



# Privacy Law - today & tomorrow

## a private briefing for the IMAA

STEPHEN VON MUENSTER, PARTNER

VON MUENSTER LEGAL

# Introduction

Arrival of Digital

2

v

Benefits to society particularly during COVID, while enabling efficient & effective advertising & connection to consumers

v

A dark side where consumer interests have become obfuscated

v

Following high profile data breaches – a significant era of Regulator intervention and reform

v

Significant future impact on any business with data and PI as their centre of gravity



## Outline for the next 45 minutes:

Overview of the current Regulator Inquiries, Investigations & Reports

Privacy and Personal Data

Privacy Reform

Bets for the Future





# Current Regulator Inquiries, Investigations & Reports

# Current Inquiries, Investigations & Reports – Impacting Privacy

## Digital Platforms Inquiry Final Report

- Ø Released 26 July 2019, the DPI Report spans 600+ pages & confirms law and regulation has not kept pace with technology & commercial practice
- Ø The DPI has a particular focus on protection of consumers' privacy & data, standards of consent and transparency of data handling
- Ø Ramifications for businesses that are involved in data processing, handling and dealing – core to their business model
- Ø Federal Government responded on 12 December 2019 with a detailed roadmap for policy and law reform

## Digital Platform Services Inquiry 2020-2025

- Ø This is a further inquiry into markets for the supply of digital platform services.
- Ø Digital platform services covered include internet search engine services, social media services, online private messaging services, digital content aggregation platform services, media referral services and electronic marketplace services.
- Ø The inquiry also covers digital advertising services supplied by digital platform service providers and the data practices of both digital platform service providers and data brokers.
- Ø 28 October 2021, the ACCC released its third interim report (choice screens)
- Ø Further interim reports 2022 and 2024 & final report due in March 2025

## Digital Advertising Services Enquiry

- Ø March 2020 the ACCC released issues paper for inquiry into the markets for the supply of ad tech services and ad agency services
- Ø Final report issued 28 September 2021 (Ad Tech Report)
- Ø This report provides in-depth analysis of competition and efficiency in the supply of these services, and details recommendations to improve competition and efficiency in the supply of ad tech services

## Privacy Act Review

- Ø Privacy Act is being reviewed to ensure that Australia's privacy law framework empowers consumers, protects their data and supports the Australian economy
- Ø Concurrent review underway of a proposed Online Privacy Bill

*Then there will be new laws and codes– transparency and consumer protection, privacy & data a focus – it will be all about CHOICE, CONSENT & CONTROL to be afforded to consumers*





# Privacy & Personal Data Current Laws

# PRIVACY | Privacy Act 1988 (Cth) – Current Law



## Privacy Act 1988

When collecting personal data it is important to be aware of the requirements of the *Privacy Act 1988* (Cth) and the 13 Australian Privacy Principles.

The legislation and APPs apply to organisations with an annual turnover of more than \$3 million or if you trade in or use PI for business.

The APP's require a business to have a Privacy Policy (APP 1), the collection must be necessary for a business purpose (APP 3) and a business must have a separate Collection Statement (APP 5) that provides up-front information to an individual about the collection, use and disclosure of the PI.

## *Direct Marketing*

*The collection, use and/or disclosure of personal information for direct marketing purposes is prohibited, except in special circumstances.*

Marketing teams can use personal information collected directly from an individual where:

APP 7.2 – the individual would reasonably expect to receive marketing communications  
*(Collection Statement disclosures achieve this)*

OR

Can use personal information collected from other sources where:

APP 7.3 – the individual would not reasonably expect to receive direct marketing:

- a. but it would be impractical to obtain consent; and
- b. the marketer provides a simple means to opt-out from receiving marketing communications; and
- c. The marketer provides an opt-out statement in each separate marketing communication; and
- d. The individual has not already requested to opt-out.



# PRIVACY | Privacy Act 1988 (Cth)

**DATA:** *is any information in digital form that can be transmitted or processed*



**PERSONAL INFORMATION UNDER THE AUSTRALIAN PRIVACY ACT** *is information or an opinion about an identified individual, or an individual who is reasonably identifiable (a) whether the information or opinion is true or not, and (b) whether the information or opinion is recorded in a material form or not*

**PERSONAL INFORMATION** is simply a ‘type’ of DATA. The Australian definition is broad, but the GDPR and Californian definitions for example are even broader. *We are seeing a trend towards any data that relates to an individual being PI, even if anonymous or deidentified when taken in isolation due to AI and data analytics technologies*

Privacy Act 1988 (Cth) Section 6	GDPR Article 4(1)	California Consumer Privacy Act 2018 Section 1798.140 (o)
<p>Personal Information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:</p> <ul style="list-style-type: none"> <li>a. Whether the information or opinion is true or not; and</li> <li>b. Whether the information or opinion is recorded in a material form or not.</li> </ul>	<p>Personal Data means any information relating to an identified or identifiable natural person - an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person</p>	<p>Personal information is information that identifies, relates to, or could reasonably be linked with you or your household. For example, it could include your name, social security number, email address, records of products purchased, internet browsing history, geolocation data, fingerprints, and inferences from other personal information that could create a profile about your preferences and characteristics.</p>



# PRIVACY | Privacy Act 1988 (Cth) – current prosecution by the OAIC

## OAIC v Facebook (March 2020)

Facts: Australian Information Commissioner alleged that, during March 2014 – May 2014, Facebook seriously and/or repeatedly interfered with privacy of approx. 311,127 Australian Facebook users by disclosing their personal information to the ‘This is Your Digital Life’ App (Digital Life App)

Users did not install the Digital Life App, yet their information was disclosed by Facebook by default.

Facebook did not adequately inform these individuals of the manner in which their personal information would be disclosed, or that it could be disclosed to an app installed by a friend, but not installed by that individual.

*Personal information of these individuals was exposed to the risk of disclosure, monetisation and use for political profiling purposes.*



No judgment has yet been delivered. However, we can take the following lessons from the OAIC’s action:

- Consent has to be obtained directly from the person involved
- Parties must have strong contracts with third parties to ensure customer data is not being disclosed without authorisation – they must know what third parties will do with the data and ensure that their contracts have provisions making third parties comply with the Australian Privacy Principles
- Allegation is that PI of Australian Facebook users was disclosed to the Digital Life app (and possibly Cambridge Analytica) for purpose other than disclosed purpose of collection .
- Issue is the inability of users to exercise reasonable choice and control about how their PI was disclosed
- OAIC is seeking a penalty for each act of disclosure of PI – the penalty could theoretically be as high as \$500 billion



## PRIVACY | ACCC – current prosecutions by the ACCC

### ACCC'S OFFENSIVE ACTIONS

Stealing a march on the OAIC and not waiting for new law to fall out of the DPI and privacy law reform process, the ACCC is using misleading and deceptive conduct provisions under the ACL to bring businesses with data as their centre of gravity to heel.

20 August 2020

Health Engine liable for collecting and disclosing users' PI and patient information to insurance brokers without consent and for publishing misleading patient reviews and ratings Health Engine found liable for ACL breach and issued a \$2.9 million fine

**TAKEAWAY:** Hidden disclosure not sufficient if buried in privacy policy

19 October 2019

Proceedings against Google alleging misleading conduct and false representations to consumers via phone screen about the sensitive and valuable personal location data it collects, keeps and uses (for numerous purposes) Google found liable for breach of ACL

**TAKEAWAY:** informed choice is key

27 July 2020

Proceedings against Google alleging misleading conduct in obtaining consumer consent to expand the scope of PI that Google could collect and combine about internet activity for purposes including targeted advertising

**TAKEAWAY:** failure to obtain explicit informed consent



## CONSUMER LAW | Privacy Breaches prosecuted under the Australian Consumer Law

### ACCC v Google [2021] FCA 367

- Facts: ACCC argued that users of some Android mobile devices were misled due to 'Web & App Activity' and 'Location History' screens. Google's found liable for conduct during setup, after set up and turning off features that supposedly gave privacy.
- *The main issue is all about consumers having informed choice about how their data is handled - rather than default setting being present whereby certain data can be collected.*
- Makes clear to businesses that representations made in their privacy policies and privacy settings could lead to liability under the ACL
- The ACCC is increasingly focussed on the disclosures provided by companies for how personal data is collected, used and disclosed;
- Businesses should consider how terms and conditions, particularly around consumer data, are presented and likely to be understood;
- Not all members of the class of consumer have to be misled for conduct to be misleading or deceptive. It is sufficient if some are likely to be misled; and
- *Courts have now decided that consumers are time poor and unlikely to effectively engage with information presented in a layered manner that requires attention to links and 'click-throughs' in a digital environment. Businesses should consider whether all relevant information required to be disclosed is presented in a way that is easily accessible to consumers and understood by them – eg "Choice Screens" supported by comprehensive Collection Statement (APP 5)*





# Privacy Reform is on the way

## PRIVACY LAW | Reform is on the way

- On 12 December 2019, the Attorney-General announced that the Australian Government would conduct a review of the *Privacy Act 1988* to ensure privacy settings empower consumers, protect their data and best serve the Australian economy. The review was announced as part of the government's response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry.
- What to expect (but still too early to call precisely what will be in the legislative package):
  - greater emphasis on transparency, the protection of individuals and the obligations on entities to ensure business models and practices safeguard privacy - *obtaining individual [express] consent for the use of personal information*
  - the introduction of fairness and reasonableness standards for the collection, use and disclosure of personal information
  - stronger organisational accountabilities for entities, with an onus on organisations to understand the risks that they create for others, and to mitigate those risks up front; expanded enforcement mechanisms and powers; new rights for individuals
  - *stricter requirements for when and how consent is obtained, an updated definition of 'personal information' to include technical data and online identifiers, additional protections in relation to de-identified information*
  - require entities to reconsider how they define personal information and revisit the operation of their consents and notification mechanisms for collecting, using and disclosing personal information. The changes are likely to necessitate technological change in order to implement and operationalise the reforms
  - *recognition of 'inferred information' as information that deserves protection under the Privacy Act, noting the increasing risks that come from organisations inferring sensitive information based on other data*



## PRIVACY LAW | Reform is on the way

- The Privacy Act review is occurring alongside consultation on the *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021* (Online Privacy Bill). The Online Privacy Bill will introduce a binding Online Privacy code for social media and certain other online platforms. It will also increase penalties and enhance enforcement measures.
- What to expect (but again only at exposure draft stage and subject to final legislative package):
  - very significant changes to how organisations approach protection of personal information, engagement with individuals and governance
  - social media companies, data brokerage companies and large online platforms will be subject to more prescriptive obligations than currently existing in Australian Privacy Principles, with a particular focus on consumer transparency and consent
  - right for individuals to request that an entity cease the use or disclosure of personal information, as well as stricter consent and verification requirements for social media services in relation to children and vulnerable groups
  - The new code will detail how an entity is to comply with:
    - APP 1 – eg privacy policies must be clear and simply explain the purposes for which the organisation collects, holds, uses and discloses personal information;
    - APP 3 and 6 - consent must be voluntary, informed, unambiguous, specific and current; and
    - APP 5 – collection notices to individuals must be clear, understandable, current and provided in a timely manner





# The Future?

# The Future?

## The Impact

- Ø The DPI Final Report, ACCC's recommendations, Government Response, establishment of the Digital Platforms Branch, current inquiries and prosecutorial vectors of the ACCC and OAIC point to a *significant future impact on any business with data and PI as their centre of gravity*
- Ø Significant court cases are already underway against the big platform players even before DPI Report spawned laws have hit the statutes
- Ø All businesses involved in programmatic services will be impacted – advertisers, media agencies, publishers and suppliers in the middle layers of the ad tech stack (SSP's, DSP's, DMP's, Ad X)
- Ø As will businesses that rely on consumer data driven business models eg sale of segment data for targeted advertising or customer loyalty schemes

## The Big Bets

- Ø Consumer Data Right is now in play, starting with banking sector
- Ø The Media Bargaining Code for tech giants to pay for news content commenced
- Ø Regulation of Ad-tech industry, advertising and media agency services
- Ø GDPR aligned amends to the Privacy Act and increased penalties
- Ø OAIC Privacy Code for Digital Platforms – enforceable
- Ø Privacy Act definition of '*personal information*' broadened to include technical & location data, IP addresses and cookie tracking – reliance on anonymized data reduced and regulated
- Ø Stricter notice and consent requirements for use of data, Privacy Policy and Collection Statement upgrades
- Ø New individual right of action for interference with privacy / cyber harm

## The Commercial Advantage

- Ø Business will be forced to implement a legal, technological and operational uplift in order to become and then remain compliant
- Ø Businesses that engage with and embrace the change will have the commercial advantage:
  - § A consumer rights & respect focus
  - § Technological ability and agility
  - § Transparency and compliance as part of business model
  - § Auditability
  - § Strong contracts with suppliers
  - § Very fair and transparent contracts with consumers
  - § Data hygiene in terms of full disclosure and express unbundled consent via active opt-ins
  - § Modern Privacy Policies – simple to understand with no bundling of consents and actually followed by the business
  - § “Choice Screens” supported by comprehensive Collection Statement (APP 5)
  - § Dealing with the great unknown – existing databases?

*Then there will be new laws and codes- transparency and consumer protection, privacy & data a focus – it will be all about CHOICE, CONSENT & CONTROL to be afforded to consumers*





Thank you

[www.vonmlegal.com](http://www.vonmlegal.com)

Tech. Media. Communications.