

**FUNDRAISING INSTITUTE AUSTRALIA**

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**THE TREASURY  
DIGITAL PLATFORMS INQUIRY**

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## Introduction

FIA is the national association representing professional fundraising and its 1400 members are responsible for more than 80 per cent of the approximately \$10 billion donated for charitable purposes annually. Members are organisations of all types and sizes that raise funds for their causes. They include most of Australia's largest charities as well as suppliers and professionals involved in the sector.

FIA welcomes the opportunity to make this second submission to the Australian Government's consultative investigation of appropriate responses to issues arising from the ubiquity of digital platforms in both the personal lives of Australians and the economic life of the nation.

## Regulation of the Sector

The overwhelming majority of FIA's members are (or work for) charities that are Australian Charities and Not-for-profit Commission (ACNC) registered. This community will increase in size from 1 July 2020 when all entities entitled to Deductible Gift Recipient status for taxation purposes will be required to register with the ACNC. Charities are also heavily regulated at the state and even municipal<sup>1</sup> level.

FIA recognises that the conduct of fundraising activities is integral to community trust and confidence in charities and although the ACNC does not have explicit responsibility for regulating fundraising practice, it does take matters relating to fundraising into account in its role of overseeing the governance of charities.

The ACNC itself has said it "sees the oversight of fundraising activities as an important aspect of good charity governance"<sup>2</sup>. To that end it has developed and promulgated various guidance relevant to fundraising, including specific guidance concerning compliance with the Australian Privacy Principles. This submission focusses mainly on the privacy-related recommendations in the DPI report.

In this submission FIA expands upon its first submission to the Digital Platform Inquiry which argued that the ACCC's draft preliminary report did not justify its recommendations to impose economy-wide new data and privacy regulation.

This submission notes that these same recommendations now appear in Chapter 7 of the final report. FIA believes the final report still fails to provide any satisfactory justification for the recommendations.

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<sup>1</sup> Charities who engage in face to face fundraising are subject to local bylaws in many municipalities across Australia.

<sup>2</sup> <https://www.acnc.gov.au/tools/topic-guides/fundraising>

## **FIA recommendations**

FIA's submission relates to Chapter 7 of the Digital Platform Final Report.

16(a) Update 'personal information' definition

**FIA opposes.** Expanding the definition of personal information as proposed is not necessary to capture activity on digital platforms. The definition was updated as recently as 2014 with the digital economy and likely future technological developments including technical data relating to an identifiable individual

16(b) Strengthen 'notification requirement'.

**FIA opposes.** Gross additional red tape burden for charities and not-for-profits.

16(c) Strengthen consumer 'consent' requirement.

**FIA opposes.** Gross additional red tape requirements for not-for-profits and charities in particular in the absence of any evidence that existing APPs are inadequate.

16(d) Enable erasure of personal information

**FIA supports.** This is already common practice and provided for under APP4.

16(e) Direct right of action for consumers

**FIA opposes.** No evidence that 'direct right of action' and/or R19 'statutory tort' are either necessary or desirable.

16(f) Higher penalties in line with ACL

**FIA supports**

17 Broader reform of privacy law

**FIA opposes** with the possible exception of 17(7) third party certification scheme. 17(1) to 17(6) are not justified.

18. OAIC privacy code for digital platforms

**FIA supports**

19 Statutory tort

**FIA opposes.** As per response to 16(e)

20 & 21 Prohibitions against unfair contract terms and certain trading practices

**Possible FIA support**

## **New and unjustified red tape in the form of data and privacy restrictions should NOT be imposed on ALL for profit and not-for-profit entities**

The Chapter 7 recommendations would have minimal impact on their intended target, the digital platforms, but would have a considerable impact on all for profit and not-for-profit entities with annual turnovers in excess of \$3 million per annum which are subject to the Privacy Act.

The ACCC clearly intends for the Report's recommendations including those in Chapter 7 to apply to the for profit sector but the not-for-profits will be included unless specifically excluded because the APPs apply to all entities. It is FIA's recommendation that the APPs remain as they are for both the for profit and not-for-profit sectors because:

. the red-tape-imposing Chapter 7 recommendations have failed to adequately take into account the impacts of two major Australian Government data and privacy initiatives – the Social Media reforms and Consumer Data Right legislation.

Both the Social Media and Data Right initiatives as well as the recommendations of the Digital Platform Report as they relate directly to the digital platforms themselves represent a shift in public policy away from economy-wide regulation such as the Privacy Act towards specifically-targeted measures which are more appropriate to the 21<sup>st</sup> century challenges caused by fast-moving technological change.

FIA contends that the Chapter 7 recommendations are inconsistent with the rest of the Final Report as well as failing to fully consider the impact of other Government measures which will be implemented well before the Digital Platform measures.

For instance, the Consumer Data Right legislation already introduced for banking with utilities and telecommunications to follow addresses the 'information asymmetries and bargaining inequalities' that consumers face in relation to sectors where such asymmetries and inequalities actually exist. CDR provides targeted, proportionate and appropriate consumer remedies where there is an identified need, unlike the Chapter 7 recommendations which are indiscriminate and unjustified.

## **Additional reasons why red-tape-intensive data and privacy measures should NOT be imposed on charities particularly their fundraising activities**

FIA urges the Government to take the following factors into account when considering the Chapter 7 recommendations:

- 1. The 'bargaining power' equation is entirely different between that of a donor and a charity as opposed to that between a consumer**

**and a digital platform, a bank, a utility or a telecommunications provider.**

As has been recognised by the ACCC in its consideration of the application of Australian Consumer Law to fundraising activities, the relationship of a donor to a charity is different from that of a consumer and a supplier of goods or services. A donation is a gift given unconditionally. Goods or services are purchased by a consumer with the expectation they will meet the claims made for them and redress is available if not.

Since the amendments to the Privacy Act which introduced the APPs, other regulations have been implemented which give greater power to donors.

In 2012 a national charities regulator, the Australian Charities and NFP Commission, came into existence giving donors instant access to financial and other information about charities so they can make informed choices about their charitable giving. The ACNC also provides donors with avenues for complaint.

In 2017 the Commonwealth, State and Territory governments promulgated Regulatory [Guidance](#) to Fundraisers on the application of the Australian Consumer Law on their activities. This guidance provided donors with definitive advice for the first time where charities and their third party suppliers are subject to the ACL.

Also in 2017, NSW amended its Charitable Fundraising Act to create a new Court of Inquiry with power to hold public investigations into alleged breaches of the fundraising law.

At the regulatory and self-regulatory level ACNC, OAIC and FIA have developed [guidance](#) and codes to address issues around vulnerable Australians particularly resulting from the aging population. In the case of FIA, specific Code material on vulnerable Australians was part of a total code review and fundraising sustainability exercise.

This year FIA published a comprehensive Privacy Guide for members prepared in collaboration with law firm MinterEllison.

In making its decisions on Chapter 7, the Government is urged to take into consideration the considerable amount of activity and regulation that has taken place to empower donors. This shows that charities, fundraisers and regulators have been working together to create a more donor-centric environment, rendering further changes to the APPs to protect donors unnecessary.

The power of donors in relation to charities has increased significantly since the inception of the ACNC and the other measures listed above. This trend has increased with the appointment of the second Chair of the ACNC, the Hon Gary Johns, who has given priority to providing as much information as possible to donors so they can make informed decisions.

## 2. The direct impact of the Chapter 7 recommendations on charitable fundraising in Australia exemplified by the introduction of the General Data Privacy Regulation (GDPR) in the European Union.

At this stage FIA members are unable to quantify the adverse impact that the introduction of the Chapter 7 measures would have because there is not enough detail to estimate the extent of:

- disruption to contact with existing donors;
- prohibition on contacting potential donors; and
- the cost of both one-off and ongoing red tape compliance.

### Impacts of GDPR on Fundraising in Europe

FIA is able to anticipate the likely impact of the Chapter 7 recommendations on the ability of fundraisers to contact potential and existing donors, as it would be similar to that faced by charities in Europe under GDPR. Many Australian charities have close links with their counterparts in Europe where introduction of the GDPR a year ago has had a depressing impact on the sector.

At the recent UK Institute of Fundraising conference, the results of a survey of charities post GDPR had found:

- *77% of respondents had been forced to reconsider their engagement strategies*
- *> 70% thought GDPR had been negative or were unsure of the overall impact*
- *Two-thirds reported that GDPR had led to a reduction in the number of people who could be contacted for fundraising purposes*
- *57% reported a drain on charitable resources*
- *41% reported that compliance continued to take up a lot of staff time*

What emerges from the above is that there will be a two-pronged hit to charitable fundraising:

- total fundraising income will be **down** in the first year and possibly later, and;
- the cost of fundraising will be **up** in the initial years.

The difference between the Chapter 7 recommendations and the introduction of the two previous private sector privacy reforms in Australia is that the proposed new consent provisions will disrupt the life-blood of all charitable fundraising endeavours, new donor acquisition. This is particularly important in the current Australian environment of an ageing population and stagnant wage growth.

### Further Consultation Needed on Chapter 7 Proposals

FIA would welcome the opportunity to participate in the next phase of face-to-face consultations. It is important that the not-for-profit sector be represented as both the Preliminary and Final Reports were deficient in with regard to impacts on this sector.

In conclusion, FIA urges the Government not to act upon the Chapter 7 recommendations for economy-wide amendments to privacy law without further consultation with sectors of the economy, such as fundraising, which were not the intended targets of the DPI. This is both in the interest of consistent public policy and to allay the concerns these recommendations are already generating in the charitable fundraising sector.

End of Submission