Office of the Australian Information Commissioner

Guidelines for developing codes – issued under Part IIIB of the *Privacy Act 1988*

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The Interactive Advertising Bureau (IAB) welcomes the opportunity to respond to the draft guidelines for developing codes under Part IIIB of the Privacy Act 1988 (the Act) published by the Office of the Australian Information Commissioner (OAIC) in March 2013.

About the IAB

The IAB is the peak trade association for online advertising in Australia and was incorporated in July 2010. IAB Australia's board includes representatives of AIMIA, Carsales.com, Fairfax Media, Google, Mi9, Network Ten, News Australia, REA Group, SBS, Telstra Media, TressCox Lawyers and Yahoo!7.

The IAB has four key objectives:

- To develop, coordinate and promote industry standards and guidelines that make interactive advertising a simpler and more attractive medium for agencies, advertisers and marketers;
- To prove and promote the effectiveness of interactive advertising to advertisers, agencies, marketers, and the press;
- To be the primary advocate for the interactive marketing and advertising industry; and
- To expand the breadth and depth of IAB membership while increasing direct value to members.

General Comments

Given that registered codes acquire subordinate legislative status (in that a breach of a registered APP code is an interference with the privacy of an individual), we have identified the largest risk in the privacy code development framework to be an entity being brought under the purview of a registered code in which they have had no part in the development of and/or being bound by a code despite the fact that the code is not properly representative of that entity or the industry in which they operate. Therefore, we place a high value on the safeguards built into the OAIC review process before making a determination of whether a code should be registered and stress that it is of utmost importance that any entity that may be bound by a code is actively consulted with before the code is submitted for registration and that the comments and concerns of any entity bound by a code are properly reflected in the version submitted for registration.

We are strongly of the view that the guidelines should expressly recognise that good corporate governance and accountability may be achieved by a number of means, one of which is the development, implementation and ongoing operation of a privacy code. As the draft guidelines currently suggest, the development and administration of a code involves significant commitment of resources and serious consequences. Many of the reasons suggested for developing a code may also be fulfilled through other

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measures such as self-regulation. The guidelines should make clear that a careful assessment of the need for and implications of developing, implementing and maintain a code must be conducted and weighed against other options. It may be that after such an assessment, a registered code is not required or the most appropriate option.

We also note that the draft guidelines speak only of registered codes. Is there an opportunity to introduce the option of unregistered codes such as those which exist in the telco space whereby codes could be approved by the Commissioner rather than registered? An unregistered code could have a different level of impact than a registered code in the event of a breach and offer a less punitive alternative.

We have a few suggestions below which will improve the code development process and provide entities with some reassurance that they will not be inadvertently caught by codes submitted to the OAIC for registration. These safeguards will also ensure that the code development process is a thoughtful one and achieves its objectives of promoting privacy, and is not used for stunts and to unduly and improperly burden entities simply because of dislike or disagreement with that entity, rather than because the code developer wishes to more effectively protect privacy.

Section 2.5

We note that one of the reasons cited for developing a code reference a desire to build trust in the use of new and emerging technologies that may impact on personal information handling practices.

The IAB is a strong supporter of industry self-regulation, particularly when it comes to new or emerging technologies and digital services due to the iterative nature of the development of these technologies and services. Self-regulatory instruments lend themselves to updates and evolution more easily than legislation or indeed registrable codes can permit. It is indisputable that any collection or use of personal information must be subject to the provisions of the Act; however the IAB strongly believes that new technologies and digital services which are collecting and using anonymous or de-identified information should remain subject to industry self-regulation.

In addition, the IAB respectfully suggests that the reason for code development being "to change the culture of an entity" be removed because this has the strong potential to lead to the code development process being used by interest groups simply because they do not like a particular company or disagree with them. Similarly, sanctioning the development of codes to "promote industry integrity" potentially invites misuse of the code development process. IAB respectfully suggests that these words also be removed.

Section 2.6

Similar to our concerns in relation to the referencing of "new technologies" in Section 2.5, the IAB has concerns about the suggestion that an entity wishing to assess the need for a code may wish to consider "the need to promote cultural change….or build trust in new and emerging technologies". Again, this seems to invite those stakeholders who dislike a new technology to develop codes to bind and change the business practices of innovators and entrepreneurs, who already have strong commitments to respect privacy and maintain user trust, as a hallmark of their business. Furthermore, it may be more

appropriate for these businesses to collaborate on a different form of regulatory instrument, such as self or co-regulatory guideline.

To further ensure the considered and appropriate use of the code development process, the IAB suggests that the Office may wish to include the following as a matter for consideration: "whether the AAP entities are truly representative of the entities that they wish to bind by the code?"

Sections 2.8 and 2.9

We believe that there is a risk that the Guidelines as presently drafted could allow a non-representative stakeholder to decide to develop a code and then assign all responsibility for funding it on to other entities, who do not agree on the need for a code. A requirement that a code developer must have secured commitment and agreement about governance arrangements from entities who are to be bound by the code and see the need for it being developed would be very helpful.

Section 2.11

In addition to making it clear who will be bound by the code, this section and the following sections must make clear that those who are to be bound by the code are properly consulted and have their feedback duly reflected in the code.

Section 2.18

This section states that any organisation which is not subject to the Act that wants to be, or indeed will be, bound by a code will need to 'opt in' to being covered by the Act. The draft guidelines use small business operators as an example of a sector which is otherwise exempt from the Act but would be subject to complying with the Act in full should that individual or class of small business be subject to coverage of a registered APP code. We suggest that requiring any entity that would otherwise not be subject to the Act, but wishes to be bound by a code to then be required to comply with the Act is unnecessarily burdensome and serves to alienate such businesses from the code development process.

Section 2.21

The Commissioner should be required to consider whether the code developer has specifically notified those entities which will be bound by the code and properly taken account of their feedback in the draft submitted for registration.

Section 2.22

The IAB membership is concerned that <u>any</u> breach of a registered code will be treated as an interference with the privacy of an individual for the purposes of the Privacy Act irrespective of whether personal information has been compromised. We suggest that circumstances whereby a registered code is breached but there has not been an invasion or infringement of an individual's privacy should not be treated in the same way as a breach which does involve an interference with an individual's privacy.

Section 3.12

We think it would be beneficial and appropriately outcome focussed for the Commissioner to lodge a Regulation Impact Statement with the Office of Best Practice Regulation for each code which is being considered for registration. A cost benefit analysis of any code which introduces additional legal obligations to an entity is an important component of these deliberations.

Section 4.22

We suggest that a consultation period for draft codes of 28 days is unduly short: we would instead recommend a minimum period of 45 days, which could be divided if the code developer elected to release two drafts.

Section 4.24

We believe that the burden of soliciting comments on a draft code from all entities that are potentially bound by that code rests with a code developer and submit that it may not be sufficient that the code has been published online and/or advertised in newspapers and industry publications in order to grab their attention. We suggest that the OAIC guidelines place proactive obligations on all code developers to both notify each and every entity to which a code is intended to apply during the consultation process, and to give due weight to any feedback from each of those entities.

For example, if an industry association such as the IAB were to develop a code there should be an obligation on the IAB to proactively notify each of the IAB's members that the code was available for review. Furthermore, and relevant to the industry association example above, if an industry association develops a code and notifies their members of their ability to review and provide feedback on the code, that association should not be able to infer agreement to or acceptance of a code from silence or a lack of response from a member. Given that registrable codes may increase legal obligations, and therefore liability, on affected entities we consider these additional obligations to be entirely reasonable.

Section 4.27 and 4.28

These provisions state that the Commissioner, when considering whether to register a code, will have particular regard to the issues raised during the consultation period by affected entities and will require a statement of consultation to be provided alongside the code. We suggest that rather than simply require a code developer to provide a summary of issues raised by the consultation that remain unresolved, it would be more reflective of the consultation process to require a summary of the range, nature and content of all written submissions in order that the Commissioner can gauge the extent to which all feedback has been incorporated into the code. We note that the Commissioner may request copies of the submissions but consider that the amendment of the above mentioned detail in the statement of consultation will give the Commissioner a better sense of the details of the code development.

Section 4.40

We consider that entities should be given discretion as to where they promote their involvement with a code. It is unnecessary and overly prescriptive to require entities to list every code or regulatory

instrument that they are involved in on their websites and that they should be able to determine the appropriate time and place to describe these efforts.

Section 5.8

The Commissioner suggests in this section that "In order to keep the [complaint handling] procedures simple and ensure that they can be easily interpreted … internal privacy complaint handling procedures [in a privacy code] cover all Privacy Act related privacy complaints rather than just complaints concerning breaches of the Code." We consider this to be an overly simplistic approach as it appears to presume that there will only be one privacy code applicable to an organisation and no other pre-existing regulation. For example, telcos are already subject to TCP and now the new CR code, so expanding other privacy codes to cover off all privacy complaints processes may not be appropriate where there is overlap, or at the very least it would have to consider which regulatory obligations have precedence, or allow for different processes where there is an existing regulatory obligation.

Section 5.10

This section includes an obligation on internal complaint handlers to make the complaint process accessible to all individuals by, amongst other things, providing facilities and assistance for disadvantaged consumers or consumers with special needs (e.g. free access to interpreters). The IAB is concerned with this requirement as it could appear rather onerous to a private sector business that is implementing complaint handling from scratch and may not have a legal obligation to provide these facilities. We ask that the list of requirements in this section be amended to reflect that they are suggestions for improving accessibility rather than strict requirements.

Part 6 – applying for registration of a code

We acknowledge the desire of the Commissioner to consult with any person they deem to be appropriate when considering whether to register a code. However, consistent with this Commissioner's emphasis on transparency, we suggest that the Commissioner disclose all parties with whom he has initiated contact.

In deciding whether to register a code, the Commissioner should be required to consider, in addition to the factors listed in **Section 6.7** whether the code developer had the requisite authority to represent and bind those entities that will be bound by the code, and if so, whether their feedback was properly reflected in the draft submitted for registration.

We respectfully suggest that a right of objection be made available to any entity that is potentially bound by a code being considered by the Commissioner for registration. This right could be based upon any number of issues, including a lack of procedural fairness in the consultation process, but would provide fundamental protection to entities who may be unintentionally bound by a code, who have not been consulted as part of the consultation process or who feel that the code does not reflect contributions made by them during the consultation process.

Appendix A

We respectfully request that an additional point be added to the checklist in Appendix A for consideration by the Commissioner which is whether other codes (either in development or already registered) purport to cover substantially similar territory and scope. Our members are concerned at the potential for overlapping codes and resulting obligations. The potential for overlapping codes would also be confusing and disorienting for consumers.

In closing, the IAB membership is strongly committed to privacy. Our members' success is tied to ensuring that people have positive experiences using their platforms, products and services and fundamental to this is securing and maintaining users' trust. Ultimately, it is imperative to our members' bottom line to get users' privacy and security right.

Please don't hesitate to be in touch with any questions or comments. Thank you in advance for your consideration.

Yours sincerely,

[redacted]
Acting CEO & Director of Regulatory Affairs

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