

28th February 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary,

RE: INQUIRY INTO THE PRIVACY ACT 1988

The Australian Direct Marketing Association (ADMA) submits the attached in response to the call for submissions by the Committee in relation to its Inquiry into the Privacy Act 1988.

ADMA is the peak association representing the Australian direct marketing industry. Since the introduction of the private sector provisions, the direct marketing discipline has evolved to incorporate customer management practices. This not only involves marketing and customer contact but also extends to the building, managing and maintenance of customer relationships through effective data management. As the face of direct marketing has changed, the remit of ADMA's representation has also extended to cover organisations in these fields. ADMA continues to act on behalf of both traditional direct marketers and advertisers, who market their products using direct marketing techniques, and specialist suppliers of direct marketing services to those advertisers, for example advertising agencies, mailing houses, list brokers, computer bureaux and database companies. In addition, ADMA represents organisations that use or provide data management services or techniques to build, manage or maintain relationships with customers. ADMA also administers the Do Not Mail and Do Not Call registers and other self-regulatory mechanisms designed to protect consumers.

ADMA's submission specifically addresses the following terms of reference:

- 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
- the resourcing of 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.

In the attached response ADMA has drawn from its submission to the Office of the Federal Privacy Commissioner's Review of the Private Sector Provisions of the Commonwealth Privacy Act 1988.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Edwards', with a long horizontal flourish extending to the right.

Rob Edwards
Chief Executive Officer

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adma

australian direct marketing association

SENATE INQUIRY INTO THE COMMONWEALTH PRIVACY ACT 1988

ADMA SUBMISSION

FEBRUARY 2005

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EXECUTIVE SUMMARY

1. In responding to the Inquiry, ADMA has identified a number of issues that relate specifically to direct marketing. Although ADMA has provided a detailed response to these points within this submission, we would like to draw your attention to the key issues and provide a summary of ADMA's position and recommendations on these matters:
 - **Technological neutrality:** ADMA submits that the private sector provisions of the Privacy Act should remain media and technology neutral to ensure they remain relevant to emerging technologies. Where there is a need for channel or technology specific legislation, it should be developed by the Government department that assumes responsibility for that sector. However, ADMA is of the strong opinion that the Office of the Federal Privacy Commissioner (OFPC) must play a more active role in ensuring channel specific legislation developed by other sections of Government accurately reflects both the definitions and requirements of the NPPs and does not introduce conflicting obligations on business. (See paragraphs 14-21 below)
 - **Focus for private sector provisions:** ADMA submits that the current focus for the private sector provisions, i.e. the ability to identify individuals', should be maintained. This focus reflects the intention of the private sector provisions to protect an individuals' personal data. ADMA contends that it is inappropriate to consider extending the focus of the private sector provisions to include 'contact' data as this suggests the purpose of the private sector provisions is to protect individuals from being contacted. This assertion is not supported by the Explanatory Memorandum or objectives of the private sector provisions. (See paragraph 7-13 below)
 - **Third party contractors:** ADMA submits that the private sector provisions must recognise a distinction in the privacy obligations that apply to an organisation and third party contractor. The current application of the provisions has significant implications for third party contractors and service providers. ADMA contends that it is an unintended consequence of the legislation that the collection requirements (NPP 1) apply to third parties that are acting on behalf of an organisation. To address this issue, ADMA proposes that a new definition of "data processor" be included in and recognised by the Privacy Act 1988 and that the collection requirements (NPP1 & 10) do not apply to data processors. The reason for this proposal and a suggested definition of "data processor" are provided in paragraphs 88-97 below.
 - **Recommended clarification or amendment:** Having fully considered the private sector provisions, ADMA has identified aspects of the private sector provisions that require clarification or amendment. These are required to both elucidate business obligations with regard to the NPPs and to ensure consumers have sufficient control over their personal data. A summary of ADMA's recommendations are as follows:
 - **Indirect collection for direct marketing purposes:** ADMA proposes that the OFPC consider placing an obligation on organisations that are indirectly collecting personal information for the purpose of *unsolicited direct marketing purposes* to ensure that at the time of collection or as soon as possible after collection, (i.e. in the first marketing approach) the

individual is provided an opportunity to opt-out of further direct marketing. ADMA suggests that this take the form of a Guidelines, Code provision or as an amendment to NPP 1.5. (See paragraphs 57-61)

- **Right to opt-out of future direct marketing:** ADMA proposes that, in line with standard industry practice, individuals should be provided an overarching right, at any time, to request that an organisation cease direct marketing and market research approaches. To ensure that such a request is complied with, ADMA further proposes an obligation for organisations to comply with the request within 45 days of receipt. (See paragraphs 76-80 below)
- **Source of personal data:** ADMA proposes that steps should be taken to gradually introduce a requirement for organisations that are using personal information to make *unsolicited marketing approaches*, on request from an individual, to inform the individual where the data was sourced. (See paragraphs 81-84 below)

A SINGLE, COMPREHENSIVE, NATIONALLY CONSISTENT SCHEME

NATIONAL CONSISTENCY

2. Two issues arise with regard to the subject of nationally consistent regulation of privacy. These are as follows:
 - Consistency between State and Federal privacy legislation
 - Consistency between the requirements of the private sector provisions of the Federal Privacy Act and privacy obligations contained in channel/ technology specific legislation developed and administered by other Government Departments.
3. ADMA's response to the latter issue is provided in paragraphs 14-21 below.
4. Nationally consistent legislation is essential if businesses are to operate efficiently on a national basis. Inconsistent legislation results in organisations having to invest significant resources to compliance – an expense ultimately borne by the consumer. The costs associated with compliance and the significant administrative burdens that arise from inconsistent laws directly impacts an organisations ability to be economically and administratively efficient.
5. Nationally consistent legislation is also required to ensure clarity with regard to consumers understanding their privacy rights. In ADMA's opinion it is beneficial to provide consumers with a single, comprehensive, understandable set of privacy rights that can be actively promoted by all regulatory authorities without blurring the message and causing confusion.
6. In conclusion, ADMA submits that it is essential that privacy legislation be consistent both on a State-by-State basis and on a State and Federal level. ADMA recommends the following:
 - to facilitate national consistency, appropriate mechanisms need to be put in place to ensure that neither Commonwealth nor State/Territory legislation be

- enacted which is inconsistent with the private sector provisions of the Privacy Act
- the Office of the Federal Privacy Commissioner should be given increased authority in this regard.

FOCUS OF THE LEGISLATION

7. The OFPC Review raised the question of whether the ability to identify individuals should remain as the focus for private sector provisions, or whether ability to contact or some additional approach should be taken to protect individual privacy.
8. ADMA maintains that the ability to identify individuals should remain as the focus for the private sector provisions.
9. Although it is recognised that organisations can use non-personal data to contact individuals this does not justify extending the focus of the private sector provisions to include 'contact' information - the purpose of the private sector provisions is to protect an individual's personal data, not to protect individuals from being contacted. Any restriction on the use of contact data would significantly hinder the free flow of information and be inconsistent with the policy objectives of the private sector provisions of the Privacy Act.
10. Furthermore, extending the focus of the private sector provisions to include contact information would be unworkable in terms of enforcement and would have consequences far beyond the intention of the legislation. For example, as the legislation would protect contact information, it would be possible for an organisation to receive an opt-out request from a household or telephone number without any personal details being provided. This would result in the organisation being prohibited from ever contacting that household or using that telephone number regardless that the occupant may have moved or the number been reassigned.
11. Unaddressed mail services are an example of the type of communications that would be adversely affected by extending the private sector provisions to cover 'contact information. Unaddressed mail communications are used extensively by small businesses and traders offering services in the local area. Restricting promotion by these types of traders would strike at the very heart of commerce and enterprise. Charities and fundraisers are also large users of unaddressed communications. In particular, charities use unaddressed mail to identify the new occupant of a household when a previous donor has moved or died. Consumers that do not wish to receive such communications have the option of placing a 'No Junk Mail' sticker on their mail box. In addition, the Distribution Standards Board runs an effective self-regulatory complaints mechanism to deal with unwanted unaddressed mail.
12. The OFPC Review also suggested that the focus of the legislation may need to be extended because technology has made it much easier to **connect** information.
13. The European approach to this issue has been to define personal information as data which *'relates to a living individual who can be identified from that data or from other data which is in the possession of or likely to come into the possession of the organisation'*. ADMA does not support this approach due to the significant problems the European authorities have had in both interpreting and enforcing

this provision rendering such an approach unworkable. It is also clear from the European experience that the introduction of such ambiguous definitions does not assist the consumer in understanding their rights and creates uncertainty for business.

TECHNOLOGICAL NEUTRALITY

14. ADMA has considered the question of whether it is possible for the NPPs to remain technologically neutral whilst also maintaining an appropriate level of protection for individual privacy.
15. ADMA submits that the intention of the legislation is to provide an adequate level of protection to an individual's personal information regardless of the channel or technology used by an organisation. Technology is emerging at a rate that is too rapid for the law to accommodate. It is therefore important that a default framework is in place to protect individuals' personal information.
16. This position is supported by the Explanatory Memorandum accompanying the private sector provisions of the Privacy Act, which states that the NPPs were developed to create user confidence in the way personal information is handled by organisations and to provide a default framework for the protection of personal information.
17. To ensure that the NPPs continue to remain relevant in relation to emerging technologies and providing an adequate level of protection for individuals personal data, ADMA submits that the NPPs should remain media and technology neutral.
18. ADMA recognises that some contact channels and technologies are more intrusive than others – indeed, this is reflected in ADMA's 'hierarchy of intrusion' which recognises that the more invasive the contact channel, the higher level of protection required. However, ADMA does not believe that this is a privacy issue – instead it is about use of technology. As stated in paragraph 8 above, the purpose of the private sector provisions is not to regulate how an organisation uses technologies or channels to contact individuals, it is to regulate how an organisation handles personal information.
19. Intrusions that occur through the use of a technology or contact channel will be addressed through development of legislation that regulates use of the specific channel or technology. A recent example of channel specific legislation was the Spam Act 2003, which regulates the use of email as a contact channel.
20. Channel/ technology specific legislation is generally developed by the Government department that assumes responsibility for that area, which is beneficial where it has expertise in the given channel or technology. However, channel specific legislation invariably includes aspects or provisions that relate to privacy. It is essential that OFPC play a more active role in ensuring such provisions accurately reflect the both definitions and requirements of the NPPs and do not introduce conflicting obligations on business
21. It is recognised that the Privacy Commissioner has broad powers under S27 of the Privacy Act to both examine proposed enactments and provide advice to a Minister or Agency on any matter. In addition the Cabinet Drafting Handbook

requires the OFPC to be consulted by Government agencies or bodies proposing new legislation that impacts on privacy. However, as inconsistent channel specific legislation is starting to emerge, it appears that the current powers are either insufficient or not being vigorously exercised. ADMA would encourage such powers to be actively and responsibly exercised by the OFPC, and should a determination be made that the current powers are not sufficient, ADMA would support a recommendation for further suitable powers to be conferred on the OFPC.

INTERNATIONAL ISSUES AND OBLIGATIONS

EU ADEQUACY

22. Although the Explanatory Memorandum states that an objective of the legislation was to develop a system for the fair handling of information compatible with the European Data Protection Directive, it is apparent that the purpose of compatibility was to remove any potential barriers to free trade.
23. After almost three years in operation, it is clear that although Australia's privacy regime has not been recognised as 'adequate' for the purposes of the EU this has not hindered organisations' ability to conduct business with European counterparts. This is mainly due to it being common practice for organisations to enter into contractual arrangements that address privacy responsibilities prior to the transfer or disclosure of personal information overseas.
24. As a result, ADMA does not support and does not believe it is necessary to amend the private sector provisions of the Privacy Act for the purpose of achieving EU adequacy.
25. ADMA would also draw attention to the work that has been undertaken on Privacy by APEC, especially in the area of International covenants.

TRANSFER OF INFORMATION OVERSEAS

26. Compliance with NPP 9 has not emerged as a problem area for ADMA members. As stated above, the use of contracts has become standard practice for organisations transferring personal information overseas.
27. ADMA believes that it would be beneficial for standard contracts to be made readily available to assist organisations transferring data to the EU or APEC regions. Alternatively, an Information Sheet outlining the issues that should be addressed as part of a contractual agreement would be similarly beneficial.

RECOGNISING INDIVIDUALS RIGHTS

AWARENESS OF RIGHTS

28. From recent research conducted by both OFPC and ADMA it is clear that there is a low level of awareness amongst consumers about the Office of the Federal Privacy Commissioner and the rights afforded to individuals under the Act.
29. Awareness is fundamental to the effective operation of the private sector provisions and NPPs as without it, the protection offered to individuals with regard to their personal data cease to become effective. This is because the private sector provisions are reliant upon:
- an individual being aware of and understanding their rights in order to be able to assert them
 - an individual understanding their rights in order to be aware if they have been violated
 - an individual understanding their rights have been violated in order to make a complaint
 - an individual making a complaint to the OFPC in order for the Provisions to be enforced against an organisation.
30. As outlined above, the results of ADMA research show that when asked about existing laws that protect personal information, only 27% of respondents spontaneously mentioned the Privacy Act although an additional 10% were aware that some legislation existed but did not know what. After three years in operation, this level of awareness is unacceptable
31. ADMA believes that the current low level of awareness is partly due to the lack of publicity surrounding the private sector provisions. The results of ADMA research show that the current level of publicity relating to the private sector provisions is low with only 31% of respondents having seen, read or heard anything in relation to privacy issues in the last three months. ADMA would urge more action to be taken to raise the profile of individual's rights under the private sector provisions. This would aid individuals in understanding the protection offered by the legislation and, as shown by the ADMA research, provide a level of comfort to individuals that provide their personal data to organisations.
32. The research also confirms that publicity or promotion of the private sector provisions does assist in individuals being aware of their privacy rights. Of the 27% of respondents who were spontaneously aware of the Privacy Act, 45% had seen, read or heard something in relation to privacy issues in the last three months.
33. ADMA strongly believes that the education aspect of the OFPC's role needs to be more adequately and suitably funded and until such times as this is addressed the effectiveness of the private sector provisions in protecting individuals' personal information will be compromised.

COMMUNITY CONFIDENCE

34. As an individual must be aware of their privacy rights in order to be confident that their rights are being protected. ADMA submits that, taking into account the current low level of community awareness about privacy issues demonstrated by both the OFPC and ADMA research, it is not possible to determine the level of community confidence that privacy rights are being protected.
35. This difficulty was demonstrated in the results of ADMA's research, which showed that the Australian public was ambivalent in its response to whether they

had confidence that an organisation would do the right thing with regard to use of their personal data. On average only 38% of respondents stated that they were unconfident that an organisations would do the right thing with their personal data. An average of over 60% were either totally confident or neither confident nor unconfident.

36. The disparity between levels of consumer confidence in different industry sectors was plainly demonstrated by ADMA's research – consumers had a high level of confidence in banks and financial institutions and a much lower level of confidence in mail order traders. Although ADMA does not believe that the level of confidence corresponds to privacy practices of the industry sector, it is clear that some industry sectors will have to take additional steps to gain the confidence of the consumer. It is here that ADMA will play a prominent and continuing role in (a) developing industry initiatives, such as the List Warranty Register, that promote transparent compliance with the private sector provisions (b) providing recognisable consumer protection through the Code of Practice, ADMA Code compliant symbol and Direct Marketing Code Authority.
37. Although ADMA believes that industry bodies and other representative associations play an integral role in developing consumer confidence, ADMA is also of the opinion that the OFPC must also play a central role as community confidence is vital to the effectiveness of the NPPs. With limited resources at its disposal, ADMA recommends that the OFPC needs to develop strategies that seek partnerships with business to encourage community confidence that privacy rights are protected.
38. ADMA is prepared to work with the OFPC itself and to encourage its members to participate in public awareness and education activities particularly in relation to the online environment.

INDIVIDUALS ABILITY TO EXERCISE THEIR RIGHTS

39. An individual's ability to exercise their rights is reliant on being aware of and understanding their rights - this issue is dealt with in paragraphs 28-33 above. In addition, it also requires that an individual knows where to complain to in the event that an organisation does not comply with the rights afforded to an individual under the legislation.
40. Recent research conducted by the OFPC shows that whilst 34% of respondents were aware that the Federal Privacy Commissioner existence only 7% would report misuse of their personal information to the Commissioners Office. Similarly, ADMA's research shows that 65% of respondents were unaware of the role of the Federal Privacy Commissioner. ADMA submits that both the issues outlined in paragraphs 28-33 above and the profile of the OFPC as a complaints handling body need to be addressed to provide individuals the required knowledge to enable them to effectively exercise their rights.

INDIVIDUALS CONTROL OVER PERSONAL INFORMATION

BUNDLED CONSENT

41. In ADMA's view, consent is only 'bundled' in instances where an organisation forces an individual to accept the uses that will be made of their personal information by denying the individual a choice whether or not to accept the proposed uses or disclosures. This scenario only arises where the product or service is a requirement of daily life and where the consumer does not have an option as to the company or operation with which it can deal. In all other instances, providing the consumer is clearly informed about the proposed uses and disclosures as required by NPP1.3, the individual has a choice whether or not to proceed with providing personal information.
42. ADMA does not support a change to the NPPs to address the issue of bundled consent for the following reasons:
- The circumstances in which bundled consent would deny the individual a choice whether or not to accept the proposed uses or disclosures are very limited, particularly as most essential services are supplied by the Government and therefore subject to IPP's.
 - The additional protection provided to individuals through prohibiting bundling consent does not outweigh the impact that changing the legislation would have on legitimate business practices.
 - It would be impractical for many organisations to operationalise a requirement to obtain separate consent for each data use or disclosure. This is particularly true where the use of data is intrinsic to the operation of the business. For example, financial services organisations are required, for confidentiality reasons, to obtain consent (express or implied) for any aspect of disclosure. Such disclosures are essential both to allow the bank to provide service to the customer and to allow the business to continue to operate effectively. It would be impractical for the organisation and a significant inconvenience to the consumer to require a separate consent to be obtained for each individual disclosure.
43. ADMA believes that the existing protection offered by the NPPs is sufficient to protect individuals, i.e.
- At the time of collection a organisation must clearly disclose how they intend to use the data; and
 - Providing the individual is aware of how a organisation intends to use their data they have a choice whether or not to supply personal information

UNRELATED SECONDARY PURPOSES

44. The Discussion around bundled consent raises the related question of the extent to which it should be possible for individuals to consent to unrelated secondary purposes.
45. Prior to addressing the issue of unrelated secondary purposes, ADMA would like to comment on the associated issue of 'related secondary purposes'. Although this is not highlighted as an issue within the OFPC's Paper, ADMA believes that the importance of NPP 2(1)(a) should be noted. The ability for organisations to use personal data for related purposes that meet the reasonable expectation of the consumer both recognises and addresses the changing nature of business over time. In addition, it provides the private sector provisions with the flexibility to allow the relationship between a business and a consumer to alter without placing undue restriction the organisations ability to communicate with its clients.

For this reason NPP 2(1)(a) is of significant importance to the business community.

46. To 'consent' to an unrelated secondary purpose, the individual must (a) know about the proposed use; and (b) be provided a choice, whether positive or negative, to agree to that use. As such, the ability to give or refuse consent provides the individual with control over whether their personal data can be used for the unrelated secondary purpose.
47. The private sector provisions as currently drafted do not limit the secondary purposes to which an individual can consent but instead provide a framework through which the individual can control use of their personal data. ADMA strongly believes that this position should be maintained and it provides the individual with both choice and control without restrictive government intervention. It is clear from the results of ADMA's research that respondents value the right to choose how organisations collect and use their personal data and they do not support the government assuming this role.
48. Over 70% of respondents to the research stated that it should be the individual rather than the government that has control over the way that companies collect or use personal information. This suggests that the Government's role is to provide framework legislation through which an individual can exercise choice and control but the decision as to how organisations collect and use data is made by the individual, not the Government. The private sector provisions achieved this balance in relation to unrelated secondary purposes.
49. ADMA would strongly object to any recommendation that proposed to limit the extent to which individuals could consent to unrelated secondary purposes as the ability to make a choice about how an organisation uses personal information must remain with the consumer.

INDIRECT COLLECTION FOR AN UNRELATED PURPOSE

50. In the OFPC Review, a concern was highlighted that the private sector provisions permit personal information, collected by one organisation (Company A) for a specific purpose, to be collected by another organisation (Company B) for a completely different purpose without the individual's knowledge.
51. ADMA does not agree. As demonstrated in the points below, the NPPs require an individual to consent to their data being disclosed to third party organisations for unrelated purposes – therefore, the individual will both know and have the opportunity to object to disclosure of their data to third party organisations for unrelated purposes.
 - Where Company A collects the personal data for the primary purpose of disclosing the data to third party organisations, NPP 1.3 requires this purpose to be made clear to the individual at the time of data collection. Therefore the individual has knowledge that their data will be disclosed and using this knowledge can decide whether to agree to such use.
 - Where Company A collects personal data for another purpose (i.e. not for the primary purpose of disclosing data to third parties), any disclosure will be regarded as a 'secondary purpose' and will therefore have to satisfy NPP 2(1)(a) or (b). NPP 2(1)(a) is not relevant in this case as it would not allow

Company A to disclose the data for a “completely different purpose”. As a result Company A could only make the disclosure to Company B by complying with NPP 2(1)(b), which requires the individual to consent to the disclosure. The individual must have knowledge of the disclosure to consent to it.

52. On the related issue of publicly available information, IPP 2 (e), if properly applied, should ensure that individuals have knowledge that their personal information will be disclosed to third parties for unrelated purposes. ADMA does not agree with the OFPC assertion that another organisation may collect and use the publicly available personal data for a completely different purpose without the individual’s knowledge.
53. Although ADMA does not propose to provide a lengthy response to the issue of publicly available information within this submission, it is important to note that whilst for example, 46% of respondents to the OFPC research stated that organisations should not be able to collect information from telephone directories, individuals provide a different response when the question is asked in context. For example, the results of ADMA research show that Australians do see value in organisations collecting and using publicly available information for purposes such as product recall, data validation and database updatingⁱ. Data accuracy is a consumer expectation - this is demonstrated by consumers’ willingness to complain if data is not kept up to dateⁱⁱ. Publicly available information is an essential updating and validation tool without which the industry would struggle to maintain current levels of accuracy. Taking this into account, ADMA suggests that should the OFPC regard collection and use of publicly available information as an issue central to the review, a separate more focused discussion should be facilitated on this matter.
54. With regard to indirect collection for unrelated purposes, ADMA does recognise that, due to the nature of NPP 1.5, although an individual will consent to their personal information being disclosed to third party organisations, they may not be aware which third party organisation has collected their personal data and for what purpose.
55. Although ADMA agrees that additional consumer protection measures may be necessary where personal information is being indirectly collected for unsolicited direct marketing purposes (see paragraphs 57-61 below), ADMA would not support or encourage any recommendation to amend NPP 1.5 to place additional responsibilities on other organisations indirectly collecting personal data. ADMA would strongly contend current requirement of NPP 1.5 for an organisation to take ‘reasonable steps’ to ensure the individual is made aware of the matters listed in NPP 1.3 provides a vital balance between protecting the consumer and allowing business to operate efficiently
56. The indirect collection of data for verification and updating purposes helps companies maintain more accurate customer and prospect databases and provide better customer service. This results in a reduction in mail wastage, fewer incorrect telephone numbers and more relevant communications. Consumers as well as companies benefit from this process.

INDIRECT COLLECTION FOR DIRECT MARKETING PURPOSES

57. ADMA is aware that when an organisation collects personal data for the primary purpose of direct marketing, the NPPs do not currently require the individual to be offered an opportunity to opt-out of future direct marketing. ADMA does not believe that this is an issue where data is collected directly from the individual as the NPPs require that the individual be made aware of the purpose for which their data is being collected – this knowledge allows individuals to control use of their data by making a choice whether to proceed with supplying their personal information. However, ADMA recognises that where an organisation indirectly collects data for the primary purpose of direct marketing, the individual may, in some instances, lose control of their personal data. (the NPPs currently permit the collecting organisation to use the personal information for direct marketing purposes without the need to provide the individual the opportunity to opt-out of future marketing approaches.)
58. To address this, ADMA would support a recommendation that organisations indirectly collecting information **for unsolicited direct marketing purposes** be obliged to ensure that at the time of collection or as soon as possible after collection (i.e. in the first marketing approach) the individual is provided an opportunity to opt-out of further direct marketing.
59. In making this suggestion, ADMA has taken into account the results of its recent research study, which shows that 64% of respondents would be comfortable with companies collecting their personal information for marketing purposes if, in the first marketing communication, they were provided an opportunity to opt-out. In addition, ADMA believes that it has become standard practice for member companies indirectly collecting data to provide an opt-out opportunity in the first marketing communication. ADMA submits that it would be beneficial for this standard to apply industry-wide.
60. The obligation to ensure the individual is provided an opportunity to opt-out of further direct marketing could be introduced through an amendment to NPP1.5 although ADMA would be interested in exploring the possibility of introducing such a requirement through a Code of Practice or similar enforceable guideline.
61. It is important to clarify that ADMA only proposes the new obligation relate to organisation indirectly collecting personal data for information for unsolicited direct marketing purposes. ADMA does not propose that it extend to indirect collection of personal data for other purposes for the reasons outlined in paragraphs 54-56 above.

ACCESS TO PERSONAL INFORMATION

62. Access to personal information has not emerged as a problem area. ADMA is aware that member organisations receive very few requests for access to personal information and where such information is requested it is supplied in accordance with the requirements of the NPPs. Access to personal information has not emerged as an issue of compliant to the Direct Marketing Code Authority. Access to personal information appears to be more an issue for organisations that hold sensitive information, which is not often the case with direct marketers.

BALANCE OF INDIVIDUALS PRIVACY INTERESTS & BUSINESS EFFICIENCY

CODES

63. In ADMA's view there are three main reasons why so few organisations have sought to develop their own privacy codes.
- (a) the code approval process proved to be more complex than had been anticipated,
 - (b) the requirement for codes to embody a higher standard than the legislation discouraged organisations from developing and submitting codes;
 - (c) the advice emanating from law firms tended to favour the 'default option' as less expensive and more resource efficient. Financial service institutions for instance were also facing a heavy burden of Financial Services Reform Act compliance at the same time.
64. ADMA believes that there is a continued role for codes in the privacy scheme as they have the potential to provide significant value in educating individual industry sectors how the high level, general principles apply to a specific industry or practice. This is particularly important in relation to fast-moving technology.
65. ADMA believes that the role of codes would be enhanced if the process of approval was simplified and the requirement for codes to embody a higher standard than the legislation was removed.
66. Therefore, ADMA would support a recommendation that (a) the process leading to approval of a code by the Privacy Commissioner be simplified and (b) removal of the requirement for codes to impose a higher level of protection than the legislation itself.

SMALL BUSINESS EXEMPTIONS

67. The small business exemption does not affect ADMA members because they are bound to observe the NPPs as a condition of membership and some trade in personal information, hence are covered by the operation of the Act. As a matter of principle, however, ADMA is opposed to exemptions that either cause confusion in the minds of consumers and/or undermine confidence in the effectiveness of privacy protection.

DIRECT MARKETING

Primary/ secondary purposes of collection

68. The OFPC highlighted a concern that organisations are not making it sufficiently clear to individuals the purpose for which information is being collected. In addition, there is fear that an individual's understanding of the purpose of collection may be quite different from that of the organisation collecting the information.

69. NPP 1 requires that organisations take reasonable steps to ‘ensure the individual is aware of the purposes for which the information is being collected’, however there is not a requirement to outline the ‘primary’ purpose of collection. This more general requirement to ‘ensure the individual is aware of the purposes for which the information is being collected’ may have been included as a substitute for a requirement to specify the ‘primary’ purpose due to a recognition that an organisation may have more than one primary purpose of collection.
70. Although ADMA agrees that it is not always possible for an organisation to specify one primary purpose of collection, it is clear from the results of ADMA’s research that, when providing personal data to an organisation, the most important aspect for an individual is to understand how the organisation is going to use the personal data. Indeed, in all five scenarios that respondents were asked to consider, understanding how the organisation would use the personal information was ranked most important in determining whether to provide personal information to the organisation.
71. To address this ADMA recommends that the Guideline accompanying NPP 1.3 be revised to make clear that in order to comply with NPP 1.3(c) organisations collecting personal information from individuals must ensure the individual is aware of the **primary purpose or purposes** for which the **organisation** is collecting the personal information. This Guideline should then also clarify that an organisation to clearly state the primary purpose of collection to the individual in instances where:
- the **organisation’s** primary purpose is not obvious from the data collection mechanism,
 - the individual’s understanding of the organisation’s primary purpose may be different from that of the organisation.
72. ADMA is confident that such clarification can be achieved through revising the Guidelines.

Direct marketing exemption

73. ADMA strongly supports the continued inclusion of the direct marketing exemption and believes that it remains not only appropriate, but an essential component of the NPPs
74. As the direct marketing exemption requires that an opportunity to opt-out be provided in every communication it ensures an adequate balance between protecting the individual’s privacy and the needs of an organisation to communicate with its customers.
75. This is supported by the results of ADMA’s research, which shows that 80% of respondents are comfortable with organisations collecting and using personal information for direct marketing purposes if, within the first marketing communication and at any time subsequently, they are provided an opportunity opt-out.

Universal right to opt-out

76. As part of the OFPC Review process, ADMA consulted widely with its membership base. In relation to the OFPC's question concerning business practices in relation to opt out, ADMA overwhelmingly found that member organisations are providing opt-out opportunities even when not required to do so by law.
77. In particular, it is important to note that even though it is not a requirement of the private sector provisions, it has become standard practice for ADMA members to comply with any request received from an individual not to receive further marketing approaches.
78. This approach is welcomed by Australian consumers, 68% of which stated they would be comfortable providing organisations with their details for direct marketing purposes if they had a right, at any time, to ask the company to stop using their personal information for direct marketing purposes.
79. It is important to note at this point that when talking about 'direct marketing', Australians do not differentiate between direct marketing and market research. ADMA research results show that, when directly asked, 70% of respondents regarded a phone call or email to take part in a survey as direct marketing.
80. In the interests of allowing the individual continued control over use of their personal data, ADMA believes that it would be beneficial for all organisations undertaking direct marketing and market research to offer a universal right to opt-out. Therefore, ADMA would support the OFPC making a recommendation that:
- the individual has a general right for, at any time, to opt-out of future direct marketing and market research approaches
 - organisation be obliged to comply with the request within 45 days of receipt.

Source of data

81. The recent OFPC 'Consumer Attitudes Towards Privacy' research indicates that, when receiving unsolicited marketing material, an individual's main concern is where their personal data was obtained from.
82. Although the NPPs currently only require an organisation to inform the individual 'generally' how it collects personal information, many organisations take the additional step, on request, of telling the individual where or from whom their data was sourced. In ADMA experience, informing the individual of the data source both provides the individual with increased control over their personal data and reduces the number of repeat complaints about unsolicited marketing approaches.
83. Although ADMA would support a recommendation that NPP 5.2 be amended to require organisation's using personal data to make *unsolicited marketing approaches*, on the request from an individual, to inform the individual where the data was sourced, there is a concern that many small organisations, in particular charities, do not currently have the technical capability to comply with such a requirement.
84. That being said, ADMA believes the issue is of sufficient importance that organisations should be taking appropriate steps to ensure this requirement can be met. As it is clear that some organisations will need time to make necessary

adjustments, ADMA recommends that the requirement for organisation's using personal data to make *unsolicited marketing approaches* to disclose the source of data on request be introduced initially as a best practice guideline with the understanding that, after a period of 18-24 months, the requirement will become mandatory through either a Code rule or legislative amendment.

BUSINESS COMPLIANCE WITH OBLIGATIONS

85. Although it is undoubtedly true that good privacy practice is good business, ADMA is not aware of any studies that measure cost-benefit of privacy compliance. The main reason for this is that companies do not separate out the costs of privacy compliance from other regulatory compliance measures. In addition, companies may categorise privacy compliance in terms of risk assessment.
86. ADMA members regard the NPPs as a benchmark from which to promote higher standards and best practice models. For instance in February 2004 the ADMA List Council launched the List Warranty Register. This initiative is aimed at greater compliance and a more reputable and accountable industry. Registrants are guaranteeing compliance with all privacy requirements, hence raising standards and promoting privacy awareness.
87. ADMA believes that the OFPC could assist business compliance by reviewing its communications strategies particularly with key stakeholder organisations. For instance business would like to see effective and comprehensive reporting of rulings complete with the reasoning behind decisions.

BUSINESS EFFICIENCY & PRIVATE SECTOR CONTRACTING

88. One of ADMA's major concerns raised in the context of the review is the OFPC's interpretation of how the NPPs apply to third party contractors and service providers. It is extremely common practice in nearly all industry sectors for organisations to engage a third party service provider or outsource agency to conduct a business operation on its behalf.
89. It is also commonplace for a third party contractor or outsource agency to require access to and organisation's customer records and other personal information in order to perform such operations.
90. In relation to customer service, customer contact and direct marketing these may include for example:
- engaging a mailing house, call centre or email/ SMS service provider to distribute communications,
 - engaging data quality, data enhancement or analytical services,
 - contracting a company to undertake data storage functions.
91. The services provided by third party service providers and contractors are, in most cases, specialised both in terms of technology and expertise. For this reason, and due to the associated cost, organisations cannot be expected to have such resources internally.
92. ADMA submits that application of the disclosureⁱⁱⁱ requirements and collection^{iv} requirements on the organisation and service provider respectively is unduly

onerous. It is also unnecessary as one is merely performing an operation or processing data on behalf of the other.

93. In light of the above, ADMA holds the view that organisation and service provider should not continue to be regarded as two separate legal entities for the purposes of the NPPs. Instead, ADMA recommends that a European approach be adopted which recognises the relationship between an organisation – a ‘Data Controller’ - and a third party service provider – a ‘Data Processor’ - and regards them as a single entity for the purposes of the data protection legislation.
94. A Data Processor, for the purposes of the European legislation is defined as ‘a person (other than an employee of the organisation) who processes data on behalf of an organisation’. Processing includes carrying out any operation or set of operations on the data such as:
- Organisation, adaptation or alteration of the data
 - Retrieval or consultation of the information
 - Use of the information for the contracted purpose
 - Disclosure of the information by transmission, dissemination or otherwise making available
 - Alignment, combination, blocking, erasure or destruction of the data.
95. It is important to note that European legislators adopted the concept of a ‘Data Processor’ to address the onerous consequences that would result from applying the data protection principles to third party service providers, contractors and outsource agencies. ADMA strongly believes that a similar concept should be embedded into the Privacy Act 1988.
96. However, to clarify, ADMA does not propose that the European approach be adopted in its entirety with data processors absolved from all responsibility under the legislation. Instead ADMA recommends that NPPs 2-9 continue to apply, with data processors being exempt from the collection requirements outlined in NPP 1 & 10.
97. ADMA submits that the recognition of data processors is essential to allow business to achieve its objectives efficiently – this being one of the stated objects of the private sector provisions.

ⁱ Respondents were asked if they agreed or disagreed with companies collecting contact details from telephone directories for (a) product recall – 16% disagreed (b) Keep databases up to date – 32% disagreed (c) ensure contact details are correct - 33% disagreed.

ⁱⁱ The OFPC’s 2003-2004 annual report shows that data accuracy is third most common complaint lodged by consumers.

ⁱⁱⁱ NPP 2 (1)(a)&(b)

^{iv} NPP 1