

Privacy Act Review Report Submission
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About FIA

Fundraising Institute Australia (FIA) is Australia's national peak body for the \$12.7 billion charitable sector. We are an industry body with over 7000 Members who are charities, not for profits, suppliers of fundraising services, and individual fundraising professionals. FIA, among its other professional fundraising activities, champions and facilitates best practice fundraising with a self-regulatory Code of conduct for the sector, the FIA Code. The FIA Code raises the standard of conduct across the fundraising sector, going beyond the requirements of Government regulation.

FIA also plays an important role in engaging regulators on behalf of its Members by representing their interests to Governmental authorities and bodies. It is in representing the interests of FIA Members that we provide this response.

About the PFRA

The Public Fundraising Regulatory Association (PFRA) is the self-regulatory body for face to face fundraising in Australia. Face to face fundraising is one of a number of methods used by charities across Australia to generate funding. It provides significant funding that allows charities to provide vital services for local communities and to help solve some of the greatest global issues. Established in February 2015, the role of the PFRA is to make sure that the right balance is maintained between the duty of charities to ask for donations and the right of the public to experience high standards of behaviour from our members' fundraisers.

Background

FIA and the PFRA welcome the opportunity to respond to the Privacy Act Review Report and appreciate that the reform efforts are aimed at strengthening the protection of personal information and enhancing the control individuals have over their information. We have consulted with Members, although, given the enormity of the Review Report and the tight timeframe to respond, it has been challenging to satisfactorily collate exhaustive feedback about the impact of each proposal on their charitable fundraising.

It is important to note that charitable fundraisers have a long history of respecting and actively caring about the privacy of members of the public and donors, as well as being strong advocates for the protection of privacy rights. Data protection concerns are a priority for charitable fundraisers, who have maintained effective compliance within the existing privacy regulatory environment. This includes adhering to best practices as outlined in the Code of conduct for charitable fundraising (the FIA Code) and other educational materials that are designed to guide charitable fundraisers in appropriately obtaining and managing personal data.

The importance of charitable fundraising cannot be overstated, as it leads to the provision of essential services to communities as well as support for causes; activities which would normally add to the responsibilities and expenses of Government. Therefore, the proposed changes in this Review Report should not add additional barriers to charitable fundraising. Further barriers will result in a proportionally and substantially lower level of service for those in need, as well as for the entire community. Moreover, Government and taxpayer funds will be called on to compensate or replace the lost funding as a result of the unintended consequences of particular aspects of this Review Report on charitable fundraising.

This submission focuses on some proposals in the Review with an emphasis on a key proposal around the requirement for consent in trading data in Proposal 20.4. Since this proposal would affect a number of direct marketing channels, there is the unintended consequence of a significant reduction in the estimated \$4.7 billion in charitable donations annually generated by direct marketing activities (See paragraph 1.1). Charities, traditional direct marketers who supply data solutions to charitable fundraisers, and communities that receive support from donations by means of trading data will be severely impacted by the unintended consequences of this proposal. **The additional constraint on consent advanced in Proposal 20.4 would significantly hinder charitable fundraisers from reaching out to and contacting a broader pool of donors and potential donors.**

1 Proposal 20.4 - Introduce a Requirement that an Individual's Consent must be Obtained to Trade their Personal Information.

1.1 The Impact of the Proposed Approach to Consent Requirement in Proposal 20.4 on Charitable Fundraising

In 2020, the Australian Charities and Not-for-Profits Commission (ACNC) reported that approximately \$12.7 billion was received as charitable donations across the country.¹ Based on another report from the Benchmarking Project, it is estimated that about 37% of charitable donations are generated through direct marketing activities.² Accordingly, it is also estimated that direct marketing activities result in \$4.7 billion in donations annually. Consequently, the amount of annual donations through direct marketing activities could be significantly reduced if Proposal 20.4 is implemented, since it would affect several direct marketing channels used by Charities.

Increasingly, charitable fundraising relies on the trading of data in order to be effective and impactful. Charities communicate with donors/prospective donors using a variety of direct marketing channels for example through buying lists and swapping data. Trading data is essential to the success of most Charities both for soliciting donations and for engaging with donors and the broader community regarding their outputs and impact. As set out in paragraph 1.4 of this submission, all of this already occurs within a regulated environment that requires Charities that trade data to obtain consent for personal information, not exploit it, and to protect people's privacy.

FIA and the PFRA submit that further consent requirements are unnecessary for charitable fundraising in view of the unintended consequences. Charity fundraisers and traditional direct marketers who supply data solutions to Charities already competently adhere to the current framework.

1.2 Distinguishing Traditional Direct Marketing from Direct Marketing Digital Platforms

It is our view that in rationalising this proposal, the Government has not made a full distinction between traditional direct marketing, traditional direct marketing by charities, and direct marketing done by digital platforms. In our evaluation of Proposal 20.4, we observed that direct marketing via digital platforms is at the core of the reasons for the proposal. The Review Report

¹ ACNC Australian Charities Report 8th Edition <<https://www.acnc.gov.au/sites/default/files/documents/2022-06/Australian%20Charities%20Report%20-%208th%20edition.pdf>>.

² The Benchmarking Project <<https://www.benchmarkingproject.org/>>.

amplifies marketing by digital platforms with references to the regulatory approaches in the EU, UK, US, and Canada.

We understand the Government's position that digital platforms need to be more transparent and certain in their handling and dissemination of data. However such concerns are not apparent in traditional direct marketing, and in particular in traditional direct marketing done by Charities. Thus, this proposal risks creating unintended consequences if these distinctions are not established and utilised.

Our view is that this proposal unintentionally combines the tensions and concerns of digital platforms with the trading of data by charity fundraisers without adequately qualifying the distinction.

FIA and the PFRA submit that clarification be provided on whether: 1) Proposal 20.4 is applicable to trading of personal information for charitable fundraising purposes, and 2) if applicable, what evidence underlies subjecting charitable fundraising to the proposed requirement.

1.3 Impracticality of Implementing Proposal 20.4

In our view, it would be onerous and unnecessary if new consent notifications need to be sent to existing databases where consent was already previously obtained. Furthermore, seeking consent in every instance before trading in personal information will invariably create consent fatigue. The cost of implementing this proposal would be extremely prohibitive, and it would eliminate direct marketing and the trading of data as a fundraising channel for charities.

FIA and the PFRA submit that: 1) the Government clarify how charity fundraisers are to comply with a proposal 20.4 regime when trading personal information, and 2) the Government provide an assessment of the cost to charities in implementing this proposal. A critical assessment must be conducted to determine whether the financial implications of this proposal are proportionate to the impact its implementation would have on charitable fundraising and the support Charities provide to the community.

1.4 The Proposal 20.4 as an Unnecessary Over-Regulation of Consent

In paragraph 1.1, we noted that Charities that trade personal information and suppliers to the charity sector are already subject to and compliant with several relevant regulations regarding consent requirements. Our view is that the underlying intentions of Proposal 20.4 are already sufficiently entrenched in existing regulatory frameworks including the Spam Act 2003, the Do Not Call Register, and the Australian Privacy Principles. These frameworks already inform, protect, and enable the privacy rights of individuals.

In line with APP 1, entities that use personal data already have the responsibility to manage personal information in an open and transparent way. Under APP 1.4, the Privacy Policy of an entity must describe the purposes for which personal information is usually collected, held and disclosed. Further, in line with APP 7, provided an entity makes available a simple means by which an individual can easily request not to receive direct marketing communications (opt out), an entity can also use or disclose personal information for direct marketing purposes if the entity collected the information from someone other than the individual. This current framework has been implemented effectively across the charity sector, and it facilitates bundled consent for the collection of data which enables the acquisition of prospective donors.

It is our view that provided third-party opt-ins are clear and opt-outs are included within notification statements, there should be no further restrictions on the use or disclosure of such information. The unintended consequence of Proposal 20.4 undermines the direct marketing provision whereby consent can be implied from the actions of the individual provided proper notice is presented.

1.5 Existing Educational Guidance from FIA and the PFRA

It should be noted that FIA and the PFRA have educational resources to enable Charities ensure that data has been collected in line with the expectations of APP7 (**see attached**). These resources emphasize that charity fundraisers must clearly outline when third parties will receive the data to be used for marketing purposes, at the point of data collection. It also prompts charity fundraisers to ensure that individuals are given the option to opt out at the point of data collection, where data was collected by a third party.

We submit that charitable fundraisers are acting responsibly and have been taking steps to ensure individuals' privacy is protected. Maintaining effective compliance with the existing regulatory environment and best practice guidance is a priority for the sector.

2 Proposal 18.3 - Introduce a Right to Erasure

Our view is that existing provisions around de-identification and destruction of personal information in the Act remain fit for purpose and proper for charitable fundraising. Currently, individuals have the right to have their information destroyed or deidentified, which makes it easier for charity fundraisers to maintain information on donor preferences in accordance with best practices fundraising. Erasure would result in a charity being unable to respect any historically expressed communication preferences e.g. for an individual not to be contacted. Donor preferences serve as a way for Charities to empower donors and enhance their trust in the sector. Donors who have more control over what they receive, when they receive it, and how much they receive from a Charity are more likely to remain committed to the charitable

cause and make regular donations.³ Where an individual's data is erased, it becomes impossible to suppress that individual's details from future marketing. Moreover, it would result in unwarranted compliance processes, including additional costs which is particular for small Charities.

We take note that the proposal suggests an APP entity could offer to keep the erasure request on record in the event their information was re-identified, and the entity must ensure its security systems will protect the de-identified information from future re-identification if an individual does not want the entity to keep a record of them. This would be challenging because maintaining the systems necessary to comply with this proposition comes at a cost to most Charities who do not have the resources or would rather dedicate those resources to meeting the needs of the community. Donors and the community expect that donations are spent on services to the community. Most charity fundraisers already have systems that enable them to update their database to exclude future communication to a person as requested by that person and this has been effective.

The erasure of donor data may also affect the ability of some charities to provide historical receipts to donors, if requested, for tax purposes as an example.

FIA and the PFRA submit that it may be more appropriate to require erasure of all other information relating to an individual excluding information that can be used to suppress future charitable communication and marketing.

3 Proposal 6.1 - Removing the Small Business Exemption

The Review proposes the removal of the small business exemption which has been a major concession for small charities. By implementing this proposal, all charities will be subject to the Act, regardless of their size.

As observed from the Report, the consideration underlying this proposal is that privacy should take precedence over a range of other countervailing interests such as cost and convenience. The Report further outlines that cost of compliance alone is not sufficient policy basis for maintaining the small business exemption.

FIA and the PFRA submit that the small business exemption should still extend to small charities. Charity fundraisers remain concerned about compliance costs and there is no indication that public interest and community benefit considerations, factors that could

³ The Commission on the Donor Experience < <https://sofii.org/images/Project-13.-Giving-donors-choices-and-managing-preferences.pdf>>.

determine if particular concessions were still necessary, were taken into account for a proposal as consequential as this.

FIA and the PFRA further contend that, if concession is not made for charitable fundraisers to still rely on the Small Business Exemption, the proposed comprehensive package of assistance and support for small businesses to comply with the Act be extend to small charities as well. We welcome further discussion on how such support can be provided in a meaningful way for charity fundraisers.

4 Proposal 26 & 27 - Introduction of a Direct Right of Action and a Statutory Tort for Serious Invasions of Privacy

FIA and the PFRA oppose the introduction of a direct right of action and statutory tort for serious invasions of privacy that could extend to charitable fundraisers and fundraising organisations. A provision of this nature would lead to an endless cycle of litigation and frivolous lawsuits in the courts at the expense of Charities who rely on fundraised dollar for the good work they do and would expose Charities to exploitation and harm.

Summary

Thank you for the opportunity to respond to the Privacy Act Review 2023 on behalf of the charitable fundraising sector.

FIA and the PFRA have put forward positions reflective of the sector noting that the actions stemming from the recommendations in the Review Report should not add additional barriers to charitable fundraising which will ultimately impact every Australian who receives support from charities in any form.