



13 December 2021

Ms Amy Jarvoll
Online Privacy Bill
Attorney-General's Department
By email: OnlinePrivacyBill@ag.gov.au

Dear Ms Jarvoll

[Joint Industry Submission: Online Privacy Bill Exposure Draft](#)

The Australian Banking Association (ABA), Australian Finance Industry Association (AFIA), Financial Services Council (FSC), Insurance Council of Australia (ICA) (collectively, the joint signatories) welcome the opportunity to provide feedback on the Attorney-General's Department's (AGD) consultation on the Online Privacy Bill Exposure Draft.¹

We represent a diverse range of financial services businesses (financial institutions) operating across the breadth of Australia's financial services industry. We all have an interest in a competitive and innovative financial services industry that consistently delivers positive outcomes for consumers and supports the Australian economy.

[Overall View and Recommendations](#)

Individual industry associations have provided their own submissions, which highlight issues specific to their memberships. The purpose of this letter is to outline key areas of common agreement and shared concerns.

First, that the Exposure Draft represents a significant expansion on the recommendations of the Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry Final Report (the DPI). There has been no data provided to explain the expanded scope or consideration of whether there is any policy basis

¹ Attorney-General's Department (Oct 2021) *Online Privacy Bill Exposure Draft* ([link](#))

for extending the DPI recommendations beyond the original terms of reference, and no consideration of the specific circumstances of the finance sector, which already operates in a heavily regulated and legally complex environment.

Second, that there may be unintended consequences arising out of this expansion in scope, which we outline below in more detail. We view that the Exposure Draft stage of the policy development process is not an appropriate stage for detailed examination of these issues and further examination and consideration should have been conducted well prior to this stage.

On the basis of these two points, the signatories strongly **recommend** that to avoid unnecessary complexity, potential conflict of laws and outcomes, and higher administrative costs, the Exposure Draft be amended to return to the scope of the DPI in accordance with its original terms of reference, and that entities within the financial services industry be excluded from the definition of online platform (OP) organisations. We also **recommend** that any outstanding questions regarding the privacy framework for the finance sector be considered as part of the ongoing Review of the Privacy Act 1988.²

Expansion of the Digital Platforms Inquiry Recommendations

The terms of reference considered by the DPI included “all digital platforms supplying online search, social media and content aggregation services”.³ The Final Report provided more detail on the scope of the ACCC’s considerations, again making clear that the inquiry was focused on a relatively narrow set of entities.

The Exposure Draft would substantially expand the application of the OP Code to include “large online platforms”. The two requirements would be that the entity:

- *collects personal information about an individual in the course of or in connection with providing access to information, goods or services (other than a data brokerage service) by use of an electronic service (other than a social media service); and*
- *has over 2,500,000 end-users in Australia in the past year, or if an organisation did not carry on business in the previous year, 2,500,000 end-users in the current year*

While the Explanatory Paper cites the examples of Apple, Google, Amazon and Spotify,⁴ the term “large online platform” would clearly capture a much broader range of entities on the above definition. It would extend to many banks, insurers, finance providers, superannuation funds, intermediaries and other third parties through which financial products, services and technologies are provided to consumers, and so on.

Financial institutions already operate within a heavily regulated and legally complex environment. Regulatory complexity in the finance sector has increased over the past few years. While the submissions of individual industry associations provide more granular detail about the regulatory frameworks of their

² Attorney-General's Department (Oct 2021) *Review of the Privacy Act 1988* ([link](#))

³ ACCC (Dec 2017) *Digital Platforms Inquiry: Terms of Reference* ([link](#))

⁴ Attorney-General's Department (Oct 2021) *Explanatory Paper: Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021*, ([link](#)) 8

individual sectors and members, the common challenge is that there has not been any sustained examination of:

- a) how the measures in the OP Code would interact with existing regulatory requirements;
- b) whether a policy rationale exists at all for extending the recommendations in this way (given the absence of any identified or known gaps in the privacy practices of the financial institutions already regulated under other laws and frameworks sector or any examination/investigation into the finance sector's data handling practices); and
- c) how the OP Code would impact the complex and varied arrangements through which financial products, services and technologies are provided to customers, including arrangements or platforms through which authorised deposit-taking institutions, insurers and financial services licensees make the products and services for which they are licenses available to third party partners which in turn distribute products and services to their customers.

Importantly, we support regulation to protect customers' data. A theme of the DPI was the lack of effective regulatory frameworks for some of the activities of digital platforms not otherwise regulated. The Explanatory Paper accompanying the Exposure Draft does not provide any information regarding how the proposals would interact with existing regulatory obligations, compliance requirements and customer protections already required of entities in the finance sector. Specifically, it is unclear how the proposals would interact with requirements under the Open Banking regime.

Potential for Unintended Consequences

The joint signatories offer the following examples of areas that need further consideration. We note this does not represent an exhaustive list, but is designed to illustrate the challenges in applying the OP Code without deeper consideration:

Lack of Clarity with Key Terms. While the term "end user" is critical to determining whether an entity meets the OP Code threshold, the Exposure Draft leaves it undefined. The Explanatory Paper suggests that this is intended to be interpreted broadly, stating that "an end-user is any individual who uses the electronic service".⁵ This suggests that it is not limited to customers but would also encompass prospective customers who seek quotes, make loan applications, request further information on products, and so on. It is also unclear whether an individual customer who interacted with the same provider through multiple channels would count as one or multiple "end users".

Fracturing the Consumer Privacy Experience. A consumer who used an entity classified as a "large online platform" would be treated differently to one who used a smaller service provider in the same industry. In many cases, this would be the same individual, who may be seeking comparison quotes from multiple sources. This would create a fractured privacy experience and likely result in significant customer confusion – it is unlikely that consumers would understand this distinction. We strongly suggest this was not the DPI's intention. Regulatory obligations should be proportionate, scalable and targeted to protect customers' data.

⁵ Explanatory Paper, 8

Lack of Appropriate Timeframe to Create the OP Code. Several of the joint signatories have experience with implementing and maintaining industry Codes of Conduct. In our view, the 12 month timeframe in the Exposure Draft is not realistic, especially given the ongoing program of regulatory reform and customer assistance in the finance sector due to but not limited to the recommendations of the Financial Services Royal Commission and disruptions associated with the COVID-19 global pandemic.

The expanded scope of the Exposure Draft will further complicate the development of the OP Code. There is no recognisable “industry” that covers online retailers, insurers, video-conferencing services, banks, dating apps, superannuation funds, online streaming services, financiers, search engines, among others. Therefore, firms within the scope of the OP Code would be faced with the need to rapidly establish consultative mechanisms across disparate industries.

To illustrate the complexity of this challenge, the most recent review of the ICA General Insurance Code of Practice occurred over a period of three years, despite being within a well-defined sector with pre-existing collaborative mechanisms. The ABA’s Banking Code of Practice took approximately two and a half years from commencement of the rewrite to registration with ASIC. AFIA’s specialised industry codes have variously taken between 18 months to 3 years to develop and implement. We also note that a Code covering such a diverse range of businesses and disparate range of industries would, by necessity, either be excessively generalist or overly complex.

Lack of a Transition Period. The Exposure Draft does not contemplate a transition period. It appears that the intention is that the OP Code will apply from 12 months after Royal Assent. Entities subject to the OP Code will need lead-in time to update policies and systems as well as undertake training programs to meet the new requirements. In turn, these requirements will become apparent after the OP Code has been developed.

Interaction with the Privacy Review. Interactions with the timing of the *Review of the Privacy Act 1988* also require consideration. Should the Exposure Draft proceed to a Bill and pass Parliament later in 2022, then the OP Code may be operational from mid-to-late 2023. Therefore, it is likely that it would be entering into operation at around the same time as the additional recommendations from the *Review of the Privacy Act 1988* are under consideration. This raises the prospect of multiple rounds of privacy reform and regulatory changes being imposed on the financial sector in rapid succession.

Next Steps

The joint signatories do not believe that a policy rationale exists for expanding the recommendations of the DPI to include the finance sector. As we have outlined above, the finance sector is qualitatively different to the online platforms considered by the ACCC. Financial institutions are heavily regulated by multiple financial regulators and exist in a legally complex environment.

We are concerned that interactions with existing regulatory requirements have not been appropriately examined and investigated. Detailed consideration would also need to be given to complex and varied distribution arrangements through which financial products, services and technologies are provided to customers, including through third party partners and/or the use of intermediaries.

We therefore strongly **recommend** that the Exposure Draft be amended to return to the more focused scope of the DPI and that entities within the financial services sector be excluded from the definition of OP organisations. Should the Government wish to explore any proposals for changes to the operation of privacy regimes in the finance sector, we believe this should be contemplated the ongoing *Review of the Privacy Act 1988*.

Thank you for the opportunity to make this submission. Please contact Aparna Reddy (areddy@insurancecouncil.com.au) if you wish to discuss this letter in further detail with the joint signatories.

Yours sincerely



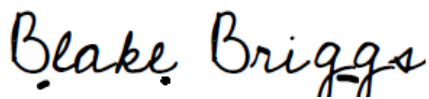
Aidan O'Shaughnessy

Executive Director, Policy
Australian Banking Association



Diane Tate

Chief Executive Officer
Australian Finance Industry Association



Blake Briggs

Deputy Chief Executive Officer
Financial Services Council



Andrew Hall

Chief Executive Office
Insurance Council of Australia