



# **Serious Invasions of Privacy in the Digital Era (DP 80)**

Submission by the Australian Communications Consumer Action Network to the Australian Law Reform Commission's Inquiry

12 May 2014

## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

## **Contact**

Teresa Corbin, CEO  
David Seidler

Suite 402, Level 4  
55 Mountain Street  
Ultimo NSW, 2007  
Email: [info@accan.org.au](mailto:info@accan.org.au)  
Phone: (02) 9288 4000  
Fax: (02) 9288 4019  
TTY: 9281 5322

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## Introduction

ACCAN thanks the Australian Law Reform Commission for the opportunity to contribute to its inquiry on *Serious Invasions of Privacy in the Digital Era*.

As with its submission to the ALRC Issues Paper 43 in November, 2013, ACCAN reiterates its support for the introduction of a statutory cause of action for serious invasions of privacy. Recent ACCAN-commissioned research into communications privacy complaints determined that the current privacy complaints system delivered “uncertain and inconsistent outcomes for consumers.”<sup>1</sup> Instituting a separate tort for invasion of privacy, and salvaging privacy from the hazy legal status it currently suffers as a subset of breach of confidence law, will serve to provide a new, more flexible avenue of redress for consumers whose privacy is breached. Clarifying and streamlining the telecommunications complaints and redress regime is essential to protecting Australian consumer privacy moving forward.

Thank you for considering ACCAN’s submission to the inquiry.

## Response to Proposal 6-2

**Proposal 6–2** The new Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider, among other things:

...

(h) whether the plaintiff consented to the conduct of the defendant;

Of the five elements outlined as the core of the new tort for serious invasion of privacy, the most concerning from ACCAN’s perspective is that regarding plaintiffs’ “reasonable expectation of privacy.” Specifically, Proposal 6-2, (h) makes mention of plaintiff consent. While ACCAN applauds the ALRC for recognising the contentious nature of ‘consent’, particularly in a commercial environment in which consumers are consistently bombarded with information, we do not believe that the proposed ‘consideration’ goes far enough.

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<sup>1</sup> Connolly, C and Vaile, D, Cyberspace Law and Policy Centre 2010. *Communications Privacy Complaints: In search of the right path*, Australian Communications Consumer Action Network, Sydney.

The ALRC is right in suggesting that “Consent may vary in quality and extent”<sup>2</sup>, however, survey data suggests that giving consent in telecommunications transactions is more often than not a hasty formality which consumers sign off on without truly comprehending the ramifications of allowing industry players the ability to access, use and, in certain circumstances, disclose their personal information. The latest OAIC report on community attitudes to privacy indicates that 51% of Australians consumers do *not* read privacy policies<sup>3</sup>, thus subverting the efficacy of the first of the new Australian Privacy Principles<sup>4</sup> and rendering the provision of consent less relevant as a “reasonable expectation of privacy” consideration. Accepting the reality of “privacy notice fatigue”<sup>5</sup> and the fact that privacy policy consent can become “virtually worthless”<sup>6</sup> is vital to properly factoring consent into consumer expectations around privacy.

Accordingly, ACCAN submits that courts consider a variation on the ALRC’s proposal, instead questioning “whether the plaintiff gave *informed* consent to the conduct of the defendant.” The concept of informed consent is typically raised in a medico-legal context but has equal weight here given the almost automatic way many consumers are agreeing to privacy policies, outlined above.<sup>7</sup> A 2011 ACMA report identifies a lack of informed consent underscoring many telecommunications contracts, quoting survey participants including one who suggested:

“The salesperson went through it really fast—told me to sit there and read it—went off and served someone else ... and I just felt pressured and hurried. I don’t have a clue what I signed.”<sup>8</sup>

The “use of legalese and unfamiliar language”<sup>9</sup> was a key concern of participants in that report. Although consumers must ultimately claim some responsibility for their approach to consent, ACCAN can anticipate myriad cases where wronged consumers might think they have a new tort redress option but find this option unavailable due to a contract they have signed without being properly informed. ACCAN is aware that this is just one of nine listed, non-exhaustive factors the ALRC has

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<sup>2</sup> Australian Law Reform Commission, *Serious Invasions of Privacy*, Discussion Paper No 80 (2014) 97.

<sup>3</sup> Office of the Australian Information Commissioner, *Community attitudes to privacy survey*, Research report 2013.

<sup>4</sup> Australian Privacy Principle 1.3: An APP entity must have a clearly expressed and up to date policy (the *APP privacy policy*) about the management of personal information by the entity.

<sup>5</sup> GSMA, ‘Mobile Privacy: Consumer research insights and considerations for policymakers’, February 2014, <[http://www.gsma.com/publicpolicy/wp-content/uploads/2014/02/MOBILE\\_PRIVACY\\_Consumer\\_research\\_insights\\_and\\_considerations\\_for\\_policymakers-Final.pdf](http://www.gsma.com/publicpolicy/wp-content/uploads/2014/02/MOBILE_PRIVACY_Consumer_research_insights_and_considerations_for_policymakers-Final.pdf)>

<sup>6</sup> Evidence to Environment and Communications References Committee, Parliament of Australia, Canberra, 29 October 2010, 22 (Mr Timothy Pilgrim, Australian Privacy Commissioner).

<sup>7</sup> See, eg. ACCAN, ‘Informed Consent’ (Research Report, 2009) <[http://accan.org.au/files/Reports/ACCAN\\_Informed\\_Consent.pdf](http://accan.org.au/files/Reports/ACCAN_Informed_Consent.pdf)>

<sup>8</sup> ACMA, ‘Community Research on Informed Consent’ (Qualitative Research Report, 2011), <<http://www.acma.gov.au/~media/Consumer%20Interests/Research/pdf/Community%20research%20on%20informed%20consent%20Qualitative%20research%20report%20MARCH%202011.PDF>>, 22.

<sup>9</sup> *Ibid*, 21.

proposed but would nonetheless like to see the notion of ‘informed consent’ play a role in these considerations.

## Response to Proposal 15-2

**Proposal 15–2** A new Australian Privacy Principle should be inserted into the *Privacy Act 1988* (Cth) that would:

(a) require an APP entity to provide a simple mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual; and

(b) require an APP entity to take reasonable steps in a reasonable time, to comply with such a request, subject to suitable exceptions, or provide the individual with reasons for its non-compliance.

ACCAN supports the introduction of a new Australian Privacy Principle which would empower individuals to request that their personal information is destroyed or de-identified by APP entities. The ability to communicate directly with an entity rather than engaging a complaints and redress system proved to be delivering lacklustre results<sup>10</sup> is one we believe consumers will embrace. Moreover, it is closely aligned with the ‘Right to choose’, one of the eight consumer rights which ACCAN advocates for in its day-to-day operations. Providing consumers with a straightforward mechanism to avoid potential privacy infringements will likely reduce the privacy complaints burden on the TIO, OAIC and ACMA - the three bodies chiefly charged with resolving these issues in the telecommunications industry at present.

That said, ACCAN is concerned about how APP entities will fund the new APP-regulated mechanism. As discussion around the mandatory data retention regime has indicated<sup>11</sup>, telcos are not averse to passing on any additional compliance costs directly to consumers. While the mechanism outlined in Proposal 15-2 will not involve costs in the same range as a data retention scheme, the current ALRC proposal does not adequately consider how (and if) APP entities would pay for the system.

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<sup>10</sup> Connolly, C and Vaile, D, above n1. ACCAN notes, however, that since this report’s publication in 2010, changes to the complaints system have been implemented. Most relevantly, the Telecommunications Industry Ombudsman (TIO) now qualifies as an external dispute resolution provider for privacy complaints under s 35A of the *Privacy Act 1988*.

<sup>11</sup> Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 27 September 2012, 48 (Stephen Dalby, Chief Regulatory Officer, iiNet Ltd).

## Response to Question 15-1

**Question 15–1** Should the new APP proposed in Proposal 15–2 also require an APP entity to take steps with regard to third parties with which it has shared the personal information? If so, what steps should be taken?

As far as the proposed new APP is concerned, ACCAN supports the idea of extending the web of accountability to take in third parties with which an APP entity has shared personal information. From a consumer perspective, the prospect of the destruction or de-identification of personal information has little practical value unless all instances of this personal information are destroyed or de-identified. For ACCAN, this extension is fundamentally a matter of consistency. APP entities are currently obliged to take reasonable steps to notify third parties with whom they have shared personal information if corrections are made to this information.<sup>12</sup> Accordingly, it appears inconsistent not to have this duty of third party notification extended to instances in which individuals have requested destruction or de-identification of their personal information; this destruction or de-identification request seemingly having greater privacy ramifications than a mere correction.

The necessity to include third parties in the scope of this new APP is rendered more obvious by the recent revelation that supermarket chain Coles has been sharing customer data with third parties overseas.<sup>13</sup> ACCAN shares the concern of David Vaile, Executive Director at the UNSW Cyberspace Law and Policy Community, regarding a lack of accountability for international third parties with whom Australian APP entities share information: “You're suddenly at the mercy of someone who's done something wrong who doesn't have to answer to you or your country.”<sup>14</sup> This concern amounts to a refocusing of the core focus of the APPs. If the proposed new APP is to service the privacy interests of consumers (thus eliminating the possibility of re-identification of consumers based on the continuing existence of third party information) and not merely represent a checklist for Australian entities to ensure their compliance, de-identification and destruction requests must be passed on to third parties. While the practicalities of positively enforcing such a requirement would likely engender jurisdictional issues, ACCAN believes that the inclusion of such a provision in a ‘best practice’ sense would be worthwhile.

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<sup>12</sup> Australian Privacy Principle 13.2

<sup>13</sup> Phillip Thomson, ‘Coles reveals customers’ data is shared with third parties overseas’, *Sydney Morning Herald* (online), 9 March 2014 <<http://www.smh.com.au/technology/technology-news/coles-reveals-customers-data-is-shared-with-third-parties-overseas-20140308-34e1h.html>>

<sup>14</sup> Ibid.

ACCAN submits that in keeping with the legislative language detailing APP 13.2, the following should describe APP entities' responsibilities regarding notifying third parties about destruction and de-identification requests:

“The entity must take such steps (if any) as are reasonable in the circumstances to give that notification unless it is impracticable or unlawful to do so.”

### Response to Question 11-1

**Question 11–1** What, if any, provisions should the ALRC propose regarding a court's power to make costs orders?

Finally, and in accordance with costs concerns raised above, ACCAN thanks the ALRC for noting the costs associated with plaintiffs pursuing the proposed new tort of invasion of privacy through the courts. Access to justice is a key concern for ACCAN (particularly re the consumer 'Right to be heard') and the organisation is weary that the institution of court proceedings introduces significant costs otherwise not associated with the existing privacy complaints model. As such, ACCAN agrees with the OAIC's submission to the inquiry advocating for an initial dispute resolution option before plaintiffs engage with court process.<sup>15</sup> While we have stressed in this submission that the current complaints system has its faults, avoiding the not insubstantial costs involved with any litigation makes it an alternative worthwhile investing in. If the OAIC (or the TIO) were able to offer a highly effective dispute resolution system as a prerequisite to court action and parties still chose to pursue the tort in the courts, ACCAN believes the functioning of existing court discretion around costs would suffice.

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<sup>15</sup> Office of the Australian Information Commissioner, Submission No 66 to the Australian Law Reform Commission's, *Inquiry into Serious Invasions of Privacy in the Digital Era*, December 2013, 6.