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## PHASE 3 - SUBMISSION ON THE TRUSTED DIGITAL IDENTITY FRAMEWORK

A Bill for an Act to establish the trusted digital identity system and to provide for the accreditation of entities in relation to digital identity systems generally, and for related purposes

27 October 2021

Thank you for the opportunity to provide comment on the Australian Government's proposed Digital Identity Legislation. This aim of this paper is draw one's attention to the fact that this legislation, if implemented will cause the most fundamental change to our society since Federation.

### 1. PART ONE

(a) One cannot overstate the enormous impact and invasiveness that this proposed digital identity legislation will have on the ability of ordinary, everyday Australian citizens to conduct their lives under (what can essentially be referred to as the '*whole-of-economy solution with global application*') from the moment it is implemented.

(b) The enormous changes proposed in this *Trusted Digital Identity Bill* (TDIB) have never been considered in Australia before without giving Australians the opportunity to debate and vote on these changes. The only forum that provides for such debate is in Constitutional Referenda.

(c) Since Federation, Australians have voted in Constitutional Referenda 44 times, with just 8 successful changes being made to the Australian Constitution. The reason I raise the point about Referenda is that whenever proposed constitutional change centralises political power, the Australian voter has overwhelmingly rejected such changes. The proposed TDIB is the largest legislative change to Australia's laws that will centralise power, and our entire identities placed into the hands of the few. Public debate has been virtually non-existent with everyone (Governments and Mainstream Media) fixated on COVID.

(d) One can surmise that with the proposed TDIB, Australians are once again being treated as ignorant citizens (Galligan 1990). It is insufficient to say that the majority will nor have the capacity to understand the intricacies of these fundamental identity ownership changes. Every Australian has an identity that should be protected at all costs and not placed in the hands of a third party, potentially in the hands of a global entity that has links to the World Economic Forum.

(e) A certain haughtiness characterises a government, supported by banking and finance oligarchies, IT / big tech entities, and major retailers consider that this legislation should be accepted without question because it is "good" for the Australian people. The inclusion of the word 'trusted' does not equate to innocent and safe legislation. There is nothing in this proposed legislation that should give anyone cause to put their trust in the 'greater good' or one's digital identity in the hands of strangers. If the Australian voting public had opportunity to understand the impact of this legislation once implemented, it would fail – Australian's are

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traditionally private people. The more ‘power’ that is centralised with government (or their authorised representatives), the less trust that exists with the people.

(f) Transparency and accountability have been questioned in Phase 2 submissions. Despite assurances, on 25 October 2021, amendments were made to the *Privacy Act 1988* (Cth) in respect of ‘complaints’ granting authority for the Inspector-General of Intelligence and Security to transfer complaints for investigation.<sup>1</sup> I challenge the reader to review this amendment for its transparency.

(g) Australia has been down this ‘identity path’ before with the attempted implementation of the Australia Card in 1986. Analysis in 1987<sup>2</sup> of the proposed Australia Card found that the legislation was an attempt to implement a national surveillance system. The Australia Card promised to limit the overreach of government. The TDIB makes similar promises and have been adequately challenged in Phase 2 submissions.

(h) The best hope for the Australian people is that the Senate utterly rejects this legislation as they did in 1986 with the Australia Card Bill.

## **2. PART TWO - Constitutional Framework and International Covenants**

(a) Phase 2 submissions referenced the *Privacy Act 1988* in terms of protections for citizens. It is our contention that neither the Privacy Act nor the proposed TDIB is sufficient to protect those citizens who choose not to participate in the *digital identity* system.

(b) The constitutional head of power for the *Privacy Act* was passed partially in reliance on the basis on the Australian Parliament’s express power to make laws with respect to ‘external affairs’.<sup>3</sup>

(c) At para 16 of the Explanatory Memorandum: The preamble formally links the Bill to the obligations undertaken by Australia in adhering to the *International Covenant on Civil and Political Rights*, Article 17 of which provides:

- i. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.
- ii. Everyone has the right to the protection of the law against such interference or attacks.

(d) The proposed TDIB is silent on the head of power, however as the ‘Consultation Regulation Impact Statement, Regulation of the Australian Government Digital Identity System’ makes reference to anticipated costs and benefits arising from the proposed policy options internationally. It is the opinion of this submission that the TDIB will similarly rely on section 51(xxix) of the Constitution as it’s head of power.

(e) It is the opinion of this submission that this proposed legislation would be struck down as the reliance on the external affairs power must be genuine. Bennan J stated that:

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<sup>1</sup> *Privacy Act 1988* (Cth), ss 49B, 50(1)(f)

<sup>2</sup> G. Greenleaf, ‘The Australia Card: towards a national surveillance system’, *Law Society Journal* (NSW), Vol 25 (9), (1987). <http://www2.austlii.edu.au/itlaw/articles/GGozcard.html#Heading14>, Accessed 26 October 2021.

<sup>3</sup> Australian Constitution s51(xxix) and Preamble to the *Privacy Act 1988* (Cth), s12B(2).

- i. A law with respect to a particular subject would not necessarily attract the support of para 51 (xxix) if a treaty obligation had been accepted with respect to that subject merely as a means of conferring legislative power upon the Commonwealth Parliament.<sup>4</sup>
- (f) If the TDIS was challenged in the courts, it is the opinion of this submission that the court would have grounds to strike the legislation down as the Commonwealth Government would be found to have engaged in converting internal matters into an external affair.
- (g) Further grounds to strike this legislation down are found in the requirement of Australian legislation to conform to Commonwealth law and the ‘treaty’. The World Economic Forum and a saving within a global economy does not conform to Commonwealth law and associated treaty.
- (h) The one treaty that is relevant is the *International Covenant on Civil and Political Rights*, which Australia fully ratified on 28 January 1993. However, as foreshadowed above, in the event that the TDIB had an unintended impact of interfering with the right of a person to live in a lawful manner (that is, not criminalising the person for choosing to reject digital identity), there would be no further need for the TDIB. If the legislation does not conform to the treaty, it cannot come into effect and should be struck out.<sup>5</sup>
- (i) Deane J at [259] stated, that a law cannot properly be characterised as a law with respect to external affairs if its direct operation is upon a domestic subject-matter which is not in itself within the ambit of external affairs.<sup>6</sup> It is the opinion of this submission that the proposed TDIB is overtly intended for the implementation of Australian domestic purposes.
- (j) Deane J, citing Dixon J in *Burgess’ Case* (1936) 55 CLR at 674:
  - i. It is apparent that the nature of this power necessitates a faithful pursuit of the purpose, namely, a carrying out of the external obligation, before it can support the imposition upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth.
  - ii. Application of Justice Dixon’s finding would today necessitate that the TDIB would fail the ‘faithful pursuit’ test. Accordingly, unless the Government can show that the proposed TDIB is for the benefit of Australian domestic purposes only, this Bill should not pass.
- (k) Where the legislative power is said to enliven a treaty binding on the Commonwealth, which we argue that the TDIB does not, a question arises as to the connection between the law and the treaty.<sup>7</sup> The majority further held that to be a law with respect to “external affairs”, the law must be reasonably be capable of being considered appropriate and

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<sup>4</sup> *Koowarta v Beljke-Peterson* (1982) 153 CLR 168 [260].

<sup>5</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at [131], Mason J.

<sup>6</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at [259], Deane J.

<sup>7</sup> *Victoria v Commonwealth* (1996) 187 CLR 416 at [487], Brennan CJ, Toohey, Gaudron, McHugh and Gummow.

adapted to implementing the treaty.<sup>8</sup> Unless the “purpose” of the proposed legislation (TDIB) has been used to identify the external affairs power would not be enlivened.

- (1) It is the opinion of this submission that section 3 ‘Objects’ of the Exposure Draft, *Trusted Digital Identity Bill 2021* is insufficient to fall within the purpose test as established by the High Court.

### **3. CONCLUSION**

It is our submission that the *Trusted Digital Identity Bill 2021* should not be enacted; and that the current Privacy Legislation should be strengthened to allow a new statutory cause of action as recommended by the ACCC in 2019.

Further, all Australians have a right to their ‘identity’ without the option of a digital identity being deleted, which can be implemented by amendment to the Privacy Act 1988.

Lastly, if as we have assumed that the Constitutional head of power is the ‘external affairs’ power – section 51(xxix), it is the opinion of this submission that the Bill will fail the ‘faithful pursuit’ test.

Implementing the *Trusted Digital Identity Bill 2021* exposes all Australian citizens to fraud and digital hacking by external bodies and international state actors, which can be avoided by maintaining the status quo.

Thank you for your consideration of this submission.

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<sup>8</sup> *Victoria v Commonwealth* (1996) 187 CLR 416 at [488].