

FUNDRAISING INSTITUTE AUSTRALIA

DIGITAL PLATFORMS INQUIRY

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The Professional Body for Australian Fundraising

FIA submission on the preliminary report

FIA's submission relates to the Preliminary Recommendations in Chapter 5: Digital platforms and consumers.

The ACCC is to be congratulated on the preliminary report of the Digital Platforms Inquiry as a whole, but FIA wishes to point out in the strongest terms that Chapter 5 is seriously flawed by the failure to recognise that the privacy-related recommendations would severely impact charitable fundraising.

FIA supports some of the Preliminary Recommendations in Chapter 5 but not those which would involve premature changes to the Australian Privacy Principles and restrict the ability of FIA members to acquire new donors.

Such regulatory changes would impact not only their intended target – the digital platforms – but all non-profit and for profit organisations with annual turnovers of more than \$3m covered by the Privacy Act.

According to the 'Scope of impact' section of the Preliminary report at page 223 the impact on non-profit organisations and charities does not appear to have been taken into consideration.

“The ACCC notes that the information asymmetries and bargaining power inequalities identified in this chapter characterise not only the data practices of digital platforms but also the data practices of many *other businesses* (FIA emphasis) which collect, use or disclose person.”

FIA believes that new regulation should focus on the intended target – the digital platforms – and not cause unnecessary regulatory impacts on organisations covered by the Privacy Act, particularly charities and not-for-profits.

In its approach to the Preliminary recommendations below FIA has sought to quarantine proposals to change the Australian Privacy Principles. The privacy principles underlying the Privacy Act have only been changed once since the private sector provisions of the legislation were first introduced nearly two decades ago. They were carefully constructed so as to be technology and platform neutral; amending them to address concerns specific to digital platforms is inconsistent with the policy approach underpinning the APPs.

The extensive changes in the Preliminary Recommendations would result in many amendments to the APPs which would in turn cause non-profit and for-profit entities alike to review and amend their privacy policies at considerable cost and inconvenience.

Speaking for the charitable and not-for-profit sector, FIA believes that such a major change is not justified at present.

If the ACCC is conducting consultations on the next stage of the Digital Platforms inquiry FIA would welcome the opportunity to participate.

FIA RESPONSES TO CHAPTER FIVE PRELIMINARY RECOMMENDATIONS

5.7 Preliminary recommendations

Preliminary recommendation 8: Amendments to the Privacy Act to:

- (a) strengthen notification requirements

This would involve change to the APPs and therefore is not supported by FIA.

- (b) introduce an independent third-party certification scheme

Supported by FIA

This measure would be both an improvement to the Australian privacy system and promote trust and confidence in charitable fundraising. The conditions surrounding the application and granting of a privacy code under the Privacy Act are so onerous that very few have been applied for or granted. This has been a failure in the legislation since its inception.

- (c) strengthen consent requirements

Not supported by FIA.

In addition to being a change to the APPs, this measure would negatively affect the ability of fundraisers to acquire new donors.

- (d) enable the erasure of personal information

FIA does not support this because it involves a change to the APPs.

In addition, as this provision is included in the proposed Digital Platforms Privacy Code FIA questions whether there is sufficient justification to impose it on all other entities including charities?

- (e) increase the penalties for breach

FIA supports this recommendation

- (f) introduce direct right of action for individuals

FIA is not opposed in principle to a direct right of action for individuals subject to:

The Australian charitable sector is underpinned by the tax-deductible status of donations which are treated as unconditional gifts. FIA is concerned that a donor's ability to seek "not only injunctions but also compensatory damages" (page 232) would mean that the gift/donation would no longer be unconditional in the view of the Australian Tax Office. As the ACCC is already considering the applicability of fundraising to the Australian Consumer Law, FIA requests that the impact on donations from the introduction of direct right of action for breach of privacy be added the ongoing ACL review.

Also, FIA questions the need for both a direct right of action under the Privacy Act and a separate statutory tort of privacy as proposed in Preliminary recommendation 10.

Preliminary recommendation 9– Establish a Privacy Code of Conduct for digital platforms.

FIA supports this recommendation

As noted earlier the experience of adoption of codes of conduct under the Privacy Act has been limited and the ability of a small agency such the OAIC even with expanded resources to match the combined power and resources of the global digital platforms is questionable.

FIA supports this Preliminary recommendation because it is aimed directly at target of this inquiry – the digital platforms – but suggests that the code should be an ACCC code for which there are many precedents.

Preliminary recommendation 10 – Introduce a statutory tort of serious invasions of privacy.

FIA does not support.

See comment on Preliminary recommendation 8(f). The proposal for both a Privacy Act direct right and a separate statutory right would appear to be overkill.

When the legislation for the statutory right was canvassed previously, there was serious concern about the low threshold required. This ‘proof of damage’ provision has been included in the Preliminary Report on page 236.

Fundraisers as well as many others are concerned that, “The invasion (of privacy) need not cause actual damage and damages for emotional distress may be awarded”.

Preliminary recommendation 11 – Impose sanctions on the use of Unfair Contract Terms to increase deterrence

FIA supports this recommendation. Unlike privacy law, which is the purview of the OAIC, contract terms for business fall squarely within the areas of responsibility and expertise of the ACCC and FIA would welcome a broader public discussion around how this avenue might be used to address the issues the ACCC has identified in its consultation paper.

End of Submission