Submission to
Senate Legal and Constitutional Committee
February 2005

Inquiry into the Privacy Act 1988

1 Terms of Reference

(a) the overall effectiveness and appropriateness of the *Privacy Act* 1988 as a means by which to protect the privacy of Australians, with particular reference to:

i) international comparisons

ii) the capacity of the current legislative regime to respond to new and emerging technologies which have implications for privacy, including:

- 'Smart Card' technology and the potential for this to be used to establish a national identification regime;
- biometric imaging data;
- genetic testing and the potential disclosure and discriminatory use of such information, and
- microchips which can be implanted in human beings (for example as recently authorised by the United States Food and Drug Administration) and

iii) any legislative changes that may help to provide more comprehensive protection or improve the current regime in any way;

(b) the effectiveness of the *Privacy Amendment (Private Sector) Act 2000* in extending the privacy scheme to the private sector, and any changes which may enhance its effectiveness; and

(c) the resourcing the Office of the Federal Privacy Commissioner (OFPC) and whether current levels of funding and the powers available to the Federal Privacy Commissioner enable her to properly fulfil her mandate.

Fundraising Institute-Australia Ltd

Fundraising Institute Australia Ltd is pleased to provide its response within this framework based on the scope of our work within the not-for-profit sector.

Fundraising Institute Australia Ltd (FIA), established in 1968, is the peak national body for Australian fundraisers engaging directly with 3,301 fundraisers representing a total of 1,983 organisations in the not-for-profit sector across a wide spectrum of societal needs in community service, health and medical research, education and related services, religion, arts and cultural development, overseas aid, indigenous affairs and sport and recreation.

Current membership (December 2004) comprises 1,026 full members who represent 647 organisations and a further 2,275 individual fundraisers, representing 1,789 organisations, who subscribe to FIA's information services or attend FIA's professional development programs. FIA has broad reach in its professional development programs, delivering approximately 10,000 hours to members and other professional fundraisers in 2004.

Nationally, FIA is working in collaboration with the Australian Council of Social Service (ACOSS), the lead agency in a project Giving Australia: Researching Philanthropy, that includes the Centre for Australian Community Organisation and Management, at the University of Technology, Sydney, the Centre of Philanthropy and Nonprofit Studies at the Queensland University of Technology, Roy Morgan Research and McNair Ingenuity Research. The project is funded by the Prime Minister's Community Business Partnership.

FIA is working with government in Queensland to develop a suite of documents relating to codes of practice in fundraising, including standards for privacy.

Internationally, FIA has Memoranda of Understanding with the two principal US fundraising organisations, Association of Fundraising Professionals (AFP) and Association of Healthcare Professionals (AHP) and has adopted a code of practice with the Washington-based ePhilanthropy Foundation. AHP Faculty head the teaching personnel in FIA's annual intensive professional development program Madison Down Under. FIA manages the examination for accreditation of senior fundraising executives through an international program, Certified Fundraising Executive (CFRE) based in Washington, US. FIA is also a member of the consortium of twenty-one international fundraising institutions from nineteen different countries and contributes to policy development and strategy in this global forum at its annual summit meeting. Currently the Summit is working towards developing a Common Code of International Ethics for Fundraisers.

Australians contribute between $3 and $5 billion annually to not-for-profit organisations. The sector's contribution to Australian economy is already recognised. Woodward and Marshall (2004) estimate the economic value of the not-for-profit sector contributes 4.7% of GDP and accounts for 6.8% of total employment, adding more to GDP than the mining industry.

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(a) the overall effectiveness and appropriateness of the *Privacy Act* 1988 as a means by which to protect the privacy of Australians, with particular reference to:

i) international comparisons

FIA supports efforts to explore further ways in which the *Privacy Amendment (Private Sector) Act 2000* can better work for business and individuals in relation to global operations.

A number of our members, particularly those working in areas of overseas aid, are caught under the private sector provisions of NPP9, but are protected by the capacity for extra-territorial transfer of personal information to another part of the same organisation. We note that the private sector principles were introduced partly in response to a directive on information privacy adopted by the European Parliament and the Council of the European Union (EU).

ii) the capacity of the current legislative regime to respond to new and emerging technologies which have implications for privacy, including:

- **'Smart Card' technology and the potential for this to be used to establish a national identification regime;**
- **biometric imaging data;**
- **genetic testing and the potential disclosure and discriminatory use of such information, and**
- **microchips which can be implanted in human beings (for example as recently authorised by the United States Food and Drug Administration) and**

FIA has limited capability to comment about some aspects of emerging technologies outlined above. However, we continue to support the general principle that the legislation was intended to be technology neutral to ensure it would remain relevant despite technological change. It is important to note that if channel/technology specific legislation is developed by government, then the Office of the Privacy Commissioner (OFPC) should play a more active

role in ensuring that such legislation reflects both the definitions and requirements of the legislation and does not introduce conflicting obligations on business.

iii) any legislative changes that may help to provide more comprehensive protection or improve the current regime in any way;

FIA notes that obtaining a balance between individual rights and business efficiency is a difficult challenge but that it appears to be largely met through the Act and current provisions.

FIA acknowledges the work undertaken by the OFPC and supports continuing and enhanced education of the public about their rights and organisations about their obligations. FIA members have expressed their views that further restrictions on the use of personal information is not appropriate as there is a lack of sufficient evidence that the Privacy Act, including the NPPs, is not meeting its objectives. FIA members advise that tightening the NPPs would unnecessarily restrict business efficiency. From our observations, there is heightened awareness among the community and organisations about the value attributed to privacy in good business practice.

FIA recalls the initial approach adopted by privacy legislation was co-regulation and the intention was to encourage codes of practice or the application of the NPPs. FIA supports this approach and urges the governement to continue to work with the private sector to enhance its 'compliance thinking' as the OFPC is not adequately resourced to deal with all issues arising from the application of privacy law.

FIA has argued that national consistency is important in ensuring compliance with regulation and in particular notes that state and territory privacy regulations impact on compliance with the Privacy Act. We comment elsewhere on the role of industry codes as models for self-regulation and standards of practice. This offers an approach that will achieve reforms more quickly and be inclusive and responsive to relevant stakeholders. We also raise below the issue of resolution of complaints.

Our members have advised that consistency in regulation would improve their capacity to undertake their work as fundraisers and to ensure compliance with the Privacy Act. Accordingly, FIA believes that any moves towards national consistency are relevant to industry practice and should be encouraged.

FIA's broader research across the nonprofit sector shows that the regulatory environment that governs the establishment and operations of not-for-profit organisations plays a critical role in sustaining and encouraging those organisations (Salamon 1997; Lyons 2003). The regulatory environment and specific laws can either support the development of a healthy and vibrant non-profit sector or stunt its growth and vitality.

The relationship between the legal environment and the non-profit sector was one of the areas examined in The Johns Hopkins Comparative Nonprofit Sector project, one of the most comprehensive comparative not-for-profit data sets developed. Studies based on that data show that the relative favourability of a country's laws and legal framework is positively related to the development and size of the not-for-profit sector in that country (Salamon and Toepler 2000).

In other words, countries with good regulatory systems for not-for-profit organisations have healthier and stronger not-for-profit sectors. These countries also had the relatively largest not-for-profit sectors in terms of share of total employment. Australia and most European countries ranked in the middle (i.e. had medium scores with respect to their legal framework and clustered around the middle in terms of not-for-profit share of employment). The Australian situation may not seem that negative in a comparative sense but neither is it

optimal and there is clearly room to improve the regulatory environment for the non-profit sector.

FIA recognizes that such discussion goes beyond the review of the Privacy Act but believes that this background is important for a more complete understanding of the sector. Further FIA acknowledges that national consistency is a long-term goal.

(b) the effectiveness of the *Privacy Amendment (Private Sector) Act 2000* in extending the privacy scheme to the private sector, and any changes which may enhance its effectiveness

We address this issue under two approaches, from the perspective of recognising individual rights; and the balance of individual privacy interests with business efficiency.

Recognising individual rights

Awareness of rights

FIA notes that 'enforcement of an Act relies largely on complaints from individuals ensuring an awareness of privacy rights amongst the community is a central component of protecting individual's privacy interests' (OFPC Issues Paper). Research from OFPC has shown that 'it appears that there may still be considerably more work to be done to improve the level of individual awareness both about the law, and about how to take action to ensure their rights are respected.'

This research shows that 47% of individuals know that charities are covered by privacy law. FIA argues that there is a government responsibility to undertake an effective and continuing marketing campaign to ensure that individual Australians are aware of their rights and have an understanding of how to exercise them.

We further suggest that public awareness of the legal responsibilities of organisations using personal information that is subject to the private sector provisions of the Commonwealth Privacy Act 1988, would be enhanced if the provisions were underwritten by standards of practice encompassed in industry codes. Like other organisations, FIA has a widely-published Privacy Policy (attachment) which has been independently developed. It is FIA's experience that our members and member organisations have altered the manner in which they collect information in line with the private sector amendments.

Community confidence that rights are protected

FIA supports measures that may improve or maintain the public's confidence that their rights are protected. Inherent in that protection is the capture of all organisations by the legislation, with the exception of media as discussed below. We also discuss our position which is contrary to the exemption from the Act for small business operators.

Research through the OFPC has shown that individuals' levels of trust with regard to the protection of their privacy by charities at 54% is the median between health service providers at 89% and mail order companies (19%). Our research has indicated that levels of public confidence may in fact be higher in the not-for-profit sector.

Although our research is broader, analysing levels of public confidence and trust, we have found that the most trusted of institutions continue to be non-government organisations (NGOs) (World Economic Forum (WEF), Global Survey on Trust, Update 2004). This study, based on a global survey of 19,000 people across 20 countries, including an Australian sample size of 1,000, was conducted between November 2003 and February 2004. It found that almost two-thirds (65%) of people surveyed across the 20 countries had either a 'lot of trust' or 'some trust' in NGOs. It further suggested that Australians have even higher levels of

trust and confidence in NGOs than other institutions compared to the international average, with over three-quarters of Australian respondents stating they had 'a lot of trust' and/or 'some trust' in NGOs.

Another survey commissioned by the WEF (Trust Leaders Survey, 2003) examined the role of leadership in levels of public trust with regard to personal interests. This survey of 15,000 people across 15 countries at the end of 2002 and beginning of 2003 asked respondents how much they trust various leaders to 'manage the challenges of the coming year in the best interests of you and your family'. Results showed that leaders from NGOs enjoyed the highest levels of trust among the public.

A survey by Edelman (2001) that examined the responses of 200 opinion leaders in Australia found that they exhibited the highest level of trust in NGOs to 'do the right thing' compared to opinion leaders from the US or Europe.

Where there have been overt attacks on the credibility of organisations in Australia, such as attacks on The Smith Family, St Vincent de Paul Society, Australian Red Cross, overseas aid agencies, environmental agencies, the churches and nonprofit peak bodies, Fitzgerald has suggested that they have their source overseas, and in this regard he cites the role of the American Enterprise Institute whose website was launched specifically 'to expose the funding, operations and agendas of international NGOs' (Fitzgerald 2003).

FIA recognizes that trust and confidence, like reputation, takes many years and decades to build but can be quickly lost. The high levels of trust and public confidence in fundraising organisations suggests that the public assumes that such organisations do act with integrity and in the public interest with often little appreciation for the multitude of existing regulatory codes. Damage to reputation and trust is more often due to poor communication and management by the fundraising organisations rather than any intended deceptive behaviour or fraud on their part. A recent example was the media criticism of the Australian Red Cross Bali Appeal, where poor communications of the Appeal's objectives and purposes on the part of the Australian Red Cross led to misplaced allegations by the media concerning the organisation's integrity (Department of Gaming and Racing 2003).

Community confidence in protection of rights can be further enhanced by public acknowledgement of standards of practice as self-regulatory codes, particularly if these are sanctioned under the Act.

Individuals able to exercise their rights
Approach to complaint handling

FIA acknowledges the challenges for an individual seeking redress for breaches of their rights to privacy about public information.

The benefits of self-regulation, supported by a code of practice have been outlined in the recent work of regulatory and compliance expert Dr Christine Parker (2002a) from the University of Melbourne. Parker's framework ensures that self regulation is inclusive of relevant external stakeholders including government, hence her use of the term 'open or 'permeable' self-regulation:

This (open self regulation) does not mean that companies can be left alone to self-regulate responsibility. Indeed corporate responsibility self-regulation systems are only effective when they are open to external stakeholder perspectives and values...and it is the basis for democratic social responsibility for corporations and other organisations (Parker 2002b:2).

While Parker's work applies primarily to self-regulation and compliance programs in a variety of areas (e.g. environmental, sexual harassment, consumer protection and competition

policy, financial services) within corporations, the principles and frameworks are also relevant to regulating protection of personal information by not-for-profits and commercial agents.

Ways in which community confidence could be enhanced include:

- raising awareness and knowledge among the community of privacy regulations and practice through strategic marketing undertaken by your office
- authorizing use of a logo signifying organisational commitment to good practice in accordance with the Act and amendments and agreed standards of practice
- encouraging organisations to develop and promote standards of practice, through industry codes as models for self-regulation, including establishing and promoting formal complaints mechanisms in their organisation
- investigating unresolved complaints and alleged breaches of the code through conciliation and determination
- enhancing its collection of data (such as demographic information) relating to complaints to determine if patterns exist in areas of complaint through the OFPC
- issuing sanctions for non-compliance such as naming and shaming.

Individual's control over personal information

Protection of an individual's control over personal information depends on the individual's knowledge of their rights, in addition to the use of personal information, whether collected for a primary or secondary purpose, directly or indirectly or through bundled consent.

FIA supports current provisions that provide for indirect collection (particularly with regard to purchase of a list or cleansing of databases) and for bundled consent. It is not our understanding that current practices limit an individual's control over their personal information. Moreover, it is clear that current practices are essential to business efficiency in our sector, that is the fundraising industry.

Access to (one's) personal information

Procedures for access to personal information should be included in the standards of practice of industry codes as the OFPC has noted that 'failure to provide access is a commonly received complaint'. It is common practice in the fundraising industry to provide access to personal information.

Balance of individual privacy interests with business efficiency

High level provisions

We believe that high level provisions are the most appropriate approach to protection of individual privacy interests, including the private sector provisions of the Privacy Act that are principle based regulations, which are less amenable to specific direction on how to comply with them. FIA members support the flexibility of the current regulations. We observe that the amendments are inclusive of individual rights and business practice and in general working well through community expectation of standards of practice, supported by the issue of guidelines by the OFPC.

In terms of business efficiency in applying the private sector legislation, we have suggested bridging the gap between principles and practice, including ways of giving organisations the expertise to self-audit.

FIA believes that the most appropriate model for regulation of practices is one based on a framework of self-regulation. By self-regulation we mean a framework where organisations internalize the responsibility for ensuring their practices comply with standards of practice

and that the systems for monitoring that compliance are open to relevant external stakeholders.

FIA draws to the attention of the Senate Committee to the report of the Industry Commission into charities which noted the three key objectives of [fundraising] legislation are:

- To protect the public against fraud, misappropriation of funds and misleading conduct
- To ensure that donors and the public have access to information
- To ensure that organisations use acceptable fundraising practices (IC 1995:231).

These objectives, and these findings, are relevant in this consideration of the balance of individual privacy interests with business efficiency.

We further note that caution is needed, however, to not 'over regulate' as there exist a range of other state and federal laws covering and protecting consumers in cases of fraud or misleading conduct (e.g. consumer protection laws, Trade Practices legislation, criminal codes) and others that cover account and record keeping and reporting requirements (Associations Incorporation Act 1981 (Victoria), Corporations Act 2001 (Commonwealth)).

Costs of compliance

The fundraising industry incurs costs in complying with industry regulation, including privacy law. We note, however, that community confidence and trust in our industry, as referred to above, is important to our success in our missions to raise funds and the benefits to business, and Australian society, outweigh the costs of compliance. Where organisations internalise responsibility for adhering to standards of practice, as noted above, they can more effectively manage costs of compliance.

We point out that compliance costs may have varying impact on organisations:

- Benefits larger organisations over smaller ones as they can take advantage of economies of scale
- Favours organisations such as small business that may be exempt from regulation

Codes

FIA members agree that they have a duty of care to ensure that the trust invested in and confidence given to the fundraising sector by government, authorities, community advice bodies and most importantly, the public, is maintained. FIA believes that developing and encouraging privacy standards in codes of practice, along with our broader codes of ethics and practice, is the key to achieving this, removing barriers to allow the sector to build healthy and productive partnerships. FIA urges the Senate Committee to encourage private sector organisations and industries to develop privacy codes of practice.

Such codes are relevant for both community and business. They are concerned about maintaining high professional standards and ensuring that individuals can be aware of what behaviour the business community expects of an organisation collecting, using, disclosing and handling personal information.

These self-regulatory codes should be continually evolving through community, industry and government consultation.

Small business exemption

In terms of the effectiveness of the legislation, FIA argues against exemptions in the application of privacy law.

Small businesses may hold significant personal information including sensitive information, for example, internet service providers. Costs of compliance are not sufficient reason to grant exemption from the provisions of the Act. Their exemption may undermine, or confuse, public confidence about the protection of personal information.

FIA does not support exemptions for the coverage of the Privacy Act for small business operators. We would not envisage, therefore, issues to arise where organisations contract out their functions or activities, that are not already covered by the Act and the NPPs. FIA continues to support the exemption provided to media to enable the free flow of information. FIA notes that the exemption is conditional upon media observance of published standards which are self-regulated, and we support the concept of self-regulation across the private sector.

Direct marketing

FIA encourages the Senate Committee to consult with the fundraising industry to develop a definition of direct marketing as this appears to be an area of practice which is not entirely understood.

We reiterate the importance of getting measures of the issues that pertain to direct marketing, such as individuals not being respected in their desire to opt out or cease contact, which would be addressed by organisational complaints procedures we have outlined above.

Issues concerning people with special social, cultural and physical needs, should be identified and quantified and, if problems are existing in the current application of legislation, these may be addressed through self-regulated standards of practice.

(c) the resourcing the Office of the Federal Privacy Commissioner and whether current levels of funding and the powers available to the Federal Privacy Commissioner enable her to properly fulfil her mandate.

It appears that current enforcement of the Act relies on receipt of consumer complaints. OFPC has acknowledged that it does not have the capacity to deal with complaints within a reasonable time and that the process may lack transparency (including the lack of right of review). FIA has consistently put forward the argument that privacy law should be supported by the development of standards relating to the application of privacy law through industry codes as models for self-regulation.

Complaints are most likely to be made to the offending organisation in the first instance. Requiring their examination by the organisation, through a self-audit – self-regulatory process sanctioned through standards of practice that underlie the legislation would ensure appropriate consideration of the complaint and enhancement of community awareness of their rights and methods by which they can exercise them. These methods would be easier, cheaper and more efficient than the current complaint handling by the OFPC.

FIA endorses completely the strategic purpose of OFPC to promote 'an Australian culture that respects privacy' (Privacy Act s 27). We acknowledge that the privacy provisions of the Act were introduced on 21 December 2001. In three years awareness of individual rights and the value that businesses place on their management of personal information has increased (60% in 2004 compared with 43% in 2001).

We support continuing focus on the cultivation of these values through the legislation. We agree the OFPC's identification of the need to address the issue of complaint handling as a priority and strongly endorse the original concept of self-audit and a co-regulatory environment. We clearly support the embedding of 'compliance thinking' into management practice through the development of industry codes as models for self-regulation, including

the handling of complaints. It is important, however, that the OFPC retains its powers under the Act to investigate complaints not adequately dealt with by organisations.

In terms of the success of the private sector principles regulating the flow of personal information into, within and out of organisations, FIA advises that there continues to be a need for dissemination of information from the OFPC with regard to interpreting and implementing the provisions, particularly with regard to their application for primacy and secondary purposes.

We strongly support the development of standards of practice that assist organisations in their collection (NPPs 1, 8, 10), use and disclosure (NPPs 2, 7, 9) and information handling (NPPs 3 – 6) of personal information.

Adequate funding of the OFPC is essential if it is to have the capacity to address and resolve these issues.

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