Mr Timothy Pilgrim
Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001
consultation@oaic.gov.au

Dear Timothy,

Re: Guidelines for developing codes issued under part IIIB of the Privacy Act 1988 - consultation draft

Thank you for the opportunity to provide this submission on the consultation draft of the Guidelines for Developing Codes. ADMA and its members appreciate the extension granted to 19 April 2013, allowing us to more properly consider the implications of the guidelines.

Introduction

ADMA is the principal industry body for data-driven marketing and advertising in Australia. ADMA's primary objective is to help companies achieve better results and efficiencies through the enlightened use of data-driven insights. ADMA represents over 500 members from a range of organisations including major financial institutions, telecommunications companies, energy providers, information and technology companies, digital service providers, travel service companies, major charities, statutory corporations, educational institutions and specialist suppliers of marketing services.

Data-driven marketing and advertising includes any marketing communication which uses data-insights, including personal information, to engage with a consumer with a view to producing a tangible and measurable response. Data-driven marketing is platform neutral.

Almost every Australian company and not-for-profit organisation markets to its current and potential customers using data-insights as a normal and legitimate part of its business activities. The ability to continue to conduct this activity underpins the large proportion of Australia's economic activity.

Summary comments on the guideline

- The proposed requirements both for a code developer and administrator are very resource-intensive in terms of cost and human capital. This will be a significant disincentive for APP entities and their representative bodies to consider developing an APP code, and applying to have it registered.
- Guidelines under similar legislation provide explanation and guidance, they do not add criteria in addition to those in the legislation, as is the case in the guidelines under review.
- Conditions around complaint handling are much too prescriptive and onerous.
- No consideration is given to the need for consistency with mandatory codes in related areas such as telecommunications and broadcasting, or the role and content of self-regulatory codes.
- The haste and lack of notice with which these Guidelines have been released and the short timeframe for response has caused anxiety and generated more uncertainty, rather than clarification.
- Should the Commissioner call on an organization such as ADMA (with its wide membership across many sectors) to develop a code, and impose the full range of conditions as presented in the draft Guidelines, the additional cost and compliance burden would result in an exodus of members.
- The draft Guidelines need to be amended to require more consultation, consistency and less prescription than that expressed in the draft Guidelines.
- ADMA recommends that the OIAC establish a reference group composed of information privacy organisations and entities with experience of self-regulatory, co-regulatory and mandatory codes, to consider the Guidelines and possibly other material, and deliver a more balanced approach. This would provide a greater level of certainty around the use of codes to industry, and associations likely to be considered as Code administrators.

Untimely requests for development of an APP Code for registration

As the OIAC is aware, ADMA has already begun a program of briefings, webinars and other information products to educate its members on changes to the privacy legislation. This will continue beyond 2013, with activities focused on the implementation of the internal process changes necessary for compliance, and testing of those processes.

The intended outcome of these activities is to raise awareness of the privacy reforms. This will assist members to understand their obligations under the Privacy Act.

This important project will be under threat by any requirement to produce a new APP code for registration in early 2014. It would mean that in less than a year, ADMA members would have to undertake another process of education, Code compliance instruction and potential changes to a wide range of communications in multiple channels. These examples are only a select few of the apparently compounding compliance costs involved. Such imposts would be inconsistent with government policy to reduce the regulatory burden on business.

ADMA is concerned that the Commissioner may form the view that *it is in the public interest* that a code be developed, and request the development of an APP code without warning on 12 March 2014.

ADMA recommends that the guidelines include under *Part Three: Request Requirements,* section 3.2 should require consultation when the Commissioner is considering requesting a code, and address the circumstances. It should read:

> *"The Commissioner will consult with APP entities or their representative organisations of the intention to request the development of a code. The Commissioner will consult with the APP entities or their representative organisations on the issue of alternative self-regulatory options, before proceeding with the request to develop a code. Development of a registered code will only be required where there is substantial evidence of a deficiency in self-regulation. This would include evidence of a high number of serious privacy breaches that have not been effectively remedied, and a blatant lack of compliance with the Australian Privacy Principles."*

Detailed consultation will be particularly important given the broad power the Commissioner will have under section 26E of the Privacy Act to make the request where it is in the 'public interest'. 'Public interest' is a notoriously amorphous concept, and the list of circumstances listed in paragraph 3.2 of the draft Guidelines is non-exhaustive. It is only appropriate that potentially affected parties be given a proper opportunity to engage with the Commissioner before the decision is made.

Comments on specific sections

2.26-2.27: Monitoring and reporting compliance with a code

Code developers have ongoing code governance responsibilities including annual reporting requirements. These would impose a significant administrative burden on ADMA and its members.

For example, there is no indication of discretion or flexibility in the words used, such as "the Commissioner expects…", and in the requirement to report any and all complaints.

3.2: Circumstances where the Commissioner may request the development of a code

The powers are very broad and the circumstances where the Commissioner will be satisfied it is in the public interest for a code to be developed do not currently exist. For example:

- There is currently no sector that has generated a large amount or serious and repeated privacy breaches or complaints about privacy breaches.
- A registered code is not necessary to clarify uncertainties about the operation of the Privacy Act for a particular industry sector. Education, rather than a code, is a far more effective means of providing clarification. Such programs are currently being implemented including by ADMA, are far less costly and cumbersome than producing a legislative instrument, and

should be given proper time to be delivered, tested and proved before mandatory codes are even considered.

The Commissioner should not be able to order the development of a code without establishing that there is substantial evidence of deficiency in existing self-regulatory codes or an existing APP code. This would be consistent with current practice, such as under s.125 of the Broadcasting Services Act which provides that ACMA can only determine a standard when there is convincing evidence that a code of practice is not operating to provide appropriate community safeguards.

4.25-4.27: Consultation on codes

The draft Guidelines are too prescriptive in relation to involving stakeholders in code redrafting. Obligations requiring code developers to make reasonable efforts to work with stakeholders to resolve issues before submitting a code for registration are vague, and unworkable.

It is unclear what constitutes 'reasonable efforts' and it could be an impossible task to negotiate this way with all stakeholders, and then proving that those efforts have been reasonable.

5.1: Privacy complaint handling by APP entities

Prescribed internal privacy complaints handling procedures are likely to be required as part of a registered APP code. Annual report administration for each entity covered by a code would be a significant administrative burden on each entity covered by the code (particularly overwhelming for small businesses including many Not-For-Profits) as well as for the code administrator.

An association such as ADMA with over 500 members would find it an insurmountable burden to collate such information for an annual report to the OAIC if it was to become a code administrator.

Similarly, in 5.7 it is inconceivable that ADMA could bind its members, which range from large multinational corporations to small agencies, to a standardized complaint handling processes.

5.10: Internal handling of privacy complaints

The accessibility requirements such as providing individuals with assistance to make written privacy complaints, and providing appropriate facilities and assistance for disadvantaged individuals or those with additional needs, such as free access to interpreters are honourable requirements in theory. In practice, they would prove to be costly to smaller enterprises, and would likely serve as more than simply a deterrent to many businesses considering whether they wish to be covered by such a code.

7.1 – 7.7: Review of registered codes

The code review process is more prescriptive than that of the Broadcasting Services Act where the industry group reviews the code in consultation with the regulator. As the OAIC will be involved in the code review process ADMA questions whether there is the additional need, and justification for the expense, of including an independent person as overseer.

In relation to the Commissioner's power to review and vary registered codes with impunity, this is another example of the disincentives in the draft Guidelines for entities and their representatives to consider developing a registered code.

Conclusion

The draft Guidelines need to be amended to require more consultation, consistency and on the Commissioner.

ADMA invites the Commissioner to seriously consider the objections raised in this submission, and to commit to further consultation. ADMA recommends that the OIAC establish a reference group composed of information privacy organisations and entities with experience of self-regulatory, co-regulatory and mandatory codes, to consider the Guidelines and possibly other material, and deliver a more balanced approach. This would provide a greater level of certainty around the use of codes to industry, and associations likely to be considered as Code administrators.

Such a commitment would contribute positively to the effort to deliver a guideline that provides clarity to all entities potentially affected by an APP Code.

Kind regards,

[redacted]
Head of Policy and Regulatory Affairs
Association for Data-driven Marketing & Advertising (ADMA)
Level 6, 50 Carrington Street
Sydney NSW 2000
[redacted]
[redacted]
[redacted]