

The logo for Optus, featuring the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to  
Attorney-General's  
Department consultation

**Explanatory Paper  
Privacy Legislation  
Amendment (Enhancing  
Online Privacy and Other  
Measures) Bill 2021**

Public Version

December 2021

## INTRODUCTION

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1. Optus welcomes the opportunity to provide comments on the Attorney-General's Department exposure draft and related explanatory paper for the proposed Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the OP Bill).
2. The OP Bill proposes a framework for certain organisations to be subject to an online privacy code. This proposed online privacy code was initially announced following the Facebook / Cambridge Analytica events and the Australian Competition and Consumer Commission's (ACCC's) Digital Platform Inquiry Final Report.
3. However, instead of being targeted at large digital platforms and social media services in their ordinary meaning, the proposed provisions are so broadly defined they would apply to a far greater array of organisations in a wide number of industries, such as banking, insurance, aviation and transport, energy – in fact just about any large company that provides online account management or ordering and tracking services – as well as telecommunications.
4. Optus considers this goes far beyond what was intended and that amendments should be made to key definitions to ensure that the new requirements are appropriately targeted and fit for purpose. Otherwise, costs will far outweigh any potential benefit.
5. Optus also submits that these changes should be considered as part of the broader Privacy Act Review that has recently been initiated. In that way the framework can be considered holistically within the broader context of the Privacy Act and interaction between the OP Bill and any other potential changes is clear. This would mitigate the chance of any unintended consequences.
6. Optus has had the opportunity to review the submission lodged by Communications Alliance. While Optus supports this submission and its contents, we wished to make further comment on the specific issue of the proposed definitions and timing of the OP Bill within the context of the broader Privacy Act Review.

## CHANGES TO PRIVACY ACT SHOULD BE CONSIDERED HOLISTICALLY WITH PRIVACY REVIEW

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7. The Online Privacy Bill proposes establishing a framework in the Privacy Act 1988 (Privacy Act) for developing an Online Privacy Code (OP Code) to deal with how certain private sector organisations must comply with the Privacy Act's Australian Privacy Principles and additional obligations. There are substantial changes to insert this new OP Code framework, new definitions, reporting obligations and enforcement and penalty changes.
8. The Attorney General's Department has also released a detailed Discussion Paper to review the Privacy Act.<sup>1</sup> This wide-ranging review proposes significant changes to the Privacy Act relating to:

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<sup>1</sup> Attorney-General's Department, Privacy Act Review – Discussion Paper, October 2021.

- (a) Controls on collection of personal information, including new obligations where information may have been originally obtained by another party.
  - (b) Controls on use of personal information, and includes new rules governing acts that are considered to pose a particular risk to privacy.
  - (c) New rights for data subject to object or withdraw consent at any time for the collection, use and disclosure of their personal information, with a limited right of erasure.
  - (d) Compliance obligations for influencing decision making, automated decision making, marketing and for new requirements regarding default settings and record keeping.
  - (e) Adjustments to the rules regarding access and correction of information.
  - (f) Changes to rules about offshore access.
  - (g) An overhaul of enforcement measures, including individual rights of action.
  - (h) Further changes to other definitions in the Privacy Act.
9. The proposed changes represent significant and substantial changes and require detailed review to consider the implications for all companies subject to the Privacy Act and APPs.
10. Optus submits there would be benefit to considering the proposed changes in the Online Privacy Bill as part of this broader Privacy Review, so that these changes can be examined holistically along with the other proposed changes to the Privacy Act. Without having the opportunity to fully examine the potential changes likely to result from the Privacy Review along with the Online Privacy Bill, it is difficult to be confident of the interaction between provisions and the privacy framework as a whole.
11. It is important to understand this interaction and the framework to ensure it is fit for purpose and targeted at addressing clearly identified harm. For example, the Online Privacy Bill notes that organisations that collect personal information are not considered large online platforms if that information is collected in connection with providing a customer loyalty scheme. However, the explanatory paper goes on to note that customer loyalty schemes will be considered as part of the broader Privacy Review.<sup>2</sup>
12. Therefore, Optus submits that consideration of the Online Privacy Bill should be deferred to form part of the broader Privacy Act Review to ensure the interaction of provisions does not have any unintended consequences, are fit for purpose and that the assessment of benefits and costs can be made in their entirety.

## DEFINITIONS NEED TO BE APPROPRIATELY TARGETED

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13. Notwithstanding Optus' views that the Online Privacy Bill should be deferred to be considered as part of the Privacy Review, Optus has further comments on the proposed Online Privacy Bill. These comments are limited to considering the Bill on its own, and not alongside the changes proposed as part of the broader Privacy Act Review.

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<sup>2</sup> Attorney-General's Department, Explanatory paper – Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021, October 2021, p. 8.

14. In particular, Optus considers that careful consideration needs to be given to the definitions in the OP Bill to be subject to the OP Code to ensure that it is appropriately targeted and addressing the specific concerns identified. Optus' submission is limited to focussing on issues related to these definitions.
15. The explanatory paper to the OP Bill notes that the OP Code is intended to apply to 'OP organisations who are defined as the following:
  - (a) Organisations that provide social media services;
  - (b) Organisations that provide data brokerage services; and
  - (c) Large online platforms.
16. The introduction to the explanatory paper specifically notes that the Government was committed to strengthening privacy protections by introducing a binding code of practice for social media and other online platforms that trade in personal information in response to the Facebook / Cambridge Analytica data harvesting incident in 2018.<sup>3</sup>
17. The explanatory paper also refers to the Australian Competition and Consumer Commission's (ACCC's) Digital Platforms Inquiry Final Report which recommended the development of a privacy code for digital platforms, including social networks.<sup>4</sup>
18. In the ACCC's Digital Platforms Inquiry, digital platforms were considered to be online search engines, social media and digital content aggregators.<sup>5</sup> When it came time to considering the interaction with privacy laws, while the ACCC noted that some broader economy-wide changes may be needed, it recommended a specific Privacy Code for digital platforms specifically (recommendation 18).
19. The explanatory paper notes that the definition for a large online platform is "intended to capture organisations who collect a high volume of personal information online".<sup>6</sup> It refers to examples of large online platforms include major global technology companies (such as Apple, Google and Amazon) and media sharing platforms (such as Spotify).<sup>7</sup> It also provides examples of 'social media services', which includes social networking sites such as Facebook; dating applications such as Bumble; online content services such as Only Fans; online forum sites such as Reddit; Gaming Platforms and online messaging/videoconferencing platforms such as WhatsApp and Zoom.<sup>8</sup>
20. It is Optus' view that online privacy measures, such as the OP Code, were clearly intended to be targeted at the above services and platforms. Yet the proposed

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<sup>3</sup> Attorney-General's Department, Explanatory paper – Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021, October 2021, p. 3.

<sup>4</sup> Attorney-General's Department, Explanatory paper – Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021, October 2021, p. 3.

<sup>5</sup> ACCC, Digital Platforms Inquiry – Final report, June 2019, p. 4.

<sup>6</sup> Attorney-General's Department, Explanatory paper – Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021, October 2021, p. 8.

<sup>7</sup> Attorney-General's Department, Explanatory paper – Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021, October 2021, p. 8.

<sup>8</sup> Attorney-General's Department, Explanatory paper – Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021, October 2021, p. 7.

definitions in the OP Bill are drafted so broadly that it is difficult to see how they would not capture companies beyond those listed above, operating in a range of industries.

21. The broad scope of these measures arises from problematic definitions of 'large online platforms', 'social media service', 'electronic service' and lack of clarity over what constitutes an 'end-user'.
22. It would seem that every organisation that provides online or app-based ordering and tracking or account management services to a large number of customers would fall under the definition of large online provider. Such measures are essentially customer support mechanisms allowing consumers to manage their services, view bills/usage or spend tools, update their contact details, track orders and delivery, view past orders and manage communications preferences. Further, it would also seem that simply by virtue of supplying telecommunications services that enable end-users to communicate with each other that telecommunications service providers would be considered an organisation supplying a social media service.
23. Optus considers such a broad number of organisations were not the potential cause of harm identified in the ACCC's Digital Platform inquiry that prompted the recommendation for an OP Code. As such, broadly crafted definitions that go beyond what is necessary to address the potential harm, are not appropriately targeted, and therefore could impose much broader costs than necessary to address the potential issue.
24. The mere act of providing a carriage service that enables an end-user to use the internet to access a digital platform should not be viewed the same way as a digital platform service. The ACCC noted in its Digital Platform inquiry final report that digital platforms provider services to customers for zero monetary price in order to obtain consumers' attention and data which is then monetised. Their business model is to attract a large number of users with the primary purpose of building rich datasets.<sup>9</sup>
25. As such, Optus considers that the definitions of 'social media service' and 'large online platform' should be amended to ensure that they are appropriately targeted.
26. Optus considers the definition of social media service (s. 6W(1)) should make clear that organisations that provide carriage services including SMS, MMS, email, and mobile applications do not fall within the scope of organisations providing social media services, as defined in section 6W.
27. Further, Optus considers the definition for large online platform (s. 6W(4)) should be amended to except telecommunications service providers from being considered a large online platform by adding an additional exception to s. 6W(5), such as (additions in red):

(5) However, an organisation is not an **OP organisation** for the purposes of subsection (4) to the extent that:

(a) the organisation collects personal information about an individual in the course of or in connection with providing a customer loyalty scheme; **or**

(b) the organisation supplies a broadband service.

Note: for the purposes of this section, **broadband service** means a carriage service that is supplied using a local access line or public mobile telecommunications service, where:

(a) the carriage service enables end-users to download communications; and

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<sup>9</sup> ACCC, Digital Platforms Inquiry – Final report, June 2019, p. 7.

- (b) the local access line or public mobile telecommunications service is part of the infrastructure of a telecommunications network in Australia.

Or option 2:

(5) However, an organisation is not an **OP organisation** for the purposes of subsection (4) to the extent that:

- (c) the organisation collects personal information about an individual in the course of or in connection with providing a customer loyalty scheme; **or**
- (d) the organisation supplies a telecommunications service.

Note: for the purposes of this section, **telecommunications service** means a service for carrying communications by means of guided or unguided electromagnetic energy or both, being a service the use of which enables communications to be carried over a telecommunications system operated by a carrier but not being a service for carrying communications solely by means of radiocommunication.

28. The above definition of telecommunications service comes from section 5 of the Telecommunications (Interception and Access) Act 1979. 'Local access line' and 'public mobile telecommunications service' are also defined in existing legislation.
29. Optus also supports including a definition for end-users for additional clarity. This could include defining 'end-user' by reference to being a registered user / current account holder or active user.
30. Optus considers making the changes discussed above to the definition of OP organisations will ensure the OP Bill is better aligned with the intent of these regulations.