

Executive Summary

1. This submission is concerned with only one aspect of the Bill: the assertion that “creating and using a digital ID is **voluntary**” (the “voluntariness principle”).
2. Clause 74 purports to give effect to this principle, but the Bill provides **no means of enforcing it**. If the government is serious about the voluntariness principle, the Bill needs to be amended to ensure that an individual who is affected by a breach of subclause 74(1) can take enforcement and remedial action.
3. The nature and extent of the **exceptions** in clause 74 are such as to make clear that the Bill is intended to pay mere lip service to the voluntariness principle. Clause 74 is just window-dressing, and the intention is to erode the voluntariness principle in practice to the point where it becomes nugatory. Amendments are proposed to **wind back** the exceptions and **subject them to safeguards** based on the voluntariness principle.

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This submission focuses on the voluntariness principle

This submission deals with only one aspect of the Bill: the assertion that “creating and using a digital ID is voluntary”, made repeatedly by the Finance Minister and also contained in the headings to clause 74 of the Bill and subclause 74(1).

The proposition that an individual should be able to choose whether or not to create or use a digital ID is referred to as the “voluntariness principle”.

Clause 74 purports to give effect to the voluntariness principle by providing as follows:

74 Creating and using a digital ID is voluntary

Creating and using a digital ID is voluntary

- (1) A participating relying party must not, as a condition of providing a service or access to a service, require an individual to create or use a digital ID.

A toothless tiger

The Bill provides no means of enforcing subclause 74(1).

In particular, there is no criminal or civil penalty for its breach, nor is any remedy created for an individual who has been refused a service, or access to a service, because he or she did not identify himself or herself by means of a digital ID.

It is not evident from the Bill or the Explanatory Memorandum (EM) how Privacy Act remedies, such as making a complaint, could be available in case where subclause 74(1) is breached.

If the government is serious about the voluntariness principle, the Bill needs to be amended to enable an individual who is affected by a breach of subclause 74(1) to take enforcement and remedial action against the participating relying party.

At a minimum this action should include a right to complain under the Privacy Act. Consideration should also be given to applying Parts 6 (enforceable undertakings) and 7 (injunctions) of the *Regulatory Powers (Standard Provisions) Act 2014*, or by including analogous provisions in the Bill itself.

Exceptions erode the voluntariness principle in practice

Service provided to individual acting on behalf of another entity

Paragraph 74(3)(a) excludes the application of subclause 74(1) if “the participating relying party is providing a service, or access to a service, to an individual who is acting on behalf of another entity in a professional or business capacity”.

The full scope of this exception is unclear, but it would seem to cover these at least:

- individuals accessing services in the course of their employment by another entity;
- individuals accessing services while acting as some kind of professional or business intermediary for another entity.

The EM says about this exception:

For example, a tax agent acts on behalf of a client to lodge taxation information; or an individual must act (*sic*) for a company or non-government organisation to lodge a Business Activity Statement. (paragraph 324)

However, it is not explained why, for example, a tax agent will be required to use a digital ID when accessing ATO services on behalf of a client, but not when doing so in his or her personal capacity. In such a case, does the client also have to be identified by means of a digital ID?

It is also not explained why an individual sole trader need not use a digital ID when lodging his or her BAS, but must do so if his or her business is restructured as a company on whose behalf the individual lodges the BAS.

A reasonable inference is that this exception is intended to erode the voluntariness principle to the point where people who do not wish to use a digital ID give up and get one, because without it their lives are too restricted.

The exemption is incompatible with the voluntariness principle and should be removed.

Exemptions by the ACCC

Subclause 74(4) provides for exemptions to be granted on a case by case basis by the ACCC in its role as the Digital ID Regulator.

Exemptions cannot be granted to Commonwealth organisations (subclause 74(6)). However, the exemption power appears to be otherwise unlimited.

It is clear from subclause 75(5) that these exemptions will erode the voluntariness principle very significantly in practice.

Small businesses

Paragraph 74(5)(a) makes it clear that any participating small business will be able to get an exemption, which means that anyone dealing with that business will require a digital ID in order to identify himself or herself.

This paragraph should be balanced by a requirement for the ACCC to be satisfied, before granting an exemption, that the services for which the small business entity requires the use of a digital ID are reasonably available, from a competitor who does not require that, to individuals who do not wish to use one.

Entities that operate only online

Paragraph 74(5)(b) says it is appropriate to grant an exemption to an entity that only operates online. This is defensible, although it can be argued that an entity should not be able to insist on the particular form of digital ID enabled by the Bill if other forms are available that the customer prefers. Also, the paragraph is open to abuse by disaggregating among separate entities the activities of a business that does not operate exclusively online.

There is a case for making this paragraph subject to a requirement like the one discussed above in relation to paragraph 74(5)(a).

Entities providing services in “exceptional circumstances”

Paragraph 74(5)(c) facilitates exemptions for entities providing services in “exceptional circumstances”. The EM gives an example of an entity providing services during an emergency situation such as flood or fire (paragraph 327). This means in practice that any individual who is exposed to the risk of needing services from the entity has no choice but to create and use a digital ID.

In all 3 of these categories, the voluntariness principle, which is about freedom of choice for consumers of services who do not wish to use digital ID, is subordinated to the interests of the providers of the services.

The EM offers no rationale for this exemption regime. A previous consultation document said this about it:¹

¹ Your Guide to the Digital ID Legislation and Digital ID Rules (18 September 2023) at page 26.

The exemption from the requirement for access to be voluntary is appropriate in those contexts as the services are either not taxpayer funded, or the cost of providing alternative ways to access the service would hinder economic participation, or the benefit of providing the services in a time of crisis is appropriate.

Services not being taxpayer-funded is an irrelevant consideration from the point of view of the voluntariness principle. The key point is that the digital ID arrangements established by the Bill are taxpayer funded. Citizens should not be compelled to use them, whether the compulsion is by government or by private actors.

In addition to the specific safeguards discussed earlier, the Bill should be amended to include a requirement for the ACCC, before granting an exemption under subclause 74(4), to take into account the voluntariness principle and the circumstances of individuals whose freedom of choice is likely to be affected by the exemption. In meeting this requirement, the ACCC should be able to consult with those individuals or their representatives.

Merits review of decisions about exemptions

Subordination of the voluntariness principle is also evident from the provisions for merits review of decisions to grant exemptions. These are reviewable under Part 4 of Chapter 9 of the Bill only if unfavourable to the applicant. Other affected persons, eg customers or clients of a small business seeking exemption, do not have standing under the Bill to challenge the grant of an exemption.

The Bill should be amended to give affected persons the right to seek merits review of an exemption. This will necessitate the ACCC giving some publicity to the making of applications, or at least to the exemptions once granted.

In the interests of transparency of the exemptions process generally, an exemption should be required to be made by means of a notifiable instrument under the *Legislation Act 2003*.

Conclusion

It is clear from the preceding analysis that the Bill is intended to pay mere lip service to the voluntariness principle. Unless amended as proposed in this submission, clause 74 will be mere window-dressing, whose real intention is to erode the voluntariness principle in practice to the point where it becomes nugatory.

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