



Insurance Council
of Australia

13 December 2021

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

Dear Ms Jarvoll

Online Privacy Bill Exposure Draft

The Insurance Council of Australia (Insurance Council) welcomes the opportunity from the Attorney-General's Department to comment on the Online Privacy Bill Exposure Draft (the Draft Bill).

The Insurance Council is the representative body of the general insurance industry in Australia and represents approximately 95 percent of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of \$57.4 billion per annum and on average pays out \$164.2 million in claims each working day (\$42.7 billion per year).

This submission outlines the general insurance industry's concerns with the significant expansion in scope of the Draft Bill relative to the recommendations of the *ACCC Digital Platforms Inquiry – Final Report* (the ACCC Report)¹ and the Government Response. We view that such an expansion is not supported through a clear policy rationale, would entail significant implementation costs for insurers (which would ultimately be borne by consumers) and would require much more detailed consideration regarding interactions with other regulatory requirements on insurance.

We strongly view that the Draft Bill stage is not an appropriate time for these fundamental policy issues to be canvassed. The financial sector is heavily regulated, and any new proposals require much more detailed and sustained analysis to understand the precise impact. While we have outlined initial concerns below, these are only preliminary thoughts, and much more sustained analysis is required.

The Insurance Council therefore recommends that the insurance industry be removed from the scope of the legislation or, in the alternative, that the Minister exercises her powers under the proposed section 6W(7) of the Draft Bill to exclude insurance from its operation. In our view, any issues related to privacy concerns outside of the scope of the ACCC Report are best dealt with through the ongoing *Review of the Privacy Act 1988*.

¹ *ACCC Digital Platforms Inquiry Final Report* ([link](#))



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Potential Impacts of the Draft Bill

The Expansive Definition of Online Platform and Need for Further Consideration

The Draft indicates that “large online platforms” would be subject to the online platform code. The definition of “large online platform” is contained in section 6W(4), and includes an organisation which:

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- (a) either:
- (i) for an organisation that carried on business in the previous year – had, in the previous year, at least 2,500,000 end-users in Australia;
 - (ii) for an organisation that did not carry on business in the previous year – has in the current year at least 2,500,000 end-users in Australia; and
- (b) 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 the use of an electronic service (other than an electronic service covered by subsection (1)); and
- (c) is not specified in, or does not belong to a class of organisations specified in, a legislative instrument made under subsection (7).
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The Insurance Council is concerned that this definition significantly extends the Draft Bill beyond the scope of the ACCC Report. The specific focus of the ACCC Report was “*the impact of digital search engines, social media platforms and other digital content aggregation platforms*”.² Recommendation 18, which the Bill seeks to implement, was confined to “*digital platforms supplying online search, social media and content aggregation services to Australian consumers*”.³ The ACCC Report provided further definitional clarity over these terms, none of which include insurance.⁴ The ACCC Report did not consider the specific context of insurance. The small number of mentions of insurance throughout the Report are discussing its relationship to the in-scope “digital platforms” (for example in context of retailers combining their data with insurance company data).⁵

Nonetheless, the regime proposed by the Exposure Draft would bring the insurance sector into operational scope. Examples are included below:

- A typical “path to purchase” for an insurance product is via online inquiry. A prospective customer will provide personal information via a questionnaire on an insurer’s website and receive a quote. The customer will then make a purchase decision.
- An insurance customer using an insurer-provided app to log into view insurance products, make claims, make purchases or renew over the phone or web.

Within those scenarios (and likely more), the customer would be an “end-user” for the purposes of the above definition. While this term is not defined in the Draft Bill, the Explanatory Paper and

² Terms of Reference, *Digital Platforms Inquiry* ([link](#))

³ ACCC Report, page 36

⁴ ACCC Report, page 41

⁵ ACCC Report, page 451



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Regulatory Impact Statement indicate that it is intended to be broad – including “any individual who uses the electronic service”.⁶ The term does not appear to be restricted to customers but would encompass any individual who made an online inquiry, or even visited an insurer’s website. Therefore, should an insurer process more than 2.5 million such inquiries during a given year, it would be subject to the online platform code irrespective of whether the inquirer ultimately purchased an insurance product. We also expect that this could unintentionally extend the OP Code to cover may other industries.

The ICA strongly suggests that urgent re-consideration is needed. We do not see a policy basis for extending the operation of the proposed online code beyond the sectors considered by the ACCC Report. We further note that potential unintended consequences have not been considered. We note the following:

- Unlike social media and other digital platforms, insurers operate in an environment in which their interactions with customers are already heavily regulated. Any new requirements would need to take existing regulation into account. A non-exhaustive list includes:
 - Conduct regulation by the Australian Securities and Investments Commission, including reforms implemented as part of the Commonwealth Government’s response to the Financial Services Royal Commission.⁷
 - Prudential Standard *CPS 234 – Information Security*, issued by the Australian Prudential Regulation Authority (to which the digital platforms considered by the ACCC are not subject), which contains requirements around data storage and usage, including to:
 - Clearly define the information security-related roles and responsibilities of the Board, senior management, governing bodies and individuals;
 - Maintain an information security capability commensurate with the size and extent of threats to its information assets, and which enables the continued sound operation of the entity;
 - Implement controls to protect its information assets commensurate with the criticality and sensitivity of those information assets, and undertake systematic testing and assurance regarding the effectiveness of those controls; and
 - Notify APRA of material information security incidents.
 - The *Insurance Contracts Act*, which contains requirements around disclosure including (among other matters) the duty of utmost good faith⁸ and requires the insured to disclose certain matters to the insurer that are relevant to the decision of the insurer to accept the risk;⁹
 - The self-regulated General Insurance Code of Practice (GICOP), maintained by the Insurance Council, which contains requirements around customer access to personal

⁶ AGD, *Online Privacy Bill – Explanatory Paper* ([link](#)), page 8; AGD, *Online Privacy Bill – Regulatory Impact Statement* ([link](#)), page 14

⁷ For an overview, see: Insurance Council, *Insurers Ready for Regulatory Changes* ([link](#))

⁸ Insurance Contracts Act 1984 (Cth), section 12-13

⁹ Insurance Contracts Act 1984 (Cth), section 21



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- information and procedures for reporting alleged breaches to the Code Governance Committee;¹⁰
- State legislation for specific insurance schemes, such as worker’s compensation and compulsory third-party insurance; and
 - The Commonwealth Government’s proposed critical infrastructure reforms, insofar as they may impose additional oversight, data security and breach requirements.¹¹
- Further, part of the rationale for the proposed changes appears to be that consumers lack a clearly defined complaints avenue against digital platforms. Insurers have existing internal dispute-resolution procedures, are subject to the jurisdiction of the Australian Financial Complaints Authority and (as noted above) are subject to GICOP.
 - The treatment of personal information by insurers is qualitatively different to that of “digital search engines, social media platforms and other digital content aggregation platforms”.¹² Insurers do not generally collect the personal information of customers or potential customers for the purposes of aggregation for sale or supply to third party advertisers, nor the commoditisation of such information. Rather, insurers collect personal information for the purposes of selling, underwriting, price-setting and risk-rating of insurance products, as well as for the evaluation of the services they provide and any marketing efforts.
 - The proposal would create a fractured privacy experience for consumers. Among other things, their privacy treatment would vary based on the size of the insurance company from which they sought a quote, the manner of seeking a quote (whether they used a digital or non-digital path) and potentially other matters. A consumer who sought a quote from a large insurer would be subject to the proposed binding industry Online Code of Practice (COP) whereas a consumer who sought a quote from a smaller insurer may not. Often, this consumer would be the same individual who may have sought quotes from multiple insurers. Their personal data would be subject to different privacy treatment – even within the same industry – and this differing level of treatment may not be clear to consumers. The Insurance Council questions whether this is an appropriate policy outcome.

We finally note that the *Privacy Act* is currently under review. The Insurance Council and its members will be contributing to that process and suggest that it is a more appropriate vehicle to progress consideration of any privacy issues. The Draft Bill stage is not an appropriate venue for exploring these questions.

Section 6W(7) would provide the Minister the power to exclude certain classes of organisations by legislative instrument. This suggests that the Draft Bill envisages an “opt out” approach where a “wide net” is cast initially, and sectors are then subsequently excluded via legislative instrument. The Insurance Council suggests that a more appropriate drafting approach would be to define the scope more accurately in the legislation itself rather than leave it to subsequent legislative instrument. A tight and accurate scope would provide more certainty for consumers and industry. Further, leaving questions of scope to a legislative instrument would risk disallowance – even if it was not intended for insurers and other industry sectors to be included.

¹⁰ Insurance Council, *General Insurance Code of Practice*, ([link](#)) parts 12 and 13

¹¹ Department of Home Affairs, *Engagement on Critical Infrastructure Reforms* ([link](#))

¹² Terms of Reference, *Digital Platforms Inquiry* ([link](#))



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Finally, the Insurance Council suggests that further clarity is required regarding the definition of “end-user”. This should include the criteria that will be used to determine who is an “end-user” and whether that will capture individuals who request a quote or seek further information by submitting personal information through an online quote tool or chatbot.

Exclusions for Social Media Services

The Insurance Council further notes the need to clearly exclude general business use of online platforms (ie. when below the 2.5 million user threshold) from regulation as a social media service. The Explanatory Paper indicates an intention that the definition “is not intended to capture organisations that enable online communication/interactions/content sharing as an additional feature – for example, business interactions with customers such as online feedback facilities”.¹³ However, this exclusion does not appear to be explicitly stated in the Draft Bill. While it may be intended that the primary definition in section 6W(1) does not cover this scenario, the Insurance Council suggests that an explicit exclusion consistent with the Explanatory Paper is included for the avoidance of doubt.

The Online Privacy Code of Practice – Timeframes and Implementation

The Draft Bill proposes to introduce a binding online COP for in-scope entities. While the Explanatory Paper states that this is intended to be an “industry” code, there is no recognisable “industry” covering the breadth of the proposed scope. Insurance is not generally viewed as operating in the same “industry” as search engines, online video streaming platforms and dating apps. This proposed scope would lead to either (a) a weak COP that does not meet the Government’s policy intentions, or (b) a complex document that takes industry differences into account but is harder for consumers to understand.

Further, the Insurance Council does not view the timeframes proposed in the Draft Bill as realistic. The most recent review of the GICOP took around three years to finalise. Given the breadth of the proposed COP and the number of industry bodies that would need to be involved in its development, it is unrealistic to expect a timeframe of twelve months from Royal Assent. We further note that there is no subsequent implementation timeframe or transition period. This is unrealistic, as entities subject to the COP would need time to update systems to meet the new requirements.

Interactions with the timings of the broader *Review of the Privacy Act 1988* needs further consideration. Should the Bill pass later in 2022, then the proposed COP would go into operation in mid-2023. This would mean that the COP would be entering into operation at around the same time as further Recommendations resulting from the broader review are moving to detailed consideration. This raises the prospect of multiple rounds of reform being imposed on industry in quick succession.

Next Steps

The bulk of the Insurance Council’s above comments have addressed the challenges involved with expanding the scope of the ACCC’s recommendations beyond the scope considered in its report. We suggest that a path forward is for the proposal to revert to a more targeted focus, in line with the

¹³ AGD, *Online Privacy Bill – Explanatory Paper* ([link](#)), page 7



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ACCC Digital Platforms Inquiry. We do not believe that a policy case exists for extension of the proposed COP to the insurance sector.

We trust that our observations are of assistance. If you have any questions or comments in relation to our submission please contact Aparna Reddy, the Insurance Council's General Manager, Policy – Regulatory Affairs, on 0427 902 960 or areddy@insurancecouncil.com.au.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'Andrew Hall'.

Andrew Hall

Executive Director and CEO