

2020

PRIVACY (MARKET AND SOCIAL RESEARCH) CODE 2020

EXPLANATORY STATEMENT

(Circulated by authority of the
Office of the Australian Information Commissioner)

PRIVACY (MARKET AND SOCIAL RESEARCH) CODE 2020

1. Issued by the authority of the Australian Information Commissioner (Commissioner) under the Privacy Act 1988 (Privacy Act).
2. This explanatory statement relates to the Privacy (Market and Social Research) Code 2020 (the AMSRO code) registered under s 26U(1) of the Privacy Act.
3. In accordance with Part IIIB of the Privacy Act, if an application for registration of an APP code is made by a code developer under s 26F of the Privacy Act, the Information Commissioner is empowered by s 26H(1) of the Privacy Act to register that APP code on the Codes Register maintained by the Commissioner.
4. This AMSRO code has been developed by the Association of Market and Social Research Organisations ABN 20 107 667 398 (AMSRO) and included on the Codes Register.
5. This AMSRO code is a registered Australian Privacy Principle (APP) code for the purposes of the Privacy Act. In recognition of the pressures on the civil justice system, the performance, funding and operation of the federal courts have been considered in many reviews and reports over the last decade. Most recently, PricewaterhouseCoopers completed a 2018 report into the efficiencies of the operation of the federal courts in respect of family law. These reviews and reports establish a clear and persuasive case for reform that the Government must address in order to ensure that the family law system meets the contemporary needs of families.

REPLACEMENT OF THE 2014 AMSRO CODE

6. The AMSRO code replaces the Privacy (Market and Social Research) Code 2014 (the 2014 AMSRO code) registered under s 26U(1) of the Privacy Act.
7. This replacement follows a review of the 2014 AMSRO code conducted by an independent reviewer appointed by the AMSRO Board and conducted in accordance with Part G (Review) of the 2014 AMSRO code. The review included publication of a draft revision of the 2014 AMSRO code and review by AMSRO and the independent reviewer of comments submitted by interested parties. AMSRO published a report of the independent code review, including recommendations for amendments to the 2014 AMSRO code that AMSRO and the independent reviewer considered necessary or desirable for the effective operation of the code. The AMSRO code that is the subject of this Explanatory Statement addresses those recommendations for amendments to the 2014 AMSRO code and accordingly replaces the 2014 AMSRO code in full.

PURPOSE

8. Each member of AMSRO which is an organisation covered by the Privacy Act (including because they have opted-in under s 6EA of that Act) is bound by this AMSRO

code. If an organisation covered by the Privacy Act ceases to be a member of AMSRO they will still be liable under this AMSRO code for acts and practices that breach this AMSRO code and that occurred while they were an AMSRO member.

9. AMSRO is the national industry body of market and social research, data and insights organisations. AMSRO states that it considers that the market and social research sector depends upon the willing cooperation of the public and business community, which is based upon confidence that the work of the sector is carried out honestly, objectively and without unwelcome intrusion or disadvantage to participants. The AMSRO code states standards for AMSRO members in relation to the conduct of market and social research which expand upon and supplement the operation of the APPs in the Privacy Act as applied to organisations that are AMSRO members and that conduct market and social research. AMSRO states that the provisions of this Code seek to give effect to the APPs in a manner that is tailored to the market and social research context, while providing the public and business community with the assurances needed to encourage informed and willing participation in market and social research activities.

10. Methods of collecting information in market and social research include postal or mail surveys, e-mail surveys, internet surveys, telephone surveys, door-to-door surveys, central location (e.g. shopping centre) surveys, observational techniques, desk research, and the recruitment and conduct of group discussions (e.g. focus groups), in depth interviews and series of interviews with online panels.

11. Market and social research is consent-based: mandatory provision of personal information from and about survey participants, respondents or subjects is not market and social research within the scope of this code.

12. Market and social research differs from other forms of information gathering in that the information is not to be used or disclosed either to support measures or decisions with respect to the particular individual, without the express consent of that individual, or in a manner that could result in any serious consequence (including substantial damage or distress) for the particular individual.

13. Part 2 of the AMSRO Code sets out how the APPs in the Privacy Act are to be applied and complied with by AMSRO members in relation to the collection, retention, use and disclosure of personal information about the subjects of and participants in market and social research (referred to in this AMSRO Code as identifiable research information). The subjects/participants are any individual about or from whom any information is sought, collected, retained, used and/or disclosed by a research organisation for the purposes of research (research subjects).

14. This code imposes some additional requirements to the requirements of the APPs. These obligations reflect the fact that participation by research subjects in market and social research as carried out by AMSRO members is always voluntary; that market and social

researchers are generally not interested in making use of the identity of research participants and that they use and disclose the information collected only for research purposes.

15. This code also includes oversight, transparency, monitoring, reporting and compliance requirements, as set out in Part 5 of the AMSRO code.

BACKGROUND

16. An APP code may be developed by APP code developers (either on their own initiative or following a request from the Commissioner) or by the Commissioner.

17. In the case of the AMSRO code, AMSRO developed this APP code in accordance with section 26E of the Privacy Act.

18. APP codes do not replace the APPs, but operate in addition to the requirements of the APPs. An APP code must set out how one or more of the APPs are to be applied or complied with. An APP code may also deal with other relevant matters, and may impose additional requirements to those imposed by the APPs, so long as the additional requirements are not contrary to, or inconsistent with, the APPs.

19. An APP entity that is bound by a registered APP code must not do an act, or engage in a practice, that breaches the registered APP code. A breach of a registered APP code will be an interference with privacy by the entity under section 13 of the Privacy Act and subject to investigation by the Commissioner under Part 5 of the Privacy Act.

20. Any APP code that is registered will be a disallowable legislative instrument.

COMMENCEMENT AND PERIOD IN FORCE

21. An APP code cannot come into force before it is included on the Codes Register (paragraph 26C(2)(c) of the Privacy Act) and subsection 12(2) (retrospective application of legislative instruments) of the Legislation Act does not apply to a registered APP code.

22. This AMSRO code comes into force on the date that it is included on the Codes Register and will remain in force until it is repealed.

23. This AMSRO code must be periodically reviewed as stated in Part 4 (Review) of the Code.

CONSULTATION

24. The Commissioner has considered the consultation process undertaken by AMSRO as the APP code developer.

25. Section 26F of the Privacy Act requires that before an APP code developer makes an application to register an APP code, it must:

- make a draft of the APP code publicly available (paragraph 2F(2)(a))
- invite the public to make submissions to the developer about the draft within a specified period (which must run for at least 28 days) (paragraph 2F(2)(b))
- give consideration to any submissions made within the specified period (paragraph 2F(2)(c)).

26. AMSRO published a review draft of the AMSRO Code on 11 December 2019, together with an Explanatory Memorandum prepared by the Independent Reviewer. The Explanatory Memorandum summarised the purpose and scope of the review of the 2014 AMSRO code and the changes that were proposed to be made to that code. AMSRO then opened a public consultation phase for the Independent Review of the 2014 AMSRO code. The public consultation period remained open until 17 January 2020. Submissions received by AMSRO were then taken into account by the Independent Reviewer in making recommendations for further revision of the review draft and by AMSRO in considering the Independent Reviewer's Report and proposed revisions to the review draft. A further review draft and the Independent Reviewer's Report were then provided to the Office of the Australian Information Commissioner (OAIC). Revisions to that further review draft were made to address comments made by the OAIC and produce the AMSRO Code as now included on the Codes Register.

27. The Commissioner is satisfied, for the reasons set out above, that the consultation process undertaken by AMSRO adequately addresses the criteria required by section 26F of the Privacy Act.

REASONS FOR THE DECISION TO REGISTER THE AMSRO CODE

28. In deciding to register the AMSRO code, the Commissioner has had regard to the objects of the Privacy Act, in particular:

- to promote the protection of the privacy of individuals (subsection 2A(a))
- to promote responsible and transparent handling of personal information by entities (subsection 2A(d)).

29. The Commissioner has taken into account the requirements for an APP code under section 26C of the Privacy Act, the procedural requirements for the development of an APP code under section 26E of the Privacy Act, and the making of the application for registration under section 26F of the Privacy Act.

30. In addition, the Commissioner has had regard to the Guidelines for developing codes (the Guidelines) issued under section 26V of the Privacy Act. The Appendix to those Guidelines sets out a non-exhaustive checklist of the primary matters that the Privacy

Commissioner will consider when deciding whether to register a code, including an APP code. Those matters include:

- whether there are appropriate governance arrangements in place to administer the code
- whether there are appropriate reporting mechanisms
- whether entities bound by the code are clearly identified
- whether there are standardised internal privacy complaint handling procedures
- whether there was initial notification of, and updates on, the code's development
- whether a code developer satisfied the public consultation requirements and considered views of stakeholders obtained during the consultation (set out in more detail below)
- whether the code meets the drafting style requirements
- whether the openness and transparency matters have been addressed
- any matters raised by any person whom the Information Commissioner consults.

31. The Commissioner is satisfied that the AMSRO code adequately addresses those criteria.

EXPLANATION OF SECTIONS

32. Section 3 (Preamble) of the code provides background as to the Code's intended operation.

33. Section 3 notes that AMSRO's primary objective is to protect and promote the research, data and insights sector and that in AMSRO's view, the long-term success of the sector depends upon the willing cooperation of the public and business community, which is based upon confidence that the work of the sector is carried out honestly, objectively and without unwelcome intrusion or disadvantage to participants.

34. Section 3 also notes that provisions of this code seek to give effect to the APPs in a manner that is tailored to the research context, while providing the public and business community with the assurances needed to encourage informed and willing participation in market and social research activities. Section 3 further states that the code imposes some additional requirements to the requirements of the APPs. These obligations reflect the fact that participation by research subjects in market and social research as carried out by

AMSRO members is always voluntary; that market and social researchers are generally not interested in making use of the identity of research participants and that they use and disclose the information collected only for research purposes.

35. Section 5 (Definitions) defines certain terms used in the code.

36. The objectives of the code are set out in section 6 are:

- to set out how the APPs in the Privacy Act are to be applied and complied with by AMSRO members in the conduct of market and social research;
- to facilitate the protection of research information about identifiable individuals being the participants or subjects of market and social research as provided by, or held in relation to, those participants or those subjects; and
- to enable quality research to be carried out, so as to provide accurate information to government, commercial and not for profit organisations to support their decision-making processes.

37. Section 8 (Eligibility and Coverage) of the code states that subscription to this code is a requirement of AMSRO membership, regardless of a research organisation's size or annual turnover. Organisations that are not members of AMSRO are not eligible to subscribe to this code. This is because AMSRO is only empowered to carry out the monitoring, reporting and compliance functions, as set out in Part 5 of the code, in respect of AMSRO members.

38. Part 2 sets out how the APPs apply to conduct by research organisations of market and social research. To facilitate cross-comparison by research organisations bound by this code with provisions of the APPs (which continue to apply to those research organisations), the order of sections in Part 2 matches the APPs. Additional requirements to those stated in the APPs are identified as such and include:

- the additional matters that a research organisation bound by the AMSRO code must notify an individual participating in market research about, and the timeframe for providing that notice (section 13A)
- the circumstances under which a research organisation bound by the AMSRO code can use and disclose certain personal information (section 14A)
- the specific purposes which a research organisation bound by the AMSRO code can rely upon to permit the retention of personal information (subsection 19A(1))
- the steps that a research organisation bound by the AMSRO code must take to deidentify certain personal information (subsection 19A(2))

- when a research organisation bound by the AMSRO code is permitted to retain certain personal information (subsection 19A(3))
- the reasonable steps a research organisation bound by the AMSRO code must take to ensure that certain personal information that it discloses is protected (paragraphs 19A(4)(a) – (c))
- a requirement to destroy or de-identify identifiable research information on request (section 21A)
- limiting circumstances when a research organisation bound by the AMSRO code is not required to comply with a request to destroy or de-identify identifiable research information (subsection 19A(1)).

39. Part 3 of the AMSRO code addresses governance. The Code Administrator for this code is AMSRO, through the AMSRO Secretariat and under direction of the AMSRO Board. AMSRO has also established a Privacy Compliance Committee, comprising an independent chair, at least two industry representatives and one consumer representative, which meets at least twice a year. The Privacy Compliance Committee advises the Code Administrator about the timing and conduct of the periodic independent review of this code under Part G of the code.

40. Part 4 of the code addresses the requirement for a periodic code review to be conducted by an independent code reviewer and the process for that review. Pursuant to subsection 24(3) of Part 4, there must be a review of this code at least every five years, but the Code Administrator may commission a review at any time: for example, if regular monitoring indicates a lack of compliance with this code, or if the Code Administrator becomes aware of systemic issues that would justify a review.

41. Part 5 of the code provides for transparency, monitoring, oversight and reporting as to compliance with the code.

42. Pursuant to subsection 28(1) of Part 5, research organisations must report annually, by 31 August, to the Code Administrator, on the number, nature and outcomes of any complaints received about breaches of the code.

43. Pursuant to subsection 28(2) of Part 5, research organisations must report systemic issues in relation to their compliance with this code, or serious and repeated breaches of the code, to the Commissioner as soon as they become aware of them.

44. Pursuant to subsection 28(5) of Part 5, the Code Administrator must monitor compliance by research organisations with the code and will investigate serious and repeated breaches and systemic issues about code compliance.

45. Pursuant to subsection 28(6) of Part 5, the Code Administrator must publish an Annual Report on the operation of this Code and make it available to the Commissioner and publicly, including online.
46. Pursuant to subsection 28(7) of Part 5, the Code Administrator must report systemic issues or serious and repeated breaches of this Code to the Commissioner as soon as the Code Administrator becomes aware of them.
47. Section 29 of Part 5 address handling by the Code Administrator of conduct by a research organisation that, in the AMSRO Board's opinion, constitutes seriously improper conduct in relation to the code. The AMSRO Board must direct the Code Administrator to notify the research organisation of the conduct. Within seven business days of receipt of notification by the Code Administrator of an opinion by the AMSRO Board concerning seriously improper conduct by the research organisation, the research organisation must take all reasonable steps to rectify the seriously improper conduct, and notify the Code Administrator of the steps taken to rectify the seriously improper conduct. If a final notice in relation to that conduct is not complied with, AMSRO may take further remedial action against the research organisation, including suspension or expulsion from membership of AMSRO. These misconduct provisions operate independently of the complaint provisions of the Privacy Act and the enforcement role of the Commissioner, and do not limit the Code Administrator's obligation, pursuant to subsection 28(7) of Part 5 of the code, to report systemic issues or serious and repeated breaches of this code to the Commissioner as soon as the Code Administrator becomes aware of them.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Subsection 9(1) of the Human Rights (Parliamentary Scrutiny) Act 2011 requires the rule maker in relation to a legislative instrument to which section 42 (disallowance) of the Legislation Act 2003 (Legislation Act) applies to cause a statement of compatibility to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

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48. Issued by the authority of the Australian Information Commissioner (Commissioner) under the Privacy Act 1988 (Privacy Act).

49. This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

OVERVIEW OF THE PRIVACY (MARKET AND SOCIAL RESEARCH) CODE 2020

50. The Privacy (Market and Social Research) Code 2020 (the AMSRO code) has been developed by the Association of Market and Social Research Organisations ABN 20 107 667 398 (AMSRO) and included on the Codes Register. It is a registered APP code for the purposes of the Privacy Act.

51. APP codes do not replace the Australian Privacy Principles (APPs) but operate in addition to the requirements of the APPs. An APP code must set out how one or more of the APPs are to be applied or complied with. An APP code may also deal with other relevant matters and may impose additional requirements to those imposed by the APPs, so long as the additional requirements are not contrary to, or inconsistent with, the APPs.

52. An APP entity that is bound by a registered APP code must not do an act, or engage in a practice, that breaches the registered APP code. A breach of a registered APP code will be an interference with privacy by the entity under section 13 of the Privacy Act and subject to investigation by the Commissioner under Part 5 of the Privacy Act.

53. The AMSRO code sets out how APP entities that are AMSRO members are to apply and comply with the APPs and sets out the period during which the code is in force.

54. The policy objectives of the AMSRO code are set out in section 6 of the AMSRO code. They include:

- To set out how the APPs in the Privacy Act are to be applied and complied with by AMSRO members in the conduct of market and social research

- To facilitate the protection of research information about identifiable individuals being the participants or subjects of market and social research as provided by, or held in relation to, those participants or those subjects; and
- To enable quality research to be carried out, so as to provide accurate information to government, commercial and not for profit organisations to support their decision-making processes.

HUMAN RIGHTS IMPLICATIONS

55. The AMSRO code engages the right to privacy in Article 17 of the International Covenant on Civil and Political Rights. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks.

56. The right to privacy is positively affected by the development and registration of the AMSRO Code.

57. The AMSRO code protects against the arbitrary interference with privacy, and advances the right to the protection of the law against such interference by:

- setting out how the APPs in Schedule 1 of the Privacy Act are to be applied and complied with in the market and social research industry (Part 2)
- introducing additional privacy enhancing requirements for research organisations to apply in the market and social research industry when handling personal information, including:
 - the additional matters that a research organisation bound by the AMSRO code must notify an individual participating in market research about, and the timeframe for providing that notice (section 13A);
 - the circumstances under which a research organisation bound by the AMSRO code can use and disclose certain personal information (section 14A);
 - the specific purposes which a research organisation bound by the AMSRO code can rely upon to permit the retention of personal information (subsection 19A(1));
 - the steps that a research organisation bound by the AMSRO code must take to de-identify certain personal information (subsection 19A(2));
 - when a research organisation bound by the AMSRO code is permitted to retain certain personal information (subsection 19A(3));

- the reasonable steps a research organisation bound by the AMSRO code must take to ensure that certain personal information that it discloses is protected (paragraphs 19A(4)(a)-(c));
- a requirement to destroy or de-identify identifiable research information on request (section 21A);
- limiting circumstances when a research organisation bound by the AMSRO code is not required to comply with a request to destroy or de-identify certain personal information (subsection 19A(1));
- providing for additional transparency, monitoring, oversight and reporting as to compliance (Part 5).

CONCLUSION

58. The AMSRO code is compatible with human rights because it advances the protection of human rights by supplementing and strengthening the APPs through the introduction of additional, privacy enhancing requirements for the handling of personal information by the entities that it binds.