Submission to the Attorney-General's Department

Consultation on the Privacy Amendment (Personal Data Protection) Bill 2026

About IAB Australia

IAB Australia is the industry body for digital advertising in Australia. We bring together members from across the digital advertising supply chain including media owners, ad tech providers, platforms and agencies to share knowledge and insights to support policy making. IAB Australia is one of 47 IAB offices globally.

IAB Australia has a local member base of approximately 180 organisations. The Board includes representatives from Carsales, Domain, Google, Guardian News & Media, Meta, News Corp Australia, Nine Entertainment, REA Group and Southern Cross Media.

Introduction

IAB Australia welcomes the opportunity to respond to the Exposure Draft Bill to amend the *Privacy Act 1988* (Cth) and accompanying Consultation Paper.

IAB supports the dual objectives of protecting consumers while also providing certainty for industry and productivity benefits for Australians more broadly. Our comments are designed to maximise these policy objectives by recommending changes that will:

(i) preserve consumers' control over their data while also removing repeated intrusions and consent requests;

(ii) reduce consent fatigue and friction in the consumer's user experience;

(iii) increase certainty for business, enabling compliance and boosting productivity; and

(iv) establish ongoing cooperative compliance pathways between industry and the regulator.

Our key concern is that the requirement for consent for such a broad category of direct marketing communications will have a significant negative impact on productivity and business sustainability. As drafted, any entity that shares an audience segment with someone else, who then uses it to make a segmented offer or otherwise deal with an individual within that segment, will be caught by the 'trading' concept and will need to seek consent. This appears likely to catch all programmatically served personalised advertising.

Additionally, each and every direct marketing communication using personal information will be subject to the opt out requirement. This may inadvertently reduce the effectiveness of the privacy framework by encouraging consumers to routinely click through rather than meaningfully engage with the choice.

We understand and support the objective of increasing control for users over their data. However, the current drafting addresses this in a way that undermines productivity and business growth in a way that Australia cannot afford, as well as causing consent fatigue for consumers.

We have suggested an alternative solution - that where consumers would reasonably expect to receive targeted advertising (e.g. where they have chosen an ad supported service) the entity should be subject to the FAR test without additional consent and opt out requirements.

We would also be open to other solutions that preserve consumers' control while avoiding the block on productivity that would be created as a result of requiring consent for such a broad universe of marketing communications. We cannot overstate the importance of finding a workable solution to this issue, to avoid an economy wide impost to the detriment of all Australians.

Executive summary

Objective	Recommendation
Preserve the consumer's control over their data while removing repeated intrusions and requests **Reduce consent fatigue and friction in the consumer's user experience** **Boost productivity and business sustainability to the benefit of all Australians**	**1. Direct marketing communications that are reasonably expected by consumers (e.g. because they have chosen an ad-supported service) should not trigger consent or opt out requirements. The FAR test should be sufficient for such marketing communications.** (a) The legislation should be amended as follows: ○ to provide that where an individual has expressly chosen an ad-supported service, there should be no further requirement for consent or opt-outs; ○ remove the direct marketing limb in s6FC(1)(b) so that 'trading' is confined to the disclosure of personal information for consideration (monetary or otherwise); ○ alternatively, if s6FC(1)(b) remains, add an exception to APP4 to exclude marketing communications that are reasonably expected by the consumer (e.g. because they have chosen an ad-supported service); ○ these amendments mean that expected direct marketing communications will be governed by the FAR test rather than by additional consent or opt-out requirements that must be navigated by the consumer, will cause consent fatigue and will undermine Australian productivity and growth.
Provide certainty for industry to enable compliance	**2. Clarify how 'fair and reasonable' will be interpreted (including the meaning of genuine choice as used in APP3)** (b) Amend APP3 by adding a closed list of objective factors that will be taken into account in judging 'fair and reasonable', rather than deferring this to the sole discretion of the regulator. For example: ○ ***Genuine choice***. Define 'genuine choice' as used in APP3 (as distinct from its use in APP7);

	○ ***Transparency.*** Allow transparency to be a factor in determining reasonable expectation. ○ ***Proportionality.*** Clarify that the assessment of what is 'fair and reasonable' will: ▪ include the concept of proportionality in balancing the potential risks to the privacy of users and the benefits of data processing for users, organisations and third parties; and ▪ take into account the user's preferences and reasonable expectations regarding their privacy. ○ ***BIOC.*** Clarify that 'best interests of the child' will balance all of the child's interests, including privacy, safety, provision of age-appropriate content, and the benefits of digital participation. (c) Amend APP 3.2 to include a rebuttable legislative presumption that an entity has complied with the 'fair and reasonable' test where it can demonstrate that it has considered and applied the objective factors listed in APP3. **3. Define the term 'genuine choice' as used in APP7** Include a definition of 'genuine choice' under APP7 centred around the following elements: ○ the individual is offered access to a functional version of the service without direct marketing on payment of a fee; ○ the fee is not excessive; ○ the options are transparent and clearly explained; ○ there is no coercion to accept any option; ○ there is no requirement that any content or service (including any specific features therein) is offered to consumers without charge.
Maximise consumers' safety and security	**4. Preserve the ability of services to retain personal information where reasonably necessary for core operations and safety, security and integrity purposes** The legislation should be amended as follows: ○ the ongoing service exception in APP 14.3(e) should be amended to substitute "reasonably necessary" for "strictly necessary"; ○ the Explanatory Memorandum should confirm that the permitted general situation in s16A item 2, preserved by APP 14.3(a), extends to retention for the detection, investigation and prevention of fraud, abuse and other serious wrongdoing on a service.
Establish an ongoing cooperative compliance pathway	**5. Include a legislative obligation for the OAIC to consult with industry before amending or creating guidance notes relating to the Privacy Act (the consultation should include the provision of the draft guidance to industry).**

between industry and the OAIC	**6. Provide a 24 month period between (1) the date of Royal Assent or publication of the OAIC guidance notes to the Bill (whichever is later); and (2) the commencement date of the Bill, together with a further 12 month 'non-enforcement' period, during which entities will not be sanctioned for non compliance with the provisions of the Privacy Act introduced under this Bill.** This will enable industry to work collaboratively with the OAIC to establish best practice and compliant behaviour, to the benefit of consumers (noting that this submission raises fundamental concerns that cannot be resolved through a longer implementation timeframe and which must be addressed separately).
Ensure that the reforms are implemented in a way that maximises business growth and sustainability	**7. Register the Children's Online Privacy Code after the Bill is finalised to ensure that the COPC (which does not align with the proposed reforms) does not lock in regulatory incoherence and create compliance builds for two conflicting domestic privacy regimes.** These reforms require significant operational changes and must be introduced in a coherent manner, to minimise the disruption to business growth and sustainability.

Reasoning and practical examples

Recommendation 1. Direct marketing communications that are reasonably expected by consumers (e.g. because they have chosen an ad-supported service) should not trigger consent or opt out requirements. The FAR test should be sufficient for such marketing communications.

See table above for proposed legislative amendments.

The Privacy Act already requires entities to provide an opt-out from direct marketing. The proposed broad definition of "trade" would introduce an additional consent requirement for disclosure of personal information for direct marketing, including targeted advertising, on top of this existing control. Where individuals already have an effective right to opt out, layering a separate consent requirement would create additional compliance friction and disrupt the user experience without providing a clear additional privacy benefit.

Under the draft Bill, consumers are likely to be inundated with requests for consent and opt out notifications, even where the communications in question are within the reasonable expectation of the individual, because the individual has chosen an ad-supported service. Elements of the Bill that lead to this outcome are:

(a) The broad definition of 'direct marketing' means that the opt out requirement will apply to examples of direct marketing communication to an individual, many of which are standard and expected today. This includes all targeted and personalised advertising that uses individuated digital identifiers disclosed by one party to a participant in the programmatic ad tech stack.

(b) The proposed APP4 and APP7 do not distinguish between: (i) an unsolicited approach to a person with no relationship with the advertiser; and (ii) the ordinary operation of a service or product the consumer has elected to use.

(c) The definition of ‘trade’ in section 6FC is broader than necessary, capturing disclosures made for another entity’s direct marketing purposes, not only disclosures for money or other valuable consideration.

(d) The effect of these, in conjunction with the requirement in s6AAB that consent be ‘specific’, could be interpreted to require consent at routine steps throughout the advertising chain (including the programmatic process) — even where an individual has already chosen to use an ad-supported service and elected to receive targeted advertising, and even where each disclosure independently satisfies the FAR test.

The current proposals would have a significant impact on productivity, without a clear privacy benefit. For example, it is difficult to see how these requirements could apply practically to programmatic advertising. Data is exchanged numerous times throughout the programmatic advertising chain and the proposed requirements are likely to result in user friction and a poor user experience, in requiring repeat consent requests for consumers who have already consented to the use of an ad-supported service. It will also hinder the service’s ability to undertake their core operations.

Practical examples

Programmatic advertising. Even where an ad-supported entity has met the “fair and reasonable” test for data handling in APP 3, consumers would still be subject to:

- multiple requests for consent during the programmatic advertising process, despite having already chosen to use an ad-supported service and receive targeted advertising (APP 4).
- an offer to opt out and information on the opt out, with every instance of digital or targeted advertising (APP 7.3 and 7.4). This is operationally impracticable for many common ad formats. For example, a 300×250 pixel banner ad or a six-second video pre-roll simply cannot accommodate opt-out information in clear and plain language as the Bill requires.

Consumer has chosen an ad-supported service. A consumer might choose an ad-supported service. In doing so, they have consented to receiving targeted advertising and would expect to receive such communications. It is unnecessarily intrusive to continue to send consent requests to that individual. Similarly, opt out requests are not relevant within the context of a choice to use a free or discounted ad-supported service. The FAR test should be sufficient in these circumstances.

Property search. A consumer saves a search and elects to receive alerts. Using that search to provide matching listings should not require repeated consent or opt-out notices. An unsubscribe button on each of those communications that is clear and accessible should be sufficient.

Related brands. It is unclear when a consumer's consent obtained by one brand can be relied upon by another brand within the same corporate group. For example, if a consumer signs up to one service and consents to marketing or personalisation, it is unclear whether and in what circumstances that consent extends to communications, audience sharing or personalisation activities involving related brands.

Recommendation 2. Clarify how ‘fair and reasonable’ will be interpreted (including the meaning of genuine choice as used in APP3)

See table above for proposed legislative amendments.

IAB supports the use of a fair and reasonable test (FAR test) as a means of providing a principles based solution, which can be adjusted to fit a range of situations in a proportionate and dynamic manner.

The challenge is to ensure that the test is applied in a way that provides sufficient certainty and consistency and enables businesses to operate efficiently. **As currently drafted, it will be difficult for businesses to establish compliance in advance. This is likely to have significant economy wide impacts on productivity and should not be left to broad regulator discretion.**

IAB’s view is that the FAR test can be made more certain by replacing the non-determinative and non-exhaustive factors with a closed list of criteria. This should be accompanied by a rebuttable presumption that a business has complied with APP 3.1(a) if, before the collection, use or disclosure occurs, it has regard to each of the matters in APP 3.2, makes and retains a written record of its consideration of those matters and the conclusion reached, and the conclusion reached was reasonably open to it, notwithstanding that it was one of alternative conclusions, on the information available at the time of the assessment.

The listed criteria should also include a definition of ‘genuine choice’ to avoid conflation with the definition used in APP7 (see below).

Recommendation 3. Define the term ‘genuine choice’ as used in APP7

See table above for proposed legislative amendments.

The meaning of ‘genuine choice’ in the context of APP7 should be clarified. It is currently used in APP3 (data handling) and APP7 (provision of a differentiated service). The Consultation Paper makes apparently conflicting statements regarding the approach to the question of genuine choice:

- “*choice will not be genuine where individuals are presented with ‘take it or leave it’ terms*”; and
- “*the absence of choice does not necessarily mean that information handling is not fair and reasonable*”.

This confusion should be resolved by providing legislative clarification of ‘genuine choice’ in both contexts. **It must be clear that there is no obligation on business to provide free or commercially unsustainable services to consumers who choose not to receive direct marketing**.

In addition, “genuine choice” should be clarified to target genuinely optional data uses, not features that are part of the service itself. For example, detecting and preventing fraud by examining transaction patterns, device signals, and account history is critical to keeping a payments system running effectively.

Recommendation 4. Preserve the ability of services to retain personal information where reasonably necessary for core operations and safety, security and integrity purposes

It is essential that consumers’ safety and security is adequately protected, even where it involves the use of their personal information. Accordingly, the legislation should be amended as follows:

- the ongoing service exception in APP 14.3(e) should be amended to substitute “reasonably necessary” for “strictly necessary”;
- the Explanatory Memorandum should confirm that the permitted general situation in s16A item 2, preserved by APP 14.3(a), extends to retention for the detection, investigation and prevention of fraud, abuse and other serious wrongdoing on a service.

Recommendation 5. Include a legislative obligation for the OAIC to consult with industry before creating or amending guidance notes relating to the Privacy Act (the consultation should include the provision of the draft guidance to industry).

Recommendation 6. Provide a 24 month period between (1) the date of Royal Assent or publication of the OAIC guidance notes to the Bill (whichever is later); and (2) the commencement date of the Bill, together with a further 12 month non-enforcement period.

First, a legislative consultation obligation would have the aim of helping to ensure guidance is workable and reducing the compliance challenges that would otherwise result from unilaterally issued guidance. The consultation with industry should be undertaken with sufficient time for genuine consultation, before the guidance or amendments are finalised.

Second, there should be a 24 month period between Royal Assent (or publication of the OAIC guidance notes if not published by the date of Royal Assent) and commencement of the Act, followed by a further 12 month period during which the OAIC does not take enforcement action. The initial 24 month period is necessary to allow businesses to implement changes of this significance — updating systems, contracts and consent flows, retraining staff, and rolling out new operational processes. The additional 12 month non-enforcement period would then allow business and the OAIC to work collaboratively on how compliance with the FAR test should be demonstrated, before the risk of enforcement attaches.

Transitional guidance should also address personal information collected before commencement and how the new test applies to its ongoing use.

These time periods must not start to run until the applicable OAIC guidance is finalised and published. It is inefficient (and potentially costly if revisions are needed) for entities to implement operational changes without the assistance of the OAIC guidance notes, particularly around core compliance requirements, such as the FAR test (to the extent they are left to the discretion of the OAIC, which we consider inappropriate for the reasons outlined above).

As an example, the automated decision making privacy reforms received Royal Assent in December 2024 [1] but the final OAIC guidance has not yet been published, making it difficult for business to ensure compliance.

Recommendation 7. Register the Children's Online Privacy Code after the Bill is finalised to ensure that the COPC (which does not align with the proposed reforms) does not lock in regulatory incoherence and create compliance builds for two conflicting domestic privacy regimes.

These privacy reforms require entities to make significant operational changes and must be introduced in a coherent manner, to minimise the disruption to business growth and sustainability. It would be extremely disruptive for entities to build a system to comply with the COPC, only for further alignment changes to be required once the Bill is passed.

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[1] Privacy and Other Legislation Amendment Act 2024 (Cth).