



FAX

To: **Owen Walsh**
(Committee Secretary for the Senate Legal
and Constitutional Committee)

Fax No: 02 6277 5794

From: **HITWISE**

Fax No: 03 9529 8907

Date: 21st April 2005

Pages: 8 including this one

Re: **SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL COMMITTEE**

Dear Owen,

Please find Hitwise's submission to the Senate Legal and Constitutional Committee following this coversheet. In the interest of fairness it would be greatly appreciated if the Senators were provided with our submission prior to tomorrow's hearing.

Kind Regards

HITWISE

Hitwise

Level 7 / 580 St Kilda Rd Melbourne VIC 3004 Australia

T: +61 3 8530 2400 F: +61 3 9529 8907

www.hitwise.com ABN 41 81 470 117



Hitwise Pty. Ltd.
Level 7/580 St Kilda Rd
Melbourne, Victoria 3004
Australia
Tel + 61 3 8530 2400
Fax + 61 3 8529 8907
www.hitwise.com
info@hitwise.com

**SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL COMMITTEE
INQUIRY INTO THE PRIVACY ACT 1988**

1. INTRODUCTION

On 9 December 2004, the Senate referred a reference inquiry into the *Privacy Act* 1988 (**Privacy Act**) to the Legal and Constitutional References Committee (**Senate Committee**), for inquiry and report by 30 June 2005.

On 19 April 2005, the Senate Committee provided Hitwise Pty Limited (**Hitwise**) with a copy of a submission made to it by Electronic Frontiers Australia (**EFA**). The EFA submission contains allegations about Hitwise's business practices that Hitwise considers to be false and misleading.

Accordingly, Hitwise appreciates the opportunity that has been provided by the Senate Committee to comment on EFA's submission, and to correct EFA's claims.

At the outset, Hitwise wishes to emphasise that its comments are limited to those aspects of EFA's submission that make claims about Hitwise or which are directly related to Hitwise. The fact that Hitwise has not commented on other parts of EFA's submission should not be taken to be an endorsement of those submissions.

Also, Hitwise understands that the Senate Committee's terms of reference require it to consider the overall effectiveness and appropriateness of the Privacy Act. EFA does not appear to have limited its submission to the terms of reference.

2. EXECUTIVE SUMMARY

EFA's submission makes a number of damaging and erroneous allegations about Hitwise's business. In particular, EFA claims that Hitwise does not comply with existing privacy laws, including the Privacy Act. However, EFA's allegations are based on an incorrect assumption and flawed analysis.

EFA has assumed that Hitwise collects data known as an "IP address". An IP address is data that, at a specific time, identifies a computer. It gives no geographic information or other information about the person using the computer, or in particular personal information as claimed by the EFA.

The Privacy Act regulates the handling of "personal information", that is, information or an opinion from which a person's identity reasonably can be ascertained. IP addresses are not considered to be "personal information" as they do not identify a person. However, EFA appears to be claiming that an IP address can be used to identify "some individuals" and that it should be regarded as "personal information". It is not clear why EFA has formed this view.

In any event, and irrespective of how IP addresses are categorised, Hitwise itself does not collect IP addresses about the individual end users (or customers) of the Internet Service Providers (ISPs) from whom Hitwise collects data. Nor does Hitwise collect other types of information that, either in isolation or when combined, would identify a person. Hitwise does not need this information for the purposes of its business, and so it is not collected.

For the information of the Senate Committee, an overview of the services provided by Hitwise is set out at section 3 below. This explains that while ISPs use proprietary software to extract data from their "proxy caches"¹ for provision to Hitwise, the data that is provided to Hitwise does not contain any IP addresses or personal information.

As Hitwise does not collect IP addresses or personal information, and as Hitwise does not use or disclose IP addresses or personal information for the purposes of providing its services, EFA's analysis of the application of the Privacy Act and other relevant privacy laws to Hitwise is fundamentally flawed.

As noted above, the purpose of this submission is to draw the flaws in those parts of EFA's submission that relate to Hitwise to the attention of the Senate Committee, to assist the Senate Committee to reach informed conclusions about those submissions.

3. ABOUT HITWISE

3.1 Hitwise's operations

Hitwise is an online measurement and research company. Hitwise and its related companies operate in Australia, United States, United Kingdom, New Zealand, Hong Kong, and Singapore.

¹ A "proxy cache" is a function of a proxy server that caches retrieved web pages on the server's hard disk so that the page can be quickly retrieved by the same or a different user the next time that page is requested. The proxy cache eases bandwidth requirements and reduces delays that are inherent in a heavily used, Internet-connected network. Because the page is stored locally on the proxy server, the page is delivered to the next request at local network speeds. The proxy cache also stores all of the images and sub-files for the visited pages, so if the user jumps to a new page within the same site that uses, for example, the same images, the proxy cache has them already stored and can load them into the user's browser quicker than having to retrieve them from the Web site server's remote site. (Source: webopedia.com)

Hitwise was a Victorian winner of a *Telstra and Australian Government Small Business Award* for 2004.

Hitwise compiles aggregated research and statistics about Internet use. Hitwise provides its research reports to over 1000 clients who wish to obtain insights into the performance of their online presence within their respective industries. For instance, a Hitwise report may compare how often a client's website is visited when compared with the websites of its competitors. Hitwise also provides research reports to ISPs who wish to improve the operation of their own services and networks (to reduce the cost of carriage and the costs to end users).

None of the services provided by Hitwise require Hitwise to have access to "personal information" about the users of Internet services.

Hitwise compiles aggregated research and statistics from data supplied by Internet Service Providers (**ISPs**), who Hitwise refers to as "partner ISPs". It must be emphasised that Hitwise does not collect information from its partner ISPs that is "personal information" (ie that would identify an end user of the ISP's services). Also, it must be emphasised that Hitwise's services involve the provision of aggregated data, rather than data about what any individual is doing online.

In summary, Hitwise's business model relies on the fact that it does not collect any data from its partner ISPs from which the identity of an individual (ie the identify of an ISP's customer) can reasonably be ascertained.

To elaborate, partner ISPs use proprietary software provided to them by Hitwise to extract aggregate data from their proxy caches. This may involve the software "analysing" the IP addresses that are included within proxy caches. As noted above, IP addresses are not considered by Hitwise to be "personal information". Nevertheless, Hitwise wishes to emphasise that this process is conducted within the ISP's network (using the proprietary software), not at Hitwise, and no IP address information or personal information is disclosed to Hitwise.

3.2 Compliance audits

Hitwise could not conduct its business if it did not comply with privacy laws. Its business model and business processes is based on the fact that it does not collect personal information, and it takes compliance with privacy laws seriously.

To illustrate how seriously Hitwise takes privacy compliance (in all the jurisdictions in which it operates), Hitwise's process of collecting data from ISPs (**ISP data collection**) is constantly reviewed by PricewaterhouseCoopers to ensure compliance with all relevant privacy legislation. Hitwise has engaged Pricewaterhouse Coopers to audit ISP data collection and Hitwise's storage

systems for compliance with the Privacy Act and compliance with the requirements and principles that apply or are relevant to other jurisdictions, including (but not limited to) the Data Protection Act 1998 (UK) and Directive 95/46/EC of the European Parliament and of the Council (EU Data Protection Directive).

As noted above, Hitwise does not collect any personal information (as defined in the Privacy Act), or any IP addresses of "end users" of its ISP partners. Quite simply, Hitwise does not need this information in order to provide its reports. Hitwise's reports identify aggregated Internet usage trends (within and between websites). Such reports do not contain information about how an identifiable individual has been using the Internet.

4. DEFINITION OF PERSONAL INFORMATION

Before addressing the specific allegations made by EFA, Hitwise notes that EFA have argued that a "broader definition of personal information must be embraced" and that it should include "identifiers" such as "an Internet user's machine ID, IP address, user ID, email address², passwords etc".

It must be noted that a definition that included data from which an individual's identity could not reasonably be ascertained would not only be contrary to the approach adopted in the Privacy Act, but also in other privacy laws that are in place overseas. "Personal information" is consistently described as information or data that can be used to identify an individual. EFA have not presented any sound policy reasons why Australia should adopt laws that are inconsistent with other OECD countries that have enacted privacy legislation.

Further, if the so-called "identifiers" (as described by EFA) don't identify a person, then it is difficult to see how the use of such information to produce aggregated trend and statistical information is an interference with any person's privacy.

As a general comment, Hitwise notes that a change of the kind advocated by EFA would be likely to have very significant implications for the Internet industry and e-commerce, as it would impact upon how every business with an online presence conducts its business. For instance, it could impact upon the operation of proxy caches (which are implemented to save costs and improve efficiency) and upon the type of network monitoring that every ISP conducts (eg for routine maintenance and to improve site functionality). Furthermore, inclusion of an IP number in the definition of personal information would negatively impact on the business processes of every company with an Australian website (or every website that sought to comply with Australian law). Such change would severely displace Australia within the world-wide internet community.

² It is noted that an individual's email address is already regulated as personal information if it is information from which that person's identity can reasonably be ascertained

Section 29 of the Privacy Act requires the Privacy Commissioner to recognise the right of business to achieve its objectives in an efficient way. However, EFA's submissions about the definition of "personal information" do not consider this issue.

5. CORRECTIONS OF FALSE AND MISLEADING INFORMATION PROVIDED BY EFA

5.1 Collection of data by Hitwise

In paragraphs 27 to 33 of the EFA submission, EFA sets out its claims that monitoring Internet use must always "invades individuals' fundamental right to privacy". In doing so, it purports to use Hitwise as an example of a business that breaches privacy legislation, because it assumes that Hitwise collects the "IP address of the computer used by the Internet user".

As noted above, an IP address is simply a number that identifies a computer, not an individual. However, irrespective of whether an IP address may in some cases be "personal information" (and that must be questioned), EFA's assumptions about Hitwise's data collection methods are incorrect.

Specifically, the data that Hitwise collects from ISPs does not include end user IP addresses.

Instead, Hitwise provides participating partner ISPs with proprietary software that enables those partner ISPs to process HTTP usage logs in order to supply Hitwise with aggregate data on the websites accessed by the partner ISP's network. This process was described in section 3 above. The data provided to Hitwise by the partner ISPs is only done in aggregate form and at no stage are the IP numbers sent to Hitwise.

5.2 Compliance with relevant laws

EFA's incorrect assumptions about the nature of the data collected by Hitwise are used as the basis for EFA's analysis of the application of relevant laws to Hitwise (in paragraph 34 of the EFA submission). As EFA's assumptions about the collection of IP addresses are fundamentally flawed, so too is its analysis of the application of relevant laws to Hitwise.

Hitwise notes that EFA has made allegations about the nature of the technology used by Hitwise. As there is a patent pending over Hitwise's technology, and as the details of the technology remain commercially and competitively sensitive, Hitwise would prefer not to respond in detail to EFA's allegation in a public submission at this time. However, Hitwise wishes to emphasise that it fully understands that its business processes comply with all relevant laws.

Hitwise notes with interest that EFA has not included its claims about Hitwise's alleged "non-compliance" with relevant laws in the version of its submission that it has posted on its own

website. Hitwise questions whether this is because EFA feels comfortable to make such claims when it is protected by Parliamentary privilege, but not when it is subject to the laws of defamation.

5.3 Hitwise's Privacy Policy

In paragraphs 31 to 32 of the EFA submission, EFA alleges that Hitwise's Privacy Policy is misleading. Specifically, EFA states as follows:

31. Visitors to the Hitwise website would also be given the understanding that the *Privacy Act 1988* does not protect them from having their online activities monitored and/or tracked by Hitwise, nor prevent Hitwise from disclosing information about them to other organisations:

Hitwise Privacy Statement, as at 16 Dec 2004:

"...Legal nature of this Privacy Statement

"...Hitwise will act to ensure it complies with the privacy principles contained in this statement, but is not legally bound to enforce these principles under Australian law."

32. Some individuals may conclude from the above that Hitwise is a small business exempt from compliance with the Privacy Act ...

The above references have been taken from Hitwise Privacy Policy that appears on the Hitwise website. It addresses how Hitwise handles the personal information of clients of its services and people who use its website (and in doing so, provide personal information that can be used to identify them).

The Privacy Policy in no way relates to the ISP data collection method that is used by Hitwise (ie to collect data about the use of the Internet by end user customers of the partner ISPs), as no personal information is collected during that process.

The EFA have attempted to create a distortion between this Privacy Policy, and relationship that Hitwise has with participating partner ISPs. While Hitwise believes that the role of the Privacy Policy is clear when the policy is read in full, Hitwise proposes to clarify the application of the Privacy Policy so that it explains in more detail that it does not apply to ISP data collection methods, and that it is intended to apply to Hitwise's handling of personal information about the clients of its services and about people who use its website.

6. **CONCLUDING COMMENTS**

In conclusion, Hitwise rejects the claims by EFA that it is not complying with its legal obligations, and that its business practices interfere with the privacy of individuals.

Hitwise thanks the Senate Committee for its consideration of this submission.

21 April 2005