the access card (Clause 26(b)(ii)).
56. None of these powers are subject to review at present, yet they are considerable.
57. **Recommendation:** As stated previously, where flexibility is needed, strong safeguards must be included. Similar recommendations apply here as they do with respect to the Secretary's discretions under Part 2, Division 2 (clauses 13-15).

58. **Clause 24(1)(g)** allows the Minister to impose additional eligibility requirements for applicants for an access card. The EM (p 29) states that although no additional requirements are contemplated, this provision is needed ‘to deal with unusual circumstances that may arise in the future’. It is unclear what is contemplated by ‘unusual circumstances’.
59. **Recommendation:** It is preferable that Parliament decides eligibility requirements must be met by applicants, rather than leave it to a Ministerial directive which is later reviewed by Parliament.
60. **Clause 25** envisages an access card being sent by post. This is one of the least secure means of delivering a document and poses a serious security risk. As the Secretary is deemed to have issued the card when sending it by post, there will be serious consequences for an individual if the card is intercepted or otherwise fails to arrive, given that a person cannot access any service without production of the card.
61. **Recommendation:** The Bill should be amended to provide for a more secure method for delivering access cards, to minimise the risk of unauthorised access or loss.

8 Information on the Access card (Part 3, Division 4)

Information on the surface (clause 30)

62. **Clause 30** sets out the information that must be included on the surface of the access card. Unlike a Medicare card, it includes photograph, signature, date of birth (optional) and if a veteran then (optional) information as to the veteran’s status. This means considerable information may be immediately viewed by an unauthorised person. The more information can be viewed on the surface of the card, the greater the risks if the card is lost or stolen.
63. The rationale for including matters on the surface of the card is addressed in the EM (pp 32-35).

Use of photo

64. The rationale (EM, p 32) makes it clear that the card is an identity card otherwise there would be no need to have a photograph. It is stated that it ‘allows a person to simply and quickly prove who they are’ and will ‘assist in correct identification when customers undertake transactions with other service providers, potentially including doctors and pharmacists’.
65. **Recommendation:** Clarity is sought about the need for a photograph to be included on the surface of the card, given authorised persons would otherwise have access to the digitised photograph in the chip. If there is a need apart from ‘consensual’ uses of the card as an identity document for the photograph to be viewed by persons without access to a reader, then this should be made plain.

Signature

66. It is claimed the digitised signature provides greater utility and security (EM, p 34). However, a digitised copy of the cardholder’s signature may be an added security risk. If compromised or stolen, digitised signatures can be used in other contexts to commit

identity fraud. As many credit card users find, signatures are often not checked and prove to be of limited utility as a security measure.

67. **Recommendation:** The signature should not be included on the surface of the card.

Card number

68. It is claimed that a number on the surface of the card is necessary for customer convenience (EM, p 34). Reference is made to the number being used for service delivery through the telephone and internet-based services and for identification purposes over the telephone. The alternative would be a requirement to use multiple references for a person to identify themselves on the telephone. However, use of a number that can be read from a stolen card is a significant security issue if it can be used to access information over the telephone and internet.
69. The card number is also a unique identifier. As stated previously in this Submission in relation to the information on the Register, the use of a unique identifier for every card holder creates the potential for data linkage and data sharing which is not expressly prohibited and is not protected by Clause 57. The EM (p 34) states that the Government believes that the access card number is an additional protection for the consumer. In fact, as with all unique identifiers it has additional privacy risks.
70. **Recommendations:**
- a. The card number should not be included on the surface of the card.
 - b. Cardholders seeking to identify themselves over the telephone or internet should instead be expected to provide identifying information that is not visible on the surface.
 - c. There needs to be far greater safeguards regarding the use of the access card number. As discussed elsewhere in this Submission, the Bill should more expressly detail who has access to information on the Register, and what uses of the access card number are permitted or prohibited.

Date of birth

71. Date of birth is optional. The EM gives no explanation as to why it may be wanted. The purpose of the card is to facilitate access to health and social services, not to operate as a 'proof of age' card. The inclusion of date of birth creates an additional security risk and provides an unauthorised user with an essential detail often used to commit identity theft.
72. **Recommendation:** Date of birth should not be included on the surface of the card.

Information in the chip (clause 33)

73. **Clause 33** identifies that there is a Commonwealth area of the chip on the card and a cardholder's area. The EM (p 36) states that it is proposed that 'card owners will be able to include in their area of the chip any information they choose to include'. The first report of the Consumer and Privacy Taskforce, *Issues and Recommendations in Relation to Architecture Questions of the Access Card*, stated (p 52) that the 'the most appropriate and readily available chip size would be 64 kilobytes (kb) and that such a

chip would, given the currently proposed functions of the Access Card result in there being a spare capacity in the order of 25%.' If it is possible to have a larger chip at little extra cost, this is likely to be the option chosen. If it contains a range of personal information relating to both government and non-government services, it is likely that a greater number of organisations will have authority to access the chip – whether under law or by consent. The more personal information contained, and the greater the number of people and organisations who access the chip, the greater the security risk.

74. The Commonwealth area is connected to the Register. There is no published information as to whether any of the information in the cardholder's area of the chip will need to connect to the Register. But the need to replace lost or stolen cards suggests that the information in this area will have to be located in a central database. If this is the case, this has additional security and privacy implications, depending on what information can be put in the individual's area. It may be appropriate for certain proposed use of the cardholders area be subject to Parliamentary scrutiny.
75. The tendering process has already begun to develop the technology. These matters ought to have been dealt with much earlier.
76. **Recommendation:** Clarity is sought about whether, and to what extent, information on the Commonwealth and cardholder's areas of the chip is connected to the Register. Detail about access and control over the information on the cardholder's area of the chip is also sought, to ensure appropriate limits on use and other safeguards are established under law. These matters should be addressed before the Bill is passed.

Information in the Commonwealth Area of the chip (clauses 34-35)

77. **Clause 34** lists the information in the Commonwealth area of the chip. Much of the information on the Register is also included on the chip and concerns already expressed in this submission equally apply. See the **Recommendations made in relation to clauses 17-19**.
78. In particular, it is noted that the Secretary has discretion to decide what information about any benefit card (which, as noted earlier, is broadly defined) be included (Clause 31(1) Item 10) and any other technical or administrative information that the Secretary deems is reasonably necessary for the administration of the Register or the access card (Clause 31(1)(Item 17(a)). As stated previously, this is very broad discretionary power to collect and store information without any Parliamentary oversight.
79. Reference is made to a card PIN number and password for authenticating identity (Clause 34(1) Item 9 (a) and (b)). There is no information as to how these features apply. They appear to be optional. As stated in relation to the Register if a PIN number or password is needed it should not be optional.
80. If the cardholder has an emergency payment number that number is included (Clause 34(1) Item 13). As with the register the EM is silent as to why this is needed. However since it is the means by which the card holder accesses emergency relief than the chip will be capable of being read by EFTPOS and ATMs.
81. Clause 34(1) Item 15 requires that if an individual has a Veterans' Affairs file number, that number is stored as is considerable information about veterans' status), including health-related information.

- 82. The amount of personal information to be retained on the Commonwealth chip is of concern as the Bill does not yet deal with who may access and use the information on the Commonwealth part of the chip.
- 83. **Clause 35** only provides an exemption to include information that the Secretary considers inappropriate because of inclusion in the National Witness Protection Program or because of an inconsistency with a Commonwealth law. There is no other ability to have residential address excluded from the chip for personal safety reasons.
- 84. It is not explained why residential address is needed on the chip as well as postal address. If it is not needed it should not be included.

9 Ownership of the access card (Part 3, Division 5: clauses 37-38)

- 85. **Clause 37** purports to vest ownership of the card in the cardholder when it is issued, but the ownership rights do not extend to the information on the card – either on the face or in the chip. (**clause 38**). Indeed, there is no express right in the Bill for the individual to access any of the information held on the Register or in the Commonwealth chip on the card. It is difficult to see what benefit the purported ownership brings without ownership, or even access rights, to the information held on it.
- 86. **Recommendation:** The Explanatory Memorandum should indicate what legal rights actually arise from the vesting of ownership in the cardholder, particularly in light of the other clauses that restrict the cardholder’s ability to deal with the card and the information on the chip. In the absence of clear and express benefits, this clause should be deleted.

10 Use of the access card (Part 3, Division 6: clauses 40-42)

- 87. **Clause 40** authorises cardholders to use their access card for any lawful purpose they choose. The EM (p 40) states that individuals may use their card as a ‘convenient proof of identity document’. In addition, cardholders can be required to produce their card to access Commonwealth benefits other concession benefits. This means that where either state or territory governments or private enterprise are providing concession benefits, an individual may be required to produce the access card. This will inevitably result in the access card being widely required as an identification card.
- 88. **Clause 41(b)** allows Commonwealth officers to use the card for other purposes with the cardholder’s consent. This extends the use of the card to matters outside of the legislation. Although it is stated to be with a person’s consent, consent is often less than informed and voluntary. For example, a person may ‘consent’ to have a police check, but the reality is that they cannot be considered, for example, for a particular employment, or obtain a particular qualification, or a position on a Board without giving such consent. This is what has been termed ‘coerced consent’.
- 89. **Clause 42** states that there is no requirement for a person to carry their access card and the EM (p 42) states that this reinforces the government’s clear intention that access

cards would not be used as national identity cards. However, the existence of such a card, and the fact that most of the adult population will have one, makes it likely that it will develop into a national identity card if it becomes the preferred form of evidence of identity by service providers, even if they do not require it. This is what has happened in relation to a driver's licence. Given the government's assurance on accuracy and security, the access card will become more desirable than a driver's licence for those requiring evidence of a person's identity.

90. **Recommendation:** If the purpose of the card is to facilitate access to health and social services, and not to become a national identity card, then there is no need to provide a cardholder area in the chip. Nor is there any need to allow cardholders to 'consent' to organisations using the card as evidence of identity. The legislation should not permit and facilitate the card's use as identity card through the mechanism of consent. These provisions should be removed from the Bill.

11 Offences (Part 4)

91. Although Part 4 sets out a number of criminal offences in relation to the access card and the information on the surface, it does not expressly make it an offence to access, misuse, disclose for purposes other than those permitted by the Act, any of the information contained in the chip or held in the Register.
92. As has been stated previously in this Submission, the chip and the Register will contain considerable personal information about most of the population and is likely to attract those who wish to misuse it and be a temptation to those authorised to access it.
93. **Recommendation:** In order to protect the personal information contained in the chip and on the Register, the Bill should make unauthorised access, disclosure and misuse a criminal offence.

Offences for requiring production of an access card (clauses 45-46)

94. **Clause 45 and 46** create a number of criminal offences that are said to demonstrate that that the access card is not to be used as a national identity card. Therefore it is an offence to require a cardholder to produce his or her card for identification purposes, or to make statements that a person would reasonably understand as meaning he or she had to produce the card. It is also an offence to require a cardholder to produce his or her card as a precondition to the supply of goods or services.
95. There are two important exceptions to this, firstly, if the cardholder consents to provide his or her card for identification purposes, or secondly, if they are required to produce the access card to show entitlement to a concession.
96. Although it is to be commended that there are deterrents to people being required to produce the access card as a means of identification, it is questionable how effective these measures will be in practice.
97. As stated above, there are many circumstances where it is very questionable that voluntary informed consent has been obtained, especially from vulnerable individuals. Equally those individuals most vulnerable to coercion are unlikely to complain and thus invoke the sanctions.

98. The exemption for persons being required to produce their access card to demonstrate entitlement to concessions means that a wide number of government and private sector organisations will be able to require a customer to produce his or her access card. This also means that a wide group of organisations and individuals will need to have a reader since concession status is no longer apparent on the face of the card.

Offences for doing things to access cards (clause 48)

99. **Clause 48** makes it an offence to intentionally change information in the Commonwealth area of the chip in someone else's card, with the exception of delegates or authorised persons who change information for purposes of the Act. But the Bill does not extend any protection against persons making unauthorised changes to the cardholder's area of the chip. Given the vague, but wide-ranging potential for personal information to be retained in the cardholder's part of the chip, the protections should be extended to that information.
100. **Recommendation:** If the cardholder's area of the chip is to be retained, contrary to recommendations made elsewhere in this Submission, then the Bill should make it an offence for persons to make unauthorised changes to the cardholder's area of the chip otherwise than with the express or implied consent of the cardholder.

Other access card offences (clauses 54 and 57)

101. Under **Clause 54** the Secretary is empowered to require persons to return access cards for certain specified reasons such as if the Secretary believes on reasonable grounds that a card has been obtained by a false or misleading statement and a person commits an offence if that person fails to return the card immediately.
102. Given that the access card will be the only means the person has to receive benefits to which he or she is entitled and significant penalties apply for failure to return a card, this provision gives significant power to the Secretary. The Bill provides no means of redress for the individual should the Secretary have mistakenly reached the conclusion that there are grounds for demanding the return of the card. There is no provision for a person being informed as to the evidence upon which the Secretary has reached such a conclusion, nor is there any right of appeal against the Secretary's decision.
103. **Recommendation:** The Bill should not be passed without addressing an individual's right of review following action by the Secretary demanding return of the card. Provision should be made to enable individuals to continue to get access to benefits while a review is pending.
104. **Clause 57** provides a penalty for unauthorised recording of another person's access card number, photograph or signature on the surface of a card. It is stated (EM, p 52) that this provision is based on section 8WB of the *Taxation Administration Act 1953* and is intended to prevent persons from creating unauthorised databases of information on an access card. However, there are a number of exceptions contained in the clause:
- a. The offence does not apply to persons who are delegates or authorised persons and record the access card number for the purposes of the Bill. The EM (p 52) gives as an example of a person authorised, a pharmacist who records a cardholder's access number connection with a pharmaceutical benefit. This means that a very broad range of people will be authorised to record the

information on the card, including photograph, number and signature whether it is necessary to record the information or not.

- b. Section 10.5 of the Criminal Code provides that a person does not commit an offence if the person's actions are justified or otherwise excused under a law of the Commonwealth. The EM (p 53) gives an example of section 108 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* where reporting entities are required to make and retain a copy of a document used for identification purposes. This means a cardholder may voluntarily use the card for identity purposes and the organisation involved will be required to make a copy of it. This example demonstrates the problem of allowing widespread use of the card outside the purposes of the Act.
- c. The recording can be done with the cardholder's consent.

105. The protection of the access card number and other information on the card is nowhere near as strong as the protection afforded to the Tax File, number and it should be.

106. **Recommendations:**

- a. For the reasons stated above in relation to informed voluntary consent, it is submitted that recordings made with consent should not be excluded from the offence. If a database of access card numbers, photographs and signatures can be compiled with consent, there is no control as to the ongoing use and disclosure of the information on those databases.
- b. As stated previously, the card number is a unique identifier, and as such is a powerful tool facilitating data matching, linkage and aggregation of datasets. The protection of the access card number will be vital if the card number will be means of accessing records by telephone or internet. The Bill should provide greater guidance about permissible use and sanctions against prohibited uses.

12 Delegations and authorisations (Part 5, Division 3: clause 72)

107. Clause 72 gives wide powers to the Secretary to allow persons to be authorised to exercise the powers under the Bill. This includes Commonwealth officers who are not employed by a participating agency and individuals prescribed by regulation. The EM (p 61) states that some of the powers will be potentially exercised, for example, by doctors and pharmacists.
108. Authorised persons have significant powers including being allowed to alter information in the Commonwealths area of the chip (Clause 48). This means that potentially a wide range of Commonwealth and non-Commonwealth Government persons will be authorised to require production of the access card, copy the information on it, access the personal information held in the Commonwealth area of the chip, and change information on it. The more people allowed to access and change the information on the chip the greater the risks to privacy, including data quality and data security.

109. **Recommendation:** The delegation power should be limited to ensure that public governance and accountability measures apply to those given power and authority to deal with the access card.

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