



10 December 2021

Attorney-General's Department  
Email: [OnlinePrivacyBill@ag.gov.au](mailto:OnlinePrivacyBill@ag.gov.au)

Dear Attorney-General's Department,

**RE: Online Privacy Bill Exposure Draft**

I write regarding the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the Bill) and the proposed creation of an Online Privacy code (OP code).

As Australia's largest consumer advocacy group, CHOICE supports measures that protect the rights of consumers both offline and online. As more people turn to the internet to access essential services and make consumer transactions, it is crucial that regulatory measures are forward-looking and work to correct power imbalances that are prevalent in the digital space. CHOICE broadly supports the creation of a mandatory code that empowers consumers to better control and protect their data.

**Recommendations:**

CHOICE recommends:

1. The Bill be amended as follows:
  1. The organisations that are subject to the OP Code (defined as 'OP organisations' in the Regulatory Impact Statement) be expanded to include organisations that collect personal information about an individual in the course of, or in connection with, providing a customer loyalty scheme. This should be in addition to social media platforms, data brokerage services and large online platforms.
  2. OP organisations be required to cease using, disclosing and *holding* personal information upon the request of an individual. This provides individuals the right to erasure of the personal information held by an OP organisation.

3. OP organisations be prohibited from charging consumers who request that the organisation cease using, disclosing or holding personal information.
  4. The OP Code be expanded to require OP organisations to:
    - a) provide mechanisms to deal with the internal handling of complaints; and
    - b) report complaints data to the Australian Information Commissioner and Privacy Commissioner (the Commissioner).
  5. The OP Code be developed by the Commissioner in consultation with consumer, public interest and industry groups, not an industry participant.
2. The Bill retains the proposed additional enforcement functions and regulatory powers of the Commissioner. These are important and necessary measures that will strengthen protections for consumers. CHOICE particularly supports the alignment of penalties with the Australian Consumer Law; the ability to issue infringement notices; and the Commissioner's power to disclose information acquired in the course of their privacy functions on the Office of the Australian Information Commissioner's (OAIC) website.

### **OP Organisations**

The introduction of an OP Code has the potential to address the particular privacy challenges posed by social media and online platforms that collect a high volume of personal information and/or trade in personal information. However, for the code to robustly address these challenges for consumers, it must first capture the right organisations.

CHOICE supports the inclusion of social media platforms, data brokerage services and large online platforms as OP organisations. However, we are concerned by the exclusion of organisations that operate in connection with providing a customer loyalty scheme, particularly since these organisations are known to handle and trade in personal information and tend to have close relationships with data brokerage services. Further, customer loyalty schemes are widely used by consumers across Australia, often in conjunction with purchasing essential goods and services (e.g. groceries and fuel).

The ACCC has rigorously highlighted the harms of customer loyalty schemes left unchecked in its 2019 Review of Customer Loyalty Schemes.<sup>1</sup> These include the profiling of consumers based on the data collected and the potential for different consumers being offered different prices for an identical product or service, as well as increasingly targeted advertising enabled by the sharing of consumer insights with third parties. CHOICE recommends that this category of organisation is included in the proposed list of OP organisations.

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<sup>1</sup> ACCC 2019, *Customer loyalty schemes - final report*, accessed on 30 November 2021, <https://www.accc.gov.au/publications/customer-loyalty-schemes-final-report>

## **APP requirements**

CHOICE is broadly supportive of the requirement that the OP Code is to set out how Australian Privacy Principle (APP) 1.4(c), APP 5, APP 3 and 6 will be complied with by OP organisations.

However, CHOICE has concerns about how data brokerage services, which often act as third parties, will be able to ensure that the consumers whose data they hold can meaningfully consent to the collection, use and disclosure of their personal information. The specified APPs would work best when there is a first party relationship between the OP organisation and the consumer, however this is rarely the case with data brokerage services.

During the development of the OP Code, CHOICE requests that non-industry stakeholders, such as consumer advocacy groups, are consulted on the proposed provisions related to data brokerage services to ensure they are fit for purpose and meet the intended outcomes. If there is sufficient evidence that data brokerage services could meet these requirements in practice, this would enable consumers to protect and control their data even if they don't have a direct relationship with the data brokerage service.

## **Requirement to cease using or disclosing personal information**

CHOICE supports the introduction of the requirement to cease using or disclosing personal information upon request from an individual. However, this should be strengthened to a consumer's right to erasure to ensure that consumers have full control over their personal information.

CHOICE is concerned about the proposal that an OP organisation may be able to impose charges for responding to an individual's request to cease using or disclosing personal information. This acts as a barrier for consumers to control the use of their personal information and may deter individuals from taking advantage of the proposed requirement. CHOICE recommends that OP organisations be prohibited from charging consumers who make such a request.

## **Optional requirements**

CHOICE recommends that the following proposed optional requirements be made mandatory within the OP Code:

- providing mechanisms to deal with the internal handling of complaints and
- providing for the reporting of complaints to the Commissioner.

Minimum requirements will ensure that complaints are dealt with methodically and fairly, in addition to increasing accountability within an organisation. Each OP organisation should have appropriate processes in place to address and report complaints. Further, complaint data should be made publicly available via the OAIC in order to alert consumers to new or emerging issues,

potentially highlight good and poor performing businesses, and encourage continual improvement across the industry.

### **Code making process**

CHOICE supports a government or regulator developed OP Code. It is not appropriate for the Code to be developed solely by industry participants. We do not believe this is in the best interests of Australian users as the Code may favour the needs and practices of businesses. As an impartial representative, the Commissioner is best placed to develop the OP Code, in close consultation with civil society (including consumer advocates and privacy experts) alongside industry representatives.

### **Penalties**

#### ***Increasing the maximum civil penalty for serious and/or repeated interference with privacy of an individual***

CHOICE supports the proposal that breaches of the Privacy Act should mirror those under the Australian Consumer Law, at a minimum. Increasing the maximum civil penalty signals to the public and regulated entities that breaches of the Privacy Act are serious and will be treated as such. Equally, the increase in penalty will act as a significant deterrent and encourage organisations to ensure rigorous compliance with the Privacy Act.

#### ***Creating a new infringement notice for failing to give information, or to provide a document or record when required as part of the Commissioner's investigation***

CHOICE supports the introduction of a new infringement notice if an OP organisation fails to give information or to provide a document or record when required by the Commissioner. This will deter organisations from failing to comply with a request made by the Commissioner. Further, it will allow for the OAIC to resolve matters more efficiently resulting in improved outcomes for consumers.

#### ***Expanding the types of declarations that the Commissioner can make in a determination at the conclusion of an investigation***

CHOICE supports the expansion of the types of declarations that the Commissioner can make in a determination, including the requirement for a respondent to engage an independent adviser to examine conduct and identify processes to ensure it is not repeated or continued. An independent adviser will act as an impartial expert who can develop solutions that meet both the organisation's and consumer needs.

Further, CHOICE supports a new determination power for the Commissioner to require a respondent to prepare a statement about the conduct that led to the interference of privacy and an outline of steps they have taken or will take to remediate the contravention. The requirement

to publish the statement and/or provide a copy to the complainant or affected class member will increase transparency and accountability; assure the complainant/s that the matter is being addressed; and provide important examples for other OP organisations to learn from and avoid.

### ***Enhancing the Commissioner's capacity to conduct assessments***

CHOICE supports the extension of the Commissioner's existing powers to conduct assessments of regulated entities. This is necessary to address the knowledge and power asymmetry between organisations and the Commissioner, and to ensure that organisations are handling information in accordance with legislative requirements.

### ***Improving the Commissioner's information-sharing arrangements with relevant enforcement bodies and complaint bodies***

CHOICE supports the proposed power of the Commissioner to share information or documents with relevant enforcement bodies and complaint bodies. This is common practice with other regulators and complaints bodies, such as the Australian Financial Complaints Authority which refers matters to ASIC, APRA and the ATO in accordance with its obligations under the *Corporations Act 2001 (Cth)*.

### ***Disclosure of information***

CHOICE supports the proposed Commissioner power to disclose information relating to privacy and information on the OAIC's website. This will provide transparency for consumers and accountability for organisations when serious breaches have occurred.

### ***Expand the extra-territorial application of the Privacy Act***

CHOICE supports the expansion of the application of the Privacy Act to foreign organisations who carry on a business in Australia. This will close loopholes and increase clarity for both organisations and consumers as to rights and obligations under the Privacy Act.

For further information, please contact CHOICE on [apereira@choice.com.au](mailto:apereira@choice.com.au)

Yours sincerely,

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