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Dear Ms Wynn

#### **DISCUSSION PAPER: SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA**

The Insurance Council of Australia (Insurance Council), the representative body of the general insurance industry in Australia, welcomes the opportunity to provide this submission on the Australian Law Reform Commission's (ALRC) *Discussion Paper: Serious Invasions of Privacy in the Digital Era* (the Discussion Paper).

The Insurance Council appreciates the ALRC's acceptance and acknowledgment of many of the issues and recommendations raised in our earlier submission to the Issues Paper in November 2013; particularly in relation to the importance for privacy laws to accommodate the ability of the insurance industry to undertake surveillance activities for the purpose of assessing personal injury claims and investigating suspected fraud or misrepresentation.

We are also supportive of the guiding principles set out in the Discussion Paper, including that privacy should be balanced with other important interests, and that privacy laws should be clear, certain, coherent and consistent. We agree that these principles set an appropriate framework for balancing the important objective of protecting individuals' privacy with other important public interests.

The Insurance Council is confident that the ALRC will undertake a careful cost benefit analysis of introducing the new tort, particularly as the *Privacy Act 1988* (the Privacy Act) already regulates for negligent breaches of information privacy. In considering the consequences of a new tort, the ALRC needs to take account of the possible impact on claims costs. For example, the tort would provide another avenue for which policy holders (primarily in relation to public liability cover) can be sued and for which insurers may have to indemnify for under their policies. If a new tort does result in an increase in claims costs, insurers would need to reflect the greater risk by specifically excluding the tort from coverage or re-evaluating the premium.

This submission outlines specific issues raised by our members in response to the proposals. We believe these comments and recommendations are consistent with the guiding principles applied by the ALRC in considering legislative reform.

### **Fault**

The Insurance Council supports **Proposal 5-2**, which seeks to confine the new tort to intentional or reckless invasions of privacy. However, we strongly urge the ALRC to establish a reasonably high threshold in determining whether behaviour is intentional or reckless to discourage frivolous or vexatious claims. We agree with the ALRC's reasons for not extending the tort to negligent invasions of privacy, or applying strict liability. We note that negligent breaches of information privacy are already regulated under the Privacy Act, which has its own complaints, redress and penalty mechanisms.

We also agree with **Proposal 5-3** that an apology made by or on behalf of a person in connection with any invasion of privacy alleged to have been committed by the person is not to be taken as an admission of fault or liability.

### **Privacy and the Threshold of Seriousness**

**Proposal 6-2** seeks to develop guidance in the new Act on factors that courts may consider in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy. While we are supportive of the additional certainty that such guidance would provide, the legislation needs to ensure there is consistency on how privacy invasions (under the new tort) and information privacy breaches (under the Privacy Act) are treated. A person may have a reasonable expectation of privacy but nonetheless the act complained about may be exempt under the exemptions in Part II Division 3 of the Privacy Act. An exempt act or practice should not be actionable under the new tort.

We are also concerned that acts or practices may be found by a court to be a serious privacy invasion under a tort action, but may nonetheless not be serious enough to warrant civil penalties to be imposed under the Privacy Act. This could create uncertainty for businesses. Businesses need to have consistent guidance from regulators and courts as to what is considered a 'serious' privacy breach, regardless of whether it concerns information privacy or other privacy. This accords with the guiding principle established by the ALRC that privacy laws should be coherent and consistent.

### **Proof of Damage**

The Insurance Council is concerned with **Proposal 7-2** that enables legal action to be taken without a plaintiff being required to prove actual damage. We reiterate comments made in our submission to the Issues Paper, noting the adverse consequences of such a proposal on dispute resolution processes and the potential for a significant number claims without merit to result.

### **Remedies and Costs**

We are concerned with the proposal that a person who had sought redress in a different forum, including alternative dispute resolution (ADR) through the Office of the Australian Information Commissioner (OAIC), would still be able to take action in tort. There should be a clear rationale as to why plaintiffs should be allowed to seek redress under more than one avenue. Otherwise defendants would potentially have gone through a prescribed complaint process and still have to defend an action in tort.

**Proposal 9-5** provides that in determining any remedy, the court may take into account the outcome of any ADR process. However, we submit that this occurs too late in the litigation process and would not ameliorate the increased costs that would have to be met by industry in defending tort actions for claims that had already been considered by OAIC or the

Financial Ombudsman Service (FOS). This is especially the case if it had already been determined that there was no breach of privacy by the defendant.

The Insurance Council also disagrees with **Proposal 11-5** making exemplary damages available under this tort. We concur with the observation made by other stakeholders, acknowledged in the Discussion Paper, that remedies for a privacy action should be directed at compensating a plaintiff and the availability of exemplary damages may stifle important and legitimate activities. Where a serious invasion into information privacy is concerned, the OAIC has the discretion to launch its own investigation and impose any civil penalties.

We are concerned that defendants could be faced with general damages plus exemplary damages under the new tort, in addition to civil penalties under the Privacy Act (or other legislation). If the concern is that there are existing gaps in the availability of redress by the individual in other (non-information) privacy areas, perhaps legislation that regulates those areas should provide the appropriate civil penalties.

**Question 11-1** seeks feedback on what, if any, provisions should the ALRC propose regarding a court's power to make costs orders. While we acknowledge the importance of a cause of action that is accessible, we note that the power to make cost orders could help deter frivolous claims by plaintiffs.

### **Surveillance Devices**

**Proposal 13-1** seeks to make surveillance device laws and workplace surveillance laws uniform throughout Australia. The Discussion Paper commentary at paragraph 13.44 suggests that under the uniform laws, an exception should continue to apply where the consent of all parties had been obtained. We note that under the *Telecommunications (Interception and Access) Act 1979*, recording a telephone recording only requires knowledge, not consent, of the parties that are being recorded.

### **New Regulatory Mechanisms**

**Proposal 15-2** seeks to insert a new Australian Privacy Principle (APP) in the Privacy Act requiring an APP entity to provide a mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual. The Insurance Council does not object to this proposal, on the condition that exceptions under the new APP capture situations where the APP entity requires the personal information for its functions or activities.

Members of the Insurance Council need to retain personal information for various reasons. For example, an insurer needs to retain an insured's personal information in order to provide insurance service to the insured. If the information is destroyed or de-identified, the insurer will not be able to provide the service. Other uses such as analytics and internal reporting, including reporting that may be required by a group company, may take place after expiry of the insurance policy and such reporting may not necessarily fall within the 'required by law' exception.

**Question 15-1** seeks feedback on whether the new APP proposed should also require an APP entity to take steps with regard to third parties with which it has shared the personal information. The Insurance Council submits that such a requirement would impose a substantial compliance burden on APP entities, and therefore, objects to any requirement for APP entities to provide a list of all third parties who have received the information.

**Question 15-2** seeks feedback on whether a regulator should be empowered to order an organisation to remove private information, whether provided by that individual or a third party, from a website or online service controlled by that organisation if it is found that publication of the information constitutes a serious invasion of privacy. We note that it could be challenging for businesses to locate all copies of the information that needs to be destroyed/de-identified. Businesses will need some guidelines that clarify what taking 'reasonable steps' involves taking into account what is technically realistic and practical to do in locating and destroying/de-identifying all the copies that are stored on systems owned by the business and its partners/suppliers.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or [janning@insurancecouncil.com.au](mailto:janning@insurancecouncil.com.au).

Yours sincerely



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