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Australian Communications and Media Authority

Submission by the Australian Communications and Media Authority to the Australian Law Reform Commission Inquiry into Serious Invasions of Privacy in the Digital Era – Discussion Paper 80

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Overview

The Australian Communications and Media Authority (the ACMA) is responsible for the regulation of broadcasting, the internet, radiocommunications, and telecommunications.

The ACMA's responsibilities are outlined in detail in Part 2, Division 2 of the *ACMA Act 2005* and include:

- promoting self-regulation and competition in the telecommunications industry, while protecting consumers and other users
- fostering an environment in which electronic media respects community standards and responds to audience and user needs
- managing access to the radiofrequency spectrum, including the broadcasting services bands
- representing Australia's communications and broadcasting interests internationally.

In November 2013 the ACMA provided a submission to the Australian Law Reform Commission Inquiry into Serious Invasions of Privacy in the Digital Era – Issues Paper 43.

This submission canvasses the proposals and questions contained in Discussion Paper 80 about new regulatory mechanisms to reduce and redress serious invasions of privacy, particularly:

- Proposal 15-1 – An extension of the ACMA's powers
- Question 15-2 – Regulator take-down orders.

The ACMA welcomes the opportunity to provide a submission to this Inquiry.

Proposal 15-1 – An extension of the ACMA's powers

> *The ACMA should be empowered, where there has been a privacy complaint under a broadcasting code of practice and where the ACMA determines that a broadcaster's act or conduct is a serious invasion of the complainant's privacy, to make a declaration that the complainant is entitled to a specific amount of compensation. The ACMA should, in making such a determination, have regard to freedom of expression and the public interest.*

Privacy protections specific to broadcasting are set out in codes of practice developed by industry. Under the *Broadcasting Services Act 1992*, the ACMA investigates complaints into compliance with codes of practice

The *Privacy Act 1988* (Privacy Act) exempts acts by media organisations in the course of journalism where the organisation is committed to observe standards dealing with privacy, such as those published by broadcasters in codes of practice. As a result, the Office of the Australian Information Commissioner (OAIC) does not generally consider privacy-related complaints in relation to broadcasting. However, the ACMA may consider privacy complaints relating to broadcasting codes of practice.

The ACMA noted in its submission to the ALRC Issues Paper 43[1] that industry-specific regulatory frameworks administered by the ACMA have a role to play which is distinct from the proposed statutory cause of action. The ACMA indicated that it saw the proposed reforms as complementing, rather than replacing, the ACMA's ability to undertake investigation into alleged breaches of privacy under the broadcasting codes of practice.

If the statutory cause of action is enacted as proposed, then individuals will be able to seek personal redress and compensation for serious invasions of privacy, leaving in place the ACMA's distinct role in encouraging broadcasters to reflect community standards. The broadcasting codes are aimed at reflecting generally accepted community standards with respect to broadcast material, and do not expressly limit the complaints process to persons directly affected by the material.

Further, the ACMA's investigations and compliance and enforcement mechanisms currently include a range of remedial responses aimed at the broadcaster rather than the complainant. These remedial responses include informal and enforceable undertakings, the imposition of licence conditions and, more usually, agreed measures such as training. While the ACMA may seek on-air statements or an apology as part of any agreed measures taken by the broadcaster, or suggest such a course to a national broadcaster, it currently does not have the power to compel such a remedial response.

As part of its deregulatory program, the Government is proposing to provide the ACMA with the discretion to investigate matters where desirable[2]. A criterion likely to weigh against exercising that discretion in favour of investigation will be the commencement of legal proceedings concerning the broadcast. The practical effect may be a decline

[1] http://www.alrc.gov.au/sites/default/files/subs/52._org_acma_submission.pdf

[2] Omnibus Repeal Day (Autumn 2014) Bill 2014, (Cth) (pt 3 sch 2)

in broadcasting code complaints by persons directly affected by a breach of privacy for which they have a cause of action under the proposed legislation, and a relative increase in matters brought by community members concerned over a breach against others.

The ACMA does not determine compensation to complainants where a breach of a broadcasting code of practice is found. It is not currently resourced to determine amounts of compensation, and does not currently have the power to formally conciliate or otherwise take steps to resolve a complaint as between the complainant and broadcaster, as the ACMA's powers in this context are limited to investigating compliance by licensees with broadcasting codes. By contrast, compensation may be made by the Information Commissioner under section 52 of the Privacy Act for breaches of privacy other than broadcasting breaches, currently resulting in a gap for code complainants.

On the other hand, the proposal to empower the ACMA to award compensation for privacy breaches would result in an inequity within the co-regulatory system because, of the range of potential broadcasting breaches, only those complainants who have brought a privacy complaint would be eligible to be compensated while those bringing any other complaint (e.g. accuracy) would not. Further, although distinguishing between serious and non-serious invasions of privacy would be relevant to the question of compensation, the broadcasting codes of practice do not provide for such a distinction so there will not be a visible scale of breach lending itself to the determination of compensation.

An alternative may be to, rather than empower the ACMA to make a declaration that the complainant is entitled to a specified amount of compensation, empower the ACMA to:

- require that where a breach of a broadcasting code of practice is found, the broadcaster be required to broadcast an appropriate on air apology and/or correction, noting that under the proposals such an apology and the publishing of a correction of any untrue information will not constitute an admission of fault or liability, or be relevant to the determination of fault or liability in civil proceedings in connection with the matter and
- refer found privacy breaches to the OAIC to make a determination as to the seriousness of the breach, to provide for conciliation and to make declaration as to the amount of any compensation payable.

Question 15-2 – Regulator take-down orders

> *Should a regulator be empowered to order an organisation to remove private information about an individual, whether provided by that individual or a third party, from a website or online service controlled by that organisation where:*
>
> *(a) the individual makes a request to the regulator to exercise its power*
>
> *(b) the individual has made a request to the organisation and the request has been rejected or has not been responded to within a reasonable time; and*
>
> *(c) the regulator considers that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests?*

The ACMA administers the Online Content Scheme (operating as the ACMA Hotline) established under Schedules 5 and 7 to the *Broadcasting Services Act 1992*.

The ACMA can issue a take-down notice requiring an Australian hosting service provider to remove 'prohibited content' or, in certain circumstances, restrict access to the content. This power does not extend to content that is hosted overseas. Where 'prohibited content' or 'potential prohibited content' is hosted overseas, the ACMA notifies the content to Internet Industry Association accredited optional end-user PC-based filters (the Communications Alliance took over these functions in March 2014). Regardless of where the content is hosted, if it is deemed to be potentially illegal (for example, child sexual abuse material or material which advocates the doing of a terrorist act), the ACMA notifies the content to the relevant law enforcement agency.

The ACMA Hotline operates on the basis that:

- prohibited content is defined by reference to the National Classification Scheme that applies to films and computer games; and
- formal mechanisms are in place within Australia and internationally to ensure the rapid removal of illegal content and referral to the relevant law enforcement agency.

In relation to the question of a new power to issue take-down notices for private material posted online, it is noted that, in relation to the online content regulatory scheme administered by the ACMA, the majority of investigations (99.6 per cent) during 2012-13 related to content hosted overseas. While the ACMA has expertise in relation to take-down notices, there are clear limitations relating to content hosted overseas.

The ACMA has expertise in tracing online material and issuing take-down notices and, in practical terms, could construct a regime such as the one proposed given an appropriate statutory base, including definitions. The ACMA has procedures in place regarding take-down notices for offensive and illegal content and procedures could be developed around privacy. An effective response would be to enable take-down with a hosting service in Australia and an Australian organisation.

If a regulator were empowered, a number of practical and technical factors would need to be considered:

- what action, if any, would be possible or appropriately required of a ‘website or online service’ not based in Australia
- how the issue of third party caching would be managed
- the proliferation of web content to multiple sites
- if content is not hosted by an Australian ISP, an alternative method for removing content may be to contact the content owners. Larger commercial entities will generally be more responsive to requests (and have greater capacity to do so quickly) but smaller entities may not as responsive (as they do not have the resources for corporate governance)
- additionally, larger commercial entities may have more at stake (i.e. to protect reputation) and therefore be more inclined to respond quickly
- the competing demands of procedural fairness versus rapid removal of content will need to be considered. Rapid removal is desirable for many reasons, including that the longer content is available online, the more likely it is to spread across multiple sites (including sites in a language other than English). Statutory powers should not, however, be exercised without appropriately fair process.