

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

11 October 2024

Dear Committee

**Re: Privacy and Other Legislation Amendment Bill 2024**

**Background**

The Council of Small Business Organisations Australia (**COSBOA**) welcomes the opportunity to comment on the *Privacy and Other Legislation Amendment Bill 2024 (Bill)*. More than half of small businesses surveyed recently said they had not managed to break even and expected operating conditions to only get worse over the next 12 months.

Following the Government's Response to the Privacy Act Review in September 2023, COSBOA has been a vocal and active commentator in relation to proposed reforms of the *Privacy Act 1988 (the Act)*.

The current small business exemption in the Privacy Act – for entities with less than \$3 million annual turnover – ensures a degree of nuance between small and micro-businesses compared to expectations of large multinational companies. Small businesses of all sizes already actively process data with appropriate care and concern, many of which already have a turnover of over \$3 million and are therefore already subject to the Act. However, the rapid introduction of complex and expanding obligations to comply with all 13 Australian Privacy Principles for those small businesses with an annual turnover under \$3 million would have undermined the viability of those businesses already facing a laundry list of increased red tape and regulation. COSBOA is therefore encouraged to see that the small business exemption is being maintained. There is never a good time to hoist higher costs onto small businesses, but to do so in the current environment would be reckless.

COSBOA notes that the ATO defines small business as those with an annual turnover of \$10 million or less whilst micro-businesses are defined as those with a turnover of less than \$2 million. We note that the current "small business exemption" relating to an annual turnover threshold of \$3 million was introduced two decades since but has never been indexed. Therefore, the effect over time has been that an increased number of small businesses have become subject to the Australian Privacy Principles but with few resources to assist them in meeting their compliance requirements.

Below sets out COSBOA's specific comments on the measures proposed under the Bill that impact **all** small businesses regardless of turnover.

## Measures to enhance the privacy of individuals with respect to their personal information

### Penalties for interference with privacy

The Explanatory Memorandum notes that the Bill seeks to implement 23 of the 25 proposals agreed to in the Government Response to the Privacy Act Review. Small businesses that have a turnover between \$3 million and \$10 million will be captured. The introduction of civil penalty tiers to address breaches of privacy (other than serious interferences with privacy) will attract up to 2,000 penalty units for a person (a maximum penalty of approximately \$660,000) or 10,000 penalty units for body corporate (a maximum penalty of approximately \$3.3 million).

The Explanatory Memorandum further notes that the maximum penalties highlighted above are intended to ensure deterrence against privacy breaches as well as reflecting the potential commercial gains that entities may obtain following an interference with privacy. The level of penalty is intended to ensure that entities breaching the Act are less likely to consider absorbing civil penalties as a cost of doing business.

Section 13 (Interferences with privacy) does not seem to be drafted in a way that considers knowledge or intent. However, consideration could be given to a small business that unknowingly breaches section 13. While compliance with the Australian Privacy Principles (**APP**) would ensure there is no breach of section 13, it is currently difficult for small businesses to determine comprehensively that they have complied with all 13 APPs.

### *Enhanced powers for the Office of the Australian Information Commissioner*

COSBOA supports the ability for the Office of the Australian Information Commissioner (**OAIC**) to have enhanced code-making powers. Small businesses rely on codes and other guidance material for clarity on how to comply with the APPs.

Clear and concise information that a small business can follow will provide them with assurance that they have complied with their obligations.

### *Measures to increase transparency and certainty*

COSBOA supports measures to increase transparency and certainty. A suggestion is made that proposed APP clause 11.3 is accompanied by supplementary guidance around what kinds of technical and organisational measures will be considered as “reasonable” for small and micro businesses to implement.

### *Statutory cause of action for serious invasions of privacy*

COSBOA is concerned about the drafting of *Schedule 2 – Serious Invasions of Privacy* which introduces a statutory tort of privacy into the Act. The Explanatory Memorandum notes that the Schedule is intended to be treated as a set of stand-alone provisions which are independent from the rest of the Act. The inclusion of the Schedule itself in the Act is likely to cause confusion.

Whilst the Australian Privacy Principles are framed towards data protection and appropriate handling of personal information, a statutory tort for serious invasions of privacy is intended to relate to a much broader concept of privacy and is distinct through its provision of tests relating to intentional and reckless behaviours. COSBOA is concerned that proposed clause 7 in Schedule 2, has a very broad application across the community, including natural persons, small businesses and larger businesses regardless of turnover. The Schedule includes a very broad and undefined use of “person”, a test of “recklessness” as well as the concept of the “misuse of information”. There is

no reference or exemption for entities who are not required to comply with Schedule 1 (e.g. small businesses with a turnover of less than \$3 million).

Additionally, the Bill does not make it clear how the actions of employees who seriously invade an individual's privacy could render employers liable under this provision.

A better definition which would provide more clarity would be to limit the definition of person to a "natural person". The vast majority of businesses are already required to comply with the significant requirements of Schedule 1 in relation to the handling and securing of personal information. Small businesses do not need to worry about privacy obligations and compliance expenses introduced by the back door or how they could be held responsible for the actions of employees acting outside the scope of their authority.

### Conclusion

COSBOA reiterates its appreciation that the Government listened to and took on board our significant concerns and decided against pushing ahead with the proposed removal of the small business exemption for small businesses under \$3 million.

However, further consideration of the new statutory cause of action for serious invasions of privacy is now required. COSBOA also requests that the Attorney-General's office grants public access to the Cost Benefit Analysis so continued consideration can be given to the benefits of maintaining and perhaps expanding the small business exemption to the small businesses between \$3 million and \$10 million that face the same significant challenges in complying with the full breadth of all 13 Australian Privacy Principles.

A survey run in 2023 by the OAIC indicated that the largest concern of the Australian community in relation to privacy related to their personal information being lost (74 per cent). Therefore, in our view, the focus to allaying the fears of most Australians in relation to their personal information is for all businesses to focus on taking reasonable steps to keep data secure (APP 11). COSBOA has launched the CyberWardens compliance tool which is a step in this process but would welcome the opportunity to discuss further practical initiatives and tools which would help small businesses of all sizes to ensure good data security and privacy practices. This should be the first step before unleashing significant and potentially irrelevant requirements on small businesses which have very limited compliance resources.

COSBOA welcomes any further consultation the committee may want to undertake regarding this matter.

Kind regards



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