

10 December 2021

Attorney-General's Department
Via Email: OnlinePrivacyBill@ag.gov.au



Re: Exposure Draft Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021

The Australian Communications Consumer Action Network (ACCAN) thanks the Attorney-General's Department for the opportunity to comment on the Exposure Draft Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021.

ACCAN is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards communications services that are trusted, inclusive and available for all.

Currently, the information and power asymmetries between consumers and digital platforms can make it challenging for individuals to make informed decisions about how our personal information is handled online.¹

ACCAN has previously outlined our support for the proposals of the ACCC's Digital Platforms Inquiry report, which have been captured in this Bill, including:

- Strengthened notice and consent requirements;
- Introduction of an enforceable privacy code for designated digital platforms; and
- Higher penalties for privacy infringements.

Online Privacy Code

The development and implementation of an Online Privacy Code (OP Code) as proposed through the Bill raises questions around the code development process.

ACCAN notes that the Bill outlines that the process for making the OP code will be similar to the process for the two existing Privacy Act codes, including giving industry the first chance to develop the OP Code and requiring public consultation. This 28-day period allowed for public consultation raises concerns for ACCAN and our members. Typically, a 28-day public consultation process is held after a code is developed, with minimal opportunity for substantive improvement to the draft code. This appears to be acknowledged in the Bill, given that should the OP Code be developed by the

¹ Falk, Angelene, '2020 Vision: Challenges and opportunities for privacy regulation', 29 October 2019 - www.oaic.gov.au/updates/speeches/2020-vision-challenges-and-opportunities-for-privacy-regulation/

Commissioner, the consultation period is extended to 40-days to allow the Commissioner to consult with stakeholders and review the draft code.

ACCAN asserts that the best outcomes and most effective codes are produced when, from the earliest possible stage, both the supply and demand side perspectives are actively considered throughout code development discussions. The ACMA and the ACCC also recognise the importance of consultation with consumer representative organisations in their code development guidelines. Indeed, the ACMA's *Guide to Developing and Varying Telecommunications Codes Registration 2015* stresses the importance of industry bodies consulting at least one consumer representative organisation during both the development and variation of an industry code.²

Similarly, the ACCC's *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* recognises that consumers play an important role in the development of business-to-consumer codes. The Guidelines recommend consultation with a 'consumer representative' such as a peak organisation, who can liaise with other consumer groups and present a wide range of consumer views as part of code development. Consulting with individual members of the public is criticised as inadequate, as this can only reflect individual personal experience.³

To ensure that consumers' interests are represented in any development or alteration of codes relating to the Online Privacy Bill 2021, ACCAN strongly urges that the Bill include a specific requirement for industry consultation with a consumer body before the registration, alteration or revocation of any related industry code, consistent with the established Telecommunications Act approach.⁴

Who will need to comply with the OP code?

ACCAN supports the inclusion of the proposed categories of private sector organisations to be bound by the OP Code;

- Organisations that provide social media services;
- Organisations that provide data brokerage services; and
- Large online platforms.

ACCAN understands that these categories of organisations already have privacy obligations under Australia's Privacy Act, with reference to certain Australian Privacy Principles (APP).

In our submission to the Privacy Act Review discussion paper in December 2020, ACCAN made the following recommendation:

Recommendation 3: Organisations should provide consumers with brief and easily understandable privacy notices when requesting consent to data.⁵

² <https://www.acma.gov.au/publications/2015-09/guide/guide-developing-and-varying-telecommunications-codes-registration-2015>

³ <https://www.accc.gov.au/publications/guidelines-for-developing-effective-voluntary-industry-codes-of-conduct>

⁴ As per Part 6. Division 5, section 135 of the Act.

⁵ See <https://accan.org.au/our-work/submissions/1827-privacy-act-review-issues-paper-consultation>

ACCAN asserts that this Recommendation relates to the following APPs, which will all be included in the OP code:

- APP 1.4(c) about privacy policies
- APP 5 about providing notice to individuals about collection of personal information
- APP 3 and 6 about seeking consent for collection, use and disclosure of personal information.

As such, ACCAN expects that the OP Code will include clear and unambiguous terms for compliance with these specific APPs as well as outline steps that individuals are able to take to obtain redress for misuse or breach of their personal data privacy.

New requirement in the OP Code — ceasing to use or disclose personal information upon request

ACCAN supports the requirement that organisations subject to the OP Code not use or disclose, or not further use or disclose, an individual's personal information upon request from that individual. However, ACCAN recommends that the OP Code explicitly outline the circumstances in which organisations must act on an individual's request. We note that the Online Privacy Bill explanatory paper includes several exclusions from this requirement, while also including the use of terms such as 'reasonable' and 'not be practicable'. These terms do not provide the requisite clarity that individuals need to understand their rights under the OP Code in respect to this requirement. In ACCAN's submission to the Privacy Act Review we made the following recommendation:

Recommendation 9: Individuals must have the right to have their data erased under certain circumstances.

While this recommendation speaks to the Right to Erasure, which is not considered in this Bill, the recommendation does identify those circumstances which need to be included in the OP Code to allow individuals to request an organisation stop using or sharing their personal data. This includes instances where:

- A consumer's personal data has been collected without their consent;
- A consumer's personal data is no longer necessary for the original purpose of its collection or use;
- A consumer has withdrawn consent to retain the data;
- A consumer has objected to the processing of their personal data and there is no legitimate interest to override the objection;
- A consumer has objected to their personal data being used for direct marketing purposes; and
- An organisation has processed a consumer's personal data unlawfully.

New requirement in the OP code — children and vulnerable groups

ACCAN has and continues to advocate for the online protection of children. We are encouraged by the Online Privacy Bill explanatory paper's statement that the Bill will elevate protections for children and vulnerable groups by including stronger and more robust privacy protections in the OP Code.

ACCAN has recently outlined our position on the need for increased measures to protect the safety of children as they increasingly engage with online products and services. In our submission to the eSafety Restricted Access System (RAS) consultation, ACCAN pointed to international initiatives that have been introduced to protect minors, under the age of 18, from access to harmful online content⁶. Additionally, in our submission to the Privacy Act Review in December 2020, ACCAN also recommended that Australia align the privacy protection of children with that of the European Union General Data Protection Regulation (GDPR). Article 8 of the GDPR applies where an information society service (ISS) is being offered directly to a child and regulates the circumstances under which a child can consent to the “processing” of their personal data.⁷

ACCAN believes that rigorous and robust protection mechanisms, such as these international examples, need to be implemented across Australia’s privacy regime to ensure that children’s privacy is protected. It is with this awareness that ACCAN draws attention to our concerns with the wording of the Online Privacy Bill explanatory paper with reference to the steps that organisations need to take to comply with the OP code. For example, the following statement in relation to social media platforms does not provide the necessary guidance needed to develop an effective OP code and consequent guidance for organisations that are bound by it.

The OP code may make provision in relation to what constitutes reasonable steps or matters to take into account when considering whether the collection, use or disclosure of a child’s personal information is fair and reasonable in the circumstances.⁸

ACCAN considers that terms such as ‘reasonable’ and ‘fair’ are too open to interpretation and as such can be less effective in ensuring that intended outcomes are achieved. Clear and unambiguous language must be used in the OP code to maximise personal data and child protection when accessing online platforms, and what is ‘reasonable’ and ‘fair’ specified in order to provide clarity and consistency of implementation.

Part B. Enforcement and penalties for privacy breaches

ACCAN supports the proposed OP code enforcement and penalty rules which are expected to provide the Commissioner with an appropriate regulatory and enforcement toolkit to ensure the privacy regulator can resolve matters more efficiently and effectively.

While understanding that organisations subject to the OP code are also subject to adherence to the Australian Privacy Act, ACCAN expects that these additional enforcement and penalty provisions in the OP code will incentivise better privacy practices.

ACCAN has previously advocated for increased penalties for privacy breaches. The move to bring the privacy breach penalties in line with the Australian Consumer Law penalties is welcome. ACCAN recommended a similar increase in the maximum penalty for privacy breaches in our submission to

⁶ See <https://accan.org.au/accans-work/submissions/1939-esafety-restricted-access-system-discussion-paper>

⁷ See <https://accan.org.au/our-work/submissions/1827-privacy-act-review-issues-paper-consultation>

⁸ Online Privacy Bill Explanatory Paper, p11. <https://consultations.ag.gov.au/rights-and-protections/online-privacy-bill-exposure-draft/>

the Privacy Act Review, recommending that the penalties for privacy breaches be increased to match those in the Consumer Data Right scheme.⁹

For a natural person, the Bill increases the maximum civil penalty for serious and repeated interferences with privacy to 2,400 penalty units (\$532,800 on current penalty unit values). For a body corporate, the maximum penalty will increase to an amount not exceeding the greater of:

- \$10,000,000;
- Three times the value of the benefit obtained by the body corporate from the conduct constituting the serious and repeated interference with privacy; or
- If the value cannot be determined, 10% of their domestic annual turnover.

The Bill sets out how to calculate turnover for the purposes of this provision.

ACCAN also supports the enhanced enforcement powers in the OP code, including:

- A new infringement notice power and penalty for failure to give information
- New types of determination
- Enhanced assessment power
- Greater information sharing
- eSafety Commissioner as an alternative complaint body
- Disclosure of information
- Extraterritoriality

In conclusion, ACCAN supports the Bill's proposed development of a binding OP code. We recommend that any OP code must include community input from the earliest stage to ensure that the code has community support, meets the expectations of both the community and policymakers, and ultimately ensures that personal data and privacy protections are at the heart of Australia's growing digital economy.

ACCAN is available to discuss any of the issues we have raised in this submission.

Sincerely,

Wayne Hawkins
Director of Inclusion

⁹ See <https://accan.org.au/our-work/submissions/1827-privacy-act-review-issues-paper-consultation>