



**Australian  
Privacy  
Foundation**

post: GPO Box 1196  
Sydney NSW 2001  
email: [mail@privacy.org.au](mailto:mail@privacy.org.au)  
web: [www.privacy.org.au](http://www.privacy.org.au)

# IPND Scheme and IPND Scheme Legislative Instruments

## Submission to ACMA and DCITA

**March 2007**

### CONTENTS

<b>THE AUSTRALIAN PRIVACY FOUNDATION</b>	<b>1</b>
<b>INTRODUCTION</b>	<b>2</b>
<b>GENERAL COMMENTS</b>	<b>2</b>
<b>SPECIFIC COMMENTS</b>	<b>3</b>
<b>Comments common to both directory and research users</b>	<b>3</b>
<b>Directory users</b>	<b>3</b>
<b>Research users</b>	<b>4</b>
<b>Genuine market or survey research</b>	<b>4</b>
<b>Political polling and canvassing</b>	<b>6</b>
<b>Government information and marketing</b>	<b>7</b>
<b>Political and Government uses</b>	<b>7</b>
<b>Other Draft Instruments</b>	<b>7</b>

## **The Australian Privacy Foundation**

The Australian Privacy Foundation (APF) 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.

The APF has been closely involved in the development of telecommunications privacy regulation for many years, and has been represented on ACIF (now CA) Working Committees on IPND Code and Guidelines since the first Code review in 2003.

For further information about the organisation, see [www.privacy.org.au](http://www.privacy.org.au)

## Introduction

Given the close relationship between the ACMA Scheme and the Legislative Instruments, we do not understand why it has been necessary for ACMA and DCITA to run separate consultations. Many of the concerns that we, and others, have with the future of the IPND relate to the combined effect of the legislation, the Scheme and the instruments, and also to the Communications Alliance's IPND Code which has just been approved for publication and which will be submitted to ACMA for registration, which would make it binding on industry participants.

We are therefore making this a combined submission, and suggest that both ACMA and DCITA need to read all of the submission to understand our concerns and recommended solutions. However, for clarity, we have indicated [DCITA] where we make a specific point about one of the Instruments and [ACMA] where we comment specifically on the Scheme. Where there is no indication, the submission concerns the overall regime and is directed primarily to ACMA.

We take this opportunity to re-iterate our serious criticism of the way the whole review of IPND regulation has been handled over the last three years. We have been through a time-consuming and inefficient process of reviewing the ACIF Code, having key elements taken over by ACA/ACMA with a view to an industry standard, and then the standard being displaced by legislation. In the meantime, review of the Code by the Communications Alliance proceeded, with a constantly moving context and terminology. The Department and the Minister have consistently failed to respond to criticisms of the fundamental gaps in regulation. This has been an object lesson in policy confusion, duplication and inefficiency, while all along the true public interest objectives have been either ignored or neglected.

A further serious criticism of the process is the apparent lack of co-ordination with the Association of Market and Survey Research Organisations (AMSRO) and the Office of the Privacy Commissioner, who are currently reviewing the AMSRO Market and Social Research Privacy Principles (a Code registered and therefore binding under the Privacy Act 1988). This Code is directly relevant to the research access to IPND data and could have been used as the basis of the conditions for research access. The Instruments and Scheme also appear to have ignored the experience of specifically defining health and medical research for the purposes of exceptions to the Privacy Act.

## General Comments

The IPND Scheme is fundamentally flawed because the underlying legislation (the *Telecommunications Amendment (Integrated Public Number Database) Act 2006*) does not apply the same rules to public number directories sourced other than from the IPND. As we said in our submission on the Bill:

“Regrettably, the Bill will be ineffective in meeting this objective, as it is restricted to controlling directories sourced from the Integrated Public Number Database (IPND). Other directories, including the dominant White and Yellow Pages published by Telstra's Sensis subsidiary, are not sourced from the IPND and therefore escape from the control of the legislation. This means that Sensis, and other directory producers not using IPND data, will remain free to make their directories available for purposes and in formats prohibited, for good reasons, where IPND data is used, including with the provision of highly intrusive 'reverse search' capability. While Sensis does not

currently offer reverse search functionality, it is aggressively marketing other services which would be prohibited if the same data was sourced from the IPND<sup>1</sup>.”

We also re-iterate our concern that it is untenable for Telstra to remain the IPND Manager – there is too great a potential for conflict of interest, and submit that the role of IPND Manager be given as soon as practicable to an independent, non-commercial body.

While our concerns were raised in the Senate by the Democrats, the Bill was regrettably not referred to a Committee and was enacted without any opportunity for these fundamental flaws to be examined. We submit that because of these flaws the regime will offer only partial privacy protection, will not meet public expectations, and will need to be reviewed sooner rather than later.

The remainder of this submission addresses the provisions of the Scheme and the Instruments in relation to the parties which *are* covered by them.

## Specific Comments

### Comments common to both directory and research users

We welcome the introduction of a role for ACMA in the process of approving applications from both new and existing public number directory producer data users, and from researchers.

We welcome the requirement for data users to attach details of their privacy compliance, both on application and in reports, and the proposed forms,<sup>2</sup> but we do not think this should be misrepresented as a privacy impact assessment (PIA).

A full PIA, in accordance with the Privacy Commissioner’s PIA Guide (August 2006), is more than just a compliance statement, and is typically undertaken in relation to a proposed ‘project’ when design parameters are still being decided. Given that the permitted parameters of IPND data use are clearly established by the legislation, instruments, Scheme and Code, not to mention Part 13 of the Telecommunications Act and the NPPs of the Privacy Act, we suggest that there is no need for applicants to canvass these wider issues – these have in effect been settled (albeit imperfectly) in the legislation etc.

The draft forms are, quite appropriately, more in the nature of a ‘privacy compliance statement’ which explains how the particular applicant intends to ensure compliance with the NPPs in the context of their particular product or research, or in the case of subsequent reports, how it has complied. We submit that it would be helpful to rename the forms (and the relevant requirements in the Scheme) to avoid confusion with PIAs as envisaged in the OPC Guide and as that term is being used in practice by Commonwealth and State agencies.

We welcome the provision for ACMA to impose additional conditions on a case by case basis, and for authorisations to relate to specified sub-sets of IPND data; e.g. specific geographic areas.

### Directory users

We welcome the following inclusions in the scheme:

- The concept of authorisation for provisional use for production of a sample PND only, followed by full authorisation once the sample PND has been assessed by ACMA.
- The ‘use it or lose it’ requirement, although the timeline for data users (90 days for directory producers) seems very tight.

---

<sup>1</sup> See advertisements for Sensis’MacroMatch’ products  
[http://www.about.sensis.com.au/products/wp\\_macromatch.php](http://www.about.sensis.com.au/products/wp_macromatch.php)

<sup>2</sup> Provisional forms on the ACMA website

- The requirement for destruction of provisional IPD data sources and any copies.
- The requirements in relation to changes from listed to unlisted numbers, and other corrections
- The requirements for internal complaint handling and for notice to consumers of both internal and external dispute resolution options (although we submit that clause 3.12(15) should require mention of the Privacy Commissioner as well as ACMA)
- The requirements for annual reports (although these should be made public), and for ad hoc or annual reports by research users

We again point out that it is precisely these detailed privacy protections, in relation to PND users, which will not apply to Sensis Directories – the dominant Australian directories - which are not sourced from the IPND, because of the flaws in the overall regulatory scheme.

### **Research users**

[DCITA] The draft ‘Permitted Research’ Instrument fails to make important distinctions between different types of contact, and provides for authorisation of some types of contact which cannot be legitimately described as market and social research as the term is generally understood. The Instrument abuses the accepted language in this area.

The draft instrument also appears to have been drafted without any consideration of relevant experience built up over two decades of privacy law, or of submissions made by the Foundation and others on the draft ACMA Standard and the IPND Bill.

We address separately below the three categories of so-called ‘research’ use for which the draft Instrument allows subsequent authorisation.

### **Genuine market or survey research**

[DCITA] The first category in the draft instrument ‘health or medical research’ (Clause 4(a)) covers a limited sub-set of bona fide research, but without any of the conditional criteria that have been accepted in previous legislation for the purposes of privacy laws, such as the ethical approval requirements under s.95 & 85A of the Privacy Act, or professional standards now incorporated into Privacy law.

Without any explanation, an imprecisely defined range of health or medical research will be given preferential access to IPND data, leaving other bona fide market and social researchers reliant on published ‘public number directories’.

To the extent that there is a public interest in allowing preferential access to IPND data to researchers, we submit that different criteria should apply, as outlined below.

[DCITA and ACMA] In our submission on the Bill we drew attention to the AMSRO Market and Social Research Privacy Principles (a Code registered under the Privacy Act 1988 and currently under review). A key element of the AMSRO Privacy Code is that in ‘genuine’ market or social research, the client of the research does not receive the findings in an identifiable form i.e. opinions are not attributed to identifiable individuals without their express consent. Another key element is that genuine market research does not make any attempt to promote goods or services, or to solicit funds (or for that matter to sell political or government messages – see later).

Clause 1.15 of the AMSRO Market and Social Research Privacy Principles states that:

“Market and social research differs from other forms of information gathering in that the information is not used, disclosed nor transferred either to support measures or decisions

with respect to the particular individual, or in a manner that results in any serious consequence (including substantial damage or distress) for the particular individual. Any information gathering activity in which the names and contact details of the people contacted are to be used for sales, promotional or fundraising activities or other non-research purposes (e.g. debt collection, credit rating) directed at the particular individual can under no circumstances be regarded as market and social research. In addition, any activity that attempts to impart information to individuals rather than collect information from individuals (e.g. push polling) can under no circumstances be regarded as market and social research.”<sup>3</sup>

[ACMA] We submit that compliance with the AMSRO Privacy Code should be a condition of approval of research access including for any class licence for researchers, if that proposal (see below) is accepted.

[ACMA] In relation to access by ‘bona fide’ researchers, subject to the AMSRO Code, we submit that the project by project ACMA approval process may involve an unnecessary level of micro-management for mainstream professional research organisations which meet established professional and ethical standards. The objective of research access approval process should be to ensure these standards in the handling of the personal information, rather than case by case approval of research objectives.

[ACMA] For previously unknown or infrequent research users, a project level approval process is appropriate. But for established professional research organisations, the equivalent of a ‘class licence’ should be available, subject to appropriate audit and review.

[ACMA] We do not agree that there is no role for ‘one-off’ dumps of data from the IPND for ‘bona fide’ research. For many research projects, there will only be a single contact with potential respondents. Allowing, or even worse requiring, research users to maintain access for the duration of their project simply increases, unnecessarily, the exposure of IPND data.

[ACMA] In contrast, our proposed ‘research class licence’ could, where appropriate, allow access for a period of time, where this was helpful to the research design.

[ACMA] The consultation paper suggests that ACMA could require de-identification of individuals in research findings although this does not appear in the conditions at clause 4.5 of the draft Scheme. Such a requirement would be unnecessary if the Scheme adopted the AMSRO Privacy Code as the default condition for research access. The provision in the Scheme clause 4.5(16) for limits on disaggregation of findings appears a partial attempt to replicate the conditions of the AMSRO Code, but should be addressed in the wider context of the definition of research.

[ACMA] We welcome many of the other procedural and substantive safeguards in relation to research use, including the requirements for ad hoc or annual reports by research users. We submit that for long-term research users making annual reports, these reports should be made public.

[ACMA] In relation to the ‘notice’ requirement in clause 4.5(9), we submit that these should be consistent with the equivalent requirements in the Telemarketing Standard under the Do Not Call Register Act. In our recent submission to ACMA on the draft Standard, we made the following comments:

---

<sup>3</sup> See <http://www.amro.com.au/index.cfm?p=2403>

**Provision of information during a call**

There is a danger of overloading consumers with so much information that it becomes an irritant rather than a benefit, and undermines the credibility of pro-consumer regulation. There is also a serious compliance/enforcement issue if requirements on callers are too onerous to be practicable. The requirements [...] seek to strike a balance, but we submit that the wrong items have been singled out for mandatory vs on-request disclosure.

We suggest that the [...] requirements in [...] are not sufficiently clear whether they mean a natural or legal person [...].

We submit that the most important information to be conveyed, and the appropriate timing, is as follows:

## A. mandatory at the start of the call

- the identity of the organisation responsible for the call
- a caller identifier (need not be a actual name as long as the calling organisation can match it to an individual caller if necessary)

## B. immediately on request

- a functional return telephone number
- an explanation of any relevant employment or contractual relationships (this needs to be flexible as the range of relationships can be very broad – [...] and any relevant contact details.
- contact details for inquiries and complaints [...]

## C. on request but with a set time period to respond

- information about sources of data [...]

[ACMA] We submit that the draft Scheme is similarly unclear as to what is meant by ‘the person’ or organisation, and that the other points we made in items A & B above are also relevant to the Scheme. In the context of IPND use we agree that item C above be replaced by an express requirement to explain in all research calls that the source of the data has been the IPND (Scheme clause 4.5(9)(b)(i)).

[DCITA and ACMA] We do not know what if any consultation ACMA and/or DCITA have undertaken with AMSRO in the preparation of the Scheme. We submit that there should be as much consistency as possible between the conditions of research access in the Instruments and Scheme and the AMSRO Privacy Code.

**Political polling and canvassing**

[DCITA] The second category of ‘contact’ in the draft instrument (clause 4(b)) is, in effect, political polling and canvassing. We can see no justification for this category.

To the extent that ‘political’ research can meet the standards of the AMSRO Code, it should be authorised under that heading. To the extent that the intention is clearly to record individuals’ views for future follow-up or promote a particular political message, we believe that such activity, while perfectly legitimate, should not gain preferential access to IPND data. It is abuse of language to describe such activities as ‘research’. There is no reason why political parties and serving politicians should not make use of published ‘public number directories’, in the same way, and subject to the same terms, as any commercial user.

This is yet another example of self-serving exceptions to regulation for political activity, similar to the exemptions under the Privacy Act, Spam Act and Do Not Call Register Act. We submit that the public are heartily sick of politicians refusing to apply the same standards to themselves, and to their political machines, as they apply to the rest of the community.

### **Government information and marketing**

[DCITA] The third category of ‘contact’ in the draft instrument (clause 4(c)) in effect provides for authorisation of Commonwealth government telemarketing campaigns – which could be provision of neutral information but could also be more aggressively promoting particular services, and would also allow for the increasingly common government propaganda from all incumbent governments. As with political polling and canvassing, we submit that the public would expect these activities to make use of published ‘public number directories’. To the extent that government agencies wish to undertake bona fide market and survey research, compliant with the AMSRO Code, they should be allowed access under a general ‘genuine’ research authorisation, subject to the conditions and criteria suggested above. There is no justification for government agencies to have preferential access to IPND data.

To the extent that any preferential treatment is given to government agencies, we can see no justification for this being restricted to Commonwealth agencies – surely the same ‘public interest’ arguments would apply to State and Territory government agencies?

### **Political and Government uses**

[ACMA] If, despite the lack of justification, the final Instrument does provide for authorisation of political polling and canvassing and of government information, then we support the requirements in the Scheme ‘conditions’ for case by case authorisation and reporting for *these* categories of use. Our submissions in relation to the other conditions, including the information required to be given when calling, are also relevant to these categories of authorised use, if they remain.

### **Other Draft Instruments**

[DCITA] The other proposed instruments are generally acceptable, subject to our overarching view about the Permitted Research purposes. We welcome the inclusion in the draft ‘Conditions of Authorisation’ Instrument the clauses concerning trans-border data flows (clause 4 - a more specific version of NPP 9); secure disposal (clause 5 – a more specific version of NPP 4) and sub-contracting (outsourcing) (clauses 6 & 7).

We also particularly welcome clause 7(2) of this Instrument which prohibits ‘reverse search’ capability in any database maintained by researchers, and seek confirmation that the reason that there is no such condition for PNDP data users, either in this Instrument or in the ‘Additional PND Requirements’ Instruments, is that this prohibition is already in the legislation?