Annex F

to APF Submission to Senate Legal & Constitutional Committee Inquiry into the Privacy Act 1988, March 2005

Australian Communications Authority Discussion Paper *Who's Got Your Number*: Regulating the use of Telecommunications Customer Information

Paper at
http://www.aca.gov.au/aca_home/issues_for_comment/discussion/customer_information.htm

Submission by the Australian Privacy Foundation

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The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see www.privacy.org.au

I note that the Foundation has been represented for several years on the ACIF Working Committees responsible for Codes of Practice and Guidelines on privacy issues including the IPND Code (C555: 2002) which led to this Discussion Paper; the Code on Protection of Personal Information (C523: 2001) and Calling Number Display (C 522: 2003). We are therefore very familiar with previous discussion of these issues.

Overview

We welcome the ACA's initiative in taking this issue back from ACIF, which was unable to reach a consensus on its attempted revision of the IPND Code. The Discussion Paper is a valuable contribution to the important debate on the appropriate limits on use of personal information in a telecommunications context.

We note however that the ACA's jurisdiction is unavoidably limited to members of the telecommunications industry. A comprehensive resolution of these issues will require regulation of the 'downstream' use of telecommunications customer information by organizations outside

the telecommunications industry. This is the jurisdiction of the various Privacy Acts (federal for the private sector and Commonwealth and ACT public sectors; NSW, Victorian and NT Acts for their public sectors). It is in our view essential that the ACA's proposed standard be designed to operate in conjunction with privacy legislation to achieve the desired objective.

This objective should be to ensure that uses of telecommunications customer information are in accordance with the reasonable expectations of the customers and to the maximum extent possible in accordance with their express preferences.

We therefore take issue with the suggestion in the Executive Summary that the objective is to balance community expectations with the needs of the business community and interests of the telecommunications industry, as though these interests were equal. While it is legitimate to take the latter interests into account, they must remain secondary to reasonable community expectations – a concept which already acknowledges business realities – particularly those information flows necessary to provide telecommunications services. Specifically, we reject any suggestion that public policy should recognize a concept of commercial free speech, which is sometimes arrogantly asserted as taking priority over individual consumer preferences.

We believe that the sensible foundation of public policy in relation to this issue, consistent with privacy law, would be to clearly mandate an 'opt-in' system whereby all telecommunications customers are asked if they wish their details (and what details) to be included in public number directories, having first been fully informed as to the implications in terms of potential uses. Such notification is arguably already required under NPP 1.3/1.5 of the Privacy Act, but consent is not as there are alternative bases for use and disclosure under NPP 2.

We note that an opt-in system would be consistent with the approach already taken by the government to regulation of unsolicited commercial email or Spam. While we have some criticisms of the Spam Act 2003 regime (particularly the exemptions), the principle of opt-in is sound. While unsolicited phone calls may not be as economically damaging as Spam (although junk faxes can be); they are, we suggest, just as annoying to many people, and deserve the same presumption of privacy.

We further suggest that the most efficient and desirable way for customers' preferences to be recorded is in the IPND, provided this is then made the only lawful source of data for Public Number Directories (PNDs). This would be far more effective than the largely unknown and unavoidably limited 'do not call' and 'do not fax' lists operated by ADMA. The popularity of the US 'do not call' register introduced last year (mentioned in section 4.8.2) provides a convincing case for a central government mandated if not organized preference list.

The underlying public policy objective should be the main driver for the Standard, rather than the artificial and somewhat arbitrary distinctions arising from the current terminology and definitions. In many ways, as we explain below, these obstruct a clear view of the obvious solutions.

Definitions and terminology

There is a need for much greater clarity and precision in terminology. The paper introduces the term 'Telecommunications customer data' (apparently a synonym for 'telecommunications customer information' used in the title and Introduction). The paper explains it as 'a subset of the whole of the information provided by a .. customer …' and 'consisting of 'customer contact details' (4.1). But this does not correspond exactly with either of the terms 'public number customer data' (PNCD) or Integrated Public Number Database (IPND) information which are used in the Licence Condition (10(4)) and Telecommunications Act 1997 (s285) respectively.

The 'plain english' understanding of 'customer information' would include a much wider range of information than just contact details – it would include for instance any information held by telecommunications businesses about their customers' transactions, enquiries, complaints etc. It is unhelpful to use such a broad general term to apply to the more limited subset of contact details which is the subject of the paper and proposed standard. We suggest that the focus of the debate, and of the Standard should be redefined as '**customer contact information**'.

There is insufficient recognition in the discussion paper of the difference between fixed and mobile line numbers. The statement that '..companies require this information to enable the provision and support of telecommunications services … and to bill' (4.2) is only partially correct. In relation to mobile services, an address is not in fact necessarily required for these purposes (depending on the method of payment) but is required by law (cite).

The proposed scope of the Standard - to 'apply to the use of customer information by Public Number Directory Producers (PNDPs)' (shaded box on p.8, and repeated in the last paragraph of 4.4) is in our view too narrow. The public policy issue at stake is in fact the use of customer contact information *by anyone, for any purpose*. We acknowledge that the ACA only has jurisdiction over sections of the telecommunications industry, but the Standard should address the use of the information in question by any telecommunications business (not just PNDPs), and do so in the context of the end-uses by any other users.

We understand that Telstra's subsidiary Sensis falls within the definition of PNDP even though it obtains its data through bilateral commercial contracts rather than from the IPND. We note that the 1997 Licence Condition requires Telstra to produce the traditional paper White Pages Directory as a separate requirement from the IPND (Licence Condition 9), and that the White and Yellow Pages are given as examples of a PND. We assume that Sensis is a PNDP necessarily by virtue of its production of the White and Yellow Pages PNDs, rather than because it has 'nominated' itself in order to gain access to the IPND, which is how the other PNDPs qualify. The Discussion Paper could helpfully have clarified these relationships.

The last paragraph of 4.3 is in our view a more appropriate statement of the desirable scope of the Standard.

The definition of 'public number directory' in the IPND Code amplifies the definition in the 1998 Determination by introducing the address as additional data, and leaving open the possibility of other data (by referring to 'other criteria no being part of the PNCD'). It would

therefore seem that the IPND Code envisages public number directories being essentially comprised of whatever data the PNDP chooses to include, provided it includes 'a list of telephone subscribers and their numbers'.

Directory assistance services, which are defined in the Telecommunications Act, appear to be limited to helping find numbers – whereas the IPND Code clearly envisages PNDs being to allow users to obtain both numbers and addresses.

We agree that the proposed Standard should contain a clear definition of 'public number directory' and that it needs to address and clarify some of the existing terminological confusions referred to above.

It also needs to be clear about whether it is regulating only the use of 'customer contact information' (whether derived from the IPND or other sources) or regulating public number directories in their entirety, including whatever other information they contain.

Uses of customer contact information and the role of consent

We note that there are a range of authorized uses of IPND information which are outside the scope of the discussion paper, and of the proposed standard, such as access by law enforcement agencies and emergency services ((e) and (f) of Licence Conditions 10.1 and 10.7). While there are some important issues in this area, we restrict our comments to the 'commercial' and public uses of the information available to others from the IPND.

We do however suggest that of necessity the Standard must deal not only with the production and uses of public number directories (PNDs) (Condition 10.1(c)) but also with some of the other authorized purposes of the IPND including provision of directory assistance services (10.1(a)); operator assistance services (10.1(b)) and location dependent carriage services. This is because all of these provide at least potentially alternative ways of achieving the same 'end-use' as using PND data. It would be pointless regulating access to PND data if the objective of the regulation could be undermined by creative use of directory or operator services, or by carriers and CSPs themselves in relation to the phone user's location.

We also urge that the issue of uses be addressed in light of pending and future developments in the use of telephone numbers, including the proposed ENUM already under consideration by the ACA, and developments in mobile phone location which will significantly enhance the attractiveness of mobile phones as a marketing device.

We believe that the issue of what uses to allow is inseparable from the question of whether customers have any choice as to having their contact details included in the IPND, or in any other source data used by PNDPs. You address this link in section 4.7.

At present, Telstra – by far the largest contributor of PNCD to the IPND - charges users a fee if they wish to have a 'silent' or unlisted number. We have consistently maintained that this is unconscionable, and suggest that it may also be a breach of National Privacy Principle 1.2 in that

it amounts to unfair collection, and of NPP 8 in that it denies individuals a degree of anonymity, unless they pay for the privilege. It is in short a form of protection racket, in that individuals are essentially told, "we will make your contact details available publicly unless you pay us not to".

We are not sure what the practice of the other carriers is in relation to listing, and associated charges, but we submit that all carriers should be required to offer customers a clear choice, with the unlisted option being free of charge, and also being the 'default' option if there is any uncertainty about a customer's preference. While carriers/PNDPs should be free to charge customers for directory entries, they are unlikely to want to do so as it is in their interests to encourage listing (We note that Telstra appears to be prohibited from charging for a standard entry in the White Pages (Licence Condition 9(3)). There is even an argument that they should pay the customer for allowing their name to be listed, as it has a commercial value.

Some of the uses listed in s.4.6.2 are not inherently objectionable, and many customers may see them as a reasonable extension of the basic directory listing. It is for instance likely that if customers were consciously opting in to directories, as a way of other people finding them to call, then they would have no objection to organizations which already have their contact details using telecommunications customer contact information to update those records. However, while customers are in the position of being listed 'by default' unless they ask, and in some cases pay, to be unlisted, then no-one can safely make an assumption about the level of 'consent' for any of the services listed in 4.6.2.

The four components listed in the shaded box at the end of s.4.6.2 are not entirely accurate, as telcos are required to advise the customer of uses to comply with NPP 1.3 of the Privacy Act (contradicting component 2), and the NPPs also regulate the uses of the information by third party clients of PNDPs (contradicting component 4) – this is acknowledged in Appendix A. We also repeat our view that the ACA should deal not just with the last two components, but must also deal with the issue of consent mentioned in component 2, and if necessary to achieve a sensible outcome, with the collection of customer information (component 1). This is implicitly acknowledged in section 4.7.

If dealing sensibly with this issue requires action beyond the scope of a Standard, then so be it – the ACA should not feel constrained – it can always make recommendations for legislative amendments as part of a 'solution'. The ACA recognizes this in the introduction to section 4.8 and in 5.1.

Do-not contact lists

We note the discussion of do-not-contact lists, which raises some important issues. Even if the government were to adopt an opt-in approach to use of telephone customer contact information, there may still be a role for opt-out or preference lists for people who are prepared to have their details in directories, but only if they are able to exercise some control.

Whoever operates do not call/fax preference lists, we can see no reason to exempt political parties and charities. These are often the source of some of the most annoying and persistent

approaches and we can see no public interest justification for allowing organizations in either category to ignore clearly expressed customer preferences. There would however be no in principle objection to a preference scheme which offered a variety of options such as 'no commercial, but charities OK'. There would however be obvious difficulties in policing such as distinction and avoiding it being abused.

We also cannot see any justification for time limiting the effect of an 'opt-out'. There is no reason to assume that customers would not wish any preference to remain in force until further notice.

Options

As will already be clear, we favour a Standard which control uses of customer contact information irrespective of whether the information comes from the IPND or from other sources.

We would hope that if questions of legislative amendment arise the ACAs' report on this issue can recommend amendments without having to go through a separate process with DOCITA. We assume that the Department is being kept informed of the course of this exercise.

We do not prejudge what uses of customer contact information should be allowed – a consent based regime would potentially allow for many if not all of the uses listed in s.4.6.2 and currently being challenged, provided they fitted the customer's clearly expressed preferences. These preferences would be expressed primarily through indications solicited and held by carriers, and transferred into a preference database which we suggest should be based on the IPND. But it should always be possible for customers to override their 'standing' preferences for specific uses. For instance, a large organization could gain express customer consent for future automated updating of their contact details from PND data, notwithstanding a general preference for 'no cleansing or matching'.

We therefore favour a regime which is not too prescriptive about permitted or prohibited uses, but which relies on much improved notification and positive consent (opt-in). The market can be left to devise an appropriate range of options to satisfy both industry and consumer needs.

We do not see any particular need for a guaranteed basic default option of being listed for the purposes of directory enquiries, operator assistance and single name to number search. Any attempt to police such limited uses would in our view be bound to fail and thereby bring the law into disrepute.

The one 'constraint' on use of directory information which we do think should be maintained is the prohibition on 'reverse directories' or number to name search. The availability of this function would in our view severely compromise the privacy of telecommunications customers. Many people disclose their telephone number as a way of being contacted but would not wish this to be able to lead to disclosure of their address. We appreciate that policing limits on reverse search poses difficulties, but a clear prohibition on the commercial availability of reverse search directories would be an important protection.

Conversely, there is one facility which we think should be mandated, and that is a suppressed address option which allows customers to list their number and general location (such as suburb) but not their full street address. This would facilitate the use of directories to find a number (eg by distinguishing between similar name customers), without providing details that could be used for postal or face to face contact.

End.

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