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Submission to the
Association of Market and Social Research Organisations (AMSRO)
concerning the proposed revision of the

Market and Social Research Privacy Code

6 October 2006

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About the APF

The Australian Privacy Foundation is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation see www.privacy.org.au

History in relation to this Code

You may be aware that APF was not consulted by AMRO/MRSA in the original development of the Code in 2001-02, and that we subsequently took up with the Privacy Commissioner, after the Code had been approved in September 2003, the inadequacy of consultation, code approval process, and other issues relating to the substance of the Code.

The justification for having a Code at all

The Privacy Foundation is not fully convinced that there is any justification for the Market and Social Research Privacy Code to exist. In the Foundation's view, industry codes should only exist if:

(i) They add additional privacy protections to those found in the NPPs;

(ii) They otherwise vary the IPPs in a way which is both allowed by the Act and justified in the public interest; or

(iii) They contain an enforcement mechanism separate from the Privacy Act; or

(iv) They serve to make the NPPs understandable and able to be complied with by a particular industry in ways which would be impossible or very difficult to achieve if members of the industry were expected to understand and comply with the NPPs themselves supplemented by Guidelines issued by the industry or the Commissioner.

These effectively summarise the 'reasons' for developing a Code included in the Privacy Commissioner's Code Development Guidelines (September 2001).

We believe that the justifications necessary for (ii), (iii) or (iv) will only rarely be found. The extra protections in (i) will rarely be offered – an example of where they have been is the Biometrics Institute Privacy Code approved by the Privacy Commissioner earlier this year.

The Code as it stands does not contain a separate enforcement mechanism (justification (iii)). Neither the Code nor any supporting documentation we have seen justifies the Code in terms of (i), (ii) or (iv). What is its justification?

It is essential that, if either (i) or (ii) are purported justifications for the Code, they should be separately identified both as justification for the Code's continuing existence, and within the Code itself, so that the public can understand the true legal import of the Code.

We find it difficult to see that (iv) alone could justify the Code, because the Code is supplemented by four different sets of industry-developed Guidelines in order to make it understandable. This could be better achieved by simply having four sets of industry-

developed Guidelines to the NPPs themselves, without the confusion of an intervening Code.

Our provisional view, in the absence of justification, is that the Code should be repealed.

Recommendations:
The Code Review should either provide a justification of the Code in terms of the criteria suggested by the Privacy Foundation and 'reasons' set out in the Commissioner's Guidelines, or should recommend the repeal of the Code.

The Code Review, to assist submissions, and the final Code should state in what ways (if any) it adds to or varies from the NPPs. This is essential if the Code is not to serve as a completely obscure set of derogations from the Privacy Act, which is the case with the current Code.

Submissions on the Code's Privacy Principles are premature

The current Code contains 19 pages of dense type, with no indication provided by either AMSRO or the Privacy Commissioner identifying at which points it reduces or enhances the protection provided by the Privacy Act. While the Code does appear to include some additional protection, which is welcome, it also clearly significantly reduces some of the protections otherwise provided by the NPPs. For example, the definition of 'genuine research concerns' which serves to provide a slew of exceptions, is completely self-serving in the interests of the research organisation or its clients, and defined broadly enough to allow them to exempt themselves from privacy protections whenever it would serve their own interests to decide to break the rules.

It would take many days analysis to unpick exactly how this Code varies the NPPs and weigh up the overall effect of any gains and losses. The foundation of this task – identification of the differences – should not be the responsibility of those making submissions on the Code. It should be provided by the Code Review (as it should have been when the Code was first proposed), as a basis for informed submissions about the need for the continuation or improvement of the Code.

Under these circumstances the Privacy Foundation is not at this stage in a position to make detailed submissions on the content of the Code's Privacy Principles. We will make such submissions once the Code Review explains how the Code varies the NPPs. We will oppose the Privacy Commissioner approving any variation of the Code until such an explanation is available and there is further opportunity to comment. We would welcome the opportunity to discuss this with the Code Review.

Confusing presentation of the Code

The Market and Social Research Privacy Code is, as the name implies, a Code approved by the Privacy Commissioner under the Privacy Act. It is not 'guidelines', a term which has a completely different meaning under the Privacy Act. Codes are binding at law, guidelines are not, so it is important that this difference be communicated clearly to both AMSRO members and consumers. Unfortunately, the current presentation of the Code and associated guidelines does not make this difference clear.

However, when you go to the AMSRO website <http://www.amro.com.au/index.cfm?p=1635> that is linked from the Privacy

Commissioner's Register of Approved Privacy Codes, the Code is described as the 'Market and Social Research Privacy Principles', and is similarly described in other documents on that page. The fact that the 'Principles' are part of a legally enforceable Code is not explained.

The four sets of 'Privacy Guidelines' available from that page further complicates the situation. The Guidelines state:

> "These Guidelines interpret and expand upon the Market and Social Research Privacy Principles (M&SRPPs). They represent AMRO's and MRSA's recommendations for best practice in areas including, but not restricted to, participant privacy. They seek to promote professionalism in the conduct of research and provide the public with the assurances needed to encourage informed and willing participation in market and social research activities. These Guidelines should be used as a guide only and do not constitute legal advice. While every effort has been made to ensure that they are comprehensive, action should not be taken solely on the basis of information provided in these Guidelines. It is understood that they provide adequate protection to enable the transfer of information with the European Community."

This explanation does not in any way make it clear that the 'Principles' are a legally binding Code whereas these Guidelines are not.

Recommendation:
Both the Code and Guidelines made under it, and the website referring to them, should clarify the differences between the Code and any Guidelines. References to 'Principles' should make clear that the Principles are part of a Code.

The Guidelines extend the number of "governing" documents that a member of AMSRO and the community in general would need to understand in order to comply or complain respectively. Are there differences in the Guideline documents from the Code in terms of the definitions or implementations areas? The Privacy Foundation does not have the resources to do a line by line comparison of the five separate governing documents presented by the organisation, and nor should this be necessary.

Recommendation:
If the Association if intent on maintaining a member specific privacy code, consideration should be given to simplifying the entire regime into a single document. If there is guidance required for different sorts of research, use of customer data and contracting out, then to avoid the potential of conflicting information across multiple documents as now exists, the area specific details should be included in the code itself.

This will accomplish several things:

- All members will receive the same consistent information about the Privacy Code itself that applies to all branches and methods
- Any specific aspects regarding methods or actions will be equally enforceable under the requirements of the code and therefore open for complaint as well
- Information will be consistent and easier to maintain instead of being spread among multiple documents

- Consumers will only have one place to look for the expected behaviour of members and will not have to try to establish which sort of research they experienced, if it was to do with use or collection or some other aspect of their data, or if the researchers were contracted or employees.

The following preliminary comments are on the Code itself.

B. Objectives

An essential aspect of the Privacy Act is that 'personal information' encompasses information from which a person is identifiable and not only information which identifies a person. This is recognised in the definition of 'identified information' in the Code. It would be more accurate and clear if the expression 'identifiable information' was used instead of 'identified information'.

Recommendation:
Replace all instances of 'identified information' with 'identifiable information' throughout the document.

Examples: 1.1.1 – change 'identified information' to 'identifiable information'; otherwise they may think that use of identifiers such as index codes or other systems would require less protection
1.1.2 – is not an objective of the code, but an objective of the organisation. This objective mentions nothing about privacy.
1.1.3 - change 'identified information' to 'identifiable information'; to reinforce that best practice deals with 'identifiable' information, a higher bar

Identified information is defined in D. Terminology. Another cross-over term is "de-identified".

C. Eligibility

The Code does not make sufficiently clear the relationship between membership of the Association, subscription to the Code and jurisdiction of the Privacy Act. While subscription is stated to be a condition of membership (C.1), and the need for 'Small Business Operators' to 'opt-in' to the Privacy Act in order to be 'bound by the Code' is explained (C.2), it is not clear if opting in is a condition of membership. This is partly because it is unclear as to whether the Association believes that none of its members could be "Small Business Operators because of the criteria listed in C.2.1.1-2.1.3. The Code Review and the Code itself should be clearer about this matter – it would be helpful to know if all current members are subject to the Privacy Act either by default, or by virtue of having opted-in.

As a matter of policy, the Association should encourage any small business members that are 'Small Business Operators' to opt in to coverage by the Privacy Act – or preferably require them to do so as a condition of membership. This policy should be stated in the Code, and a link provided to information about how to opt in.

Recommendation:
The Code should be clearer about the status of any small business members; encourage or require them to opt- in to coverage by the Privacy Act, and assist them to do so.

E. Privacy Principles – general comments

As noted above, the Foundation is not in a position to make detailed comments on the Privacy Principles until we are informed how they vary from the NPPs. We will then make a submission on them.

However, there are two general matters concerning new developments that we would like to raise at this stage.

Do Not Call Register

There is currently no mention of the new Do Not Call Register that is under development as required by the *Do Not Call Register Act 2006*. While we appreciate that the actions of market and social researchers would normally fall outside the definition of 'telemarketing calls' in that Act, we think that the Act should be reflected in the Code in two ways.

The Do Not Call Register Act reflects a significant change in Australian public policy toward the systematic and legally enforced restriction of unwanted communications. The direction of public policy is clearly toward giving members of the public the right to opt out of the continuation of unwanted communications. The Privacy Foundation considers that the Association and the Code should anticipate and stay ahead of public opinion by voluntarily applying the 'Do Not Call Register' approach to market and social research.

Recommendations

The Code should contain a warning that if any calls do fall within the definition of a telemarketing call, they must comply with the Do Not Call Register Act.

The Code should provide for an Association-operated 'Do Not Call Register' allowing persons to opt out of any contact for market and social research or from specified types of market and social research, and should require Code participants to comply with the Register scheme.

ACMA IPND Standard

The Australian Privacy Foundation also has concerns about potential access by the market research industry to information held on the Integrated Public Number Database (IPND). The Association will be aware that the Australian Communications and Media Authority it due to release a binding IPND Standard, and that the Communications Alliance (formerly ACIF) is reviewing the existing IPND Code. The current Code prohibits use of IPND information for non-approved purposes. The meaning of this has been somewhat unclear and it will be a major objective of both the Standard and the revised Code to clarify approved and prohibited uses of IPND information.

It is the position of the APF that the IPND is a restricted-use database and should not be used for any market or social research purposes beyond what would be permissible use of any directories of public numbers, and subject to other restrictions such as in the Privacy and Do Not Call Register Acts.

The Association's Code will need to be made consistent with the IPND Standard and Code.

Recommendation:

The Code will need to be made consistent with the binding IPND Standard and Code.

We look forward to a next stage in the Association's Review of its Code, in which we hope that some of our concerns, both about process and about substantive content, will be addressed.

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