

10 January 2022

By email: privacyactreview@ag.gov.au

Privacy Act Review
Attorney-General's Department
CANBERRA ACT 2600

Dear Madam/Sir

Privacy Act Review – Discussion Paper

Thank you for the opportunity to respond to the Privacy Act Review Discussion Paper, published by the Attorney General's Department in October 2021. This submission responds solely to the proposals and questions relating to direct marketing, targeted advertising and profiling (section 16 of the Discussion Paper).

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians

The Discussion Paper usefully sets out some of the privacy risks and harms associated with direct marketing, including a lack of transparency, the validity of consent, and individuals' ability to exercise control. We consider, however, that the Discussion Paper somewhat underplays the extent of consumer harm, including in relation to lead generation.

In 2018, Consumer Action published a report, *Dirty leads: consumer protection in online lead generation*. A copy of the report is enclosed. This report finds:

- The risks for consumers in the lead generation process are that they are disempowered, manipulated or misled.
- The main disempowerment risk is that a person has not voluntarily and knowingly elected to share personal information for the purposes of receiving further contact about products or services. When marketing consent is hidden behind unrelated online activities, bundled with mandatory terms and conditions, is overly broad or simply not sought, consumers are denied their opportunity to protect their privacy and can lose control of how their personal information is used.

- The distance between the online publisher and the lead buyer (sometimes with multiple intermediaries standing between them) can also obfuscate consent. If a publisher, who initially interacts directly with customer, doesn't know how the lead will be used, how can a consumer give full and proper consent?
- Lead generation does not offer a promise of consumer suitability and so there is no guarantee that the goods and services on offer through lead generation activities are appropriate to an individual's circumstances. Like all marketing, lead generation uses skilled advertisers and salespeople to influence consumer decision making. Case studies in the report demonstrates that while a product may be personalised and presented as a compelling offer, lead generation can lead to situations where consumers feel manipulated into purchasing products or services that are ill-suited to their situation.
- Consumer manipulation can also occur earlier in the lead lifecycle where people's behavioural biases are exploited in order to source the lead. An offer of free goods or a chance to win prizes or money can deflect attention from the marketing consequences that will arise.
- The report also discusses a growing body of evidence that third party lead generators are willing to take greater risks with their advertising than their clients would, increasing the risks that consumers can be misled.

Given these risks, a core recommendation of the report was for an opt-in requirement for all unsolicited marketing, which would reduce the incentive for lead generation.

The Discussion Paper proposes an unqualified right to object to collection, use and disclosure for direct marketing. We consider that while this is welcome, it must be implemented so that the default requires express opt-in to direct marketing and that this consent is separately identified from other use cases. The opt-in should also clearly state whether information is shared with or sold to third parties to enable lead generation or other marketing.

A right to object, or a requirement to cease using or disclosing personal information on request (as is proposed by the proposed Online Privacy Code¹), is insufficient because it is "after the fact". Personal information may have already been shared by the collecting entity, and the individual has no knowledge about where that information has been sold or shared. Once it is shared, it is difficult to get personal information "back inside the box", even where there are rights to request personal information no longer be collected, used or disclosed. Objecting is inherently a burdensome process for individuals, and even collecting organisations may not be able to stop the use or further disclosure of personal information already shared. Given this, and given the harms listed above, we strongly urge that there be a clear opt-in requirement for any direct marketing.

Please contact us at **Consumer Action Law Centre** on 03 9670 5088 or at info@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

¹ See: <https://consultations.ag.gov.au/rights-and-protections/online-privacy-bill-exposure-draft/>

