



**SERIOUS INVASION OF PRIVACY  
IN A DIGITAL AGE**

**Issues Paper 43**

**SUBMISSION**

**NOVEMBER 2013**

## **Executive Summary**

The Australian Interactive Media Industry Association's (AIMIA) Digital Policy Group (Digital Policy Group) welcomes the opportunity to provide comment in response to the *Serious Invasions of Privacy in the Digital Era* Issues Paper 43 (Issues Paper).

As you may be aware the Digital Policy Group is the policy group of AIMIA that represents 460 digital players in the Australian digital industry. We represent large and small, local and global players that provide digital content services, applications and platforms. Our members and supporters include Australia Post, eBay, Facebook, Freelancer, Google, Pandora, Selz, and Yahoo!7.

Our industry provides platforms that are used by billions of people every day to help them stay in touch with loved ones (regardless of whether they are nearby or on the other side of the world), perform daily tasks more efficiently, gain access to information, commercial and public products and services when and where they need to and entertains them wherever they have access to the internet.

Our industry has a shared commitment to privacy based on the understanding that the success of our industry is squarely based on users having a positive experience as a result of using our member's platforms. Our industry understands that securing and maintaining users' trust is fundamental to our industry's success. Getting users' privacy and security right is vital as competition, in the highly competitive digital world, is only a decision to click or not to click away.

Our industry strongly believes that a significant antidote and preventative mechanism for some of the issues outlined in the Issues Paper includes increasing digital citizenship awareness within Australia. Our industry provides a range of leading edge tools to support and promote digital citizenship.

We note that the investigation into whether a statutory cause of action for serious invasions of privacy may be premature given that Australia is in the midst of significant reform to its data privacy regime and that consideration of whether a statutory cause of action for a serious invasion of privacy is needed should be assessed later.

We commend the ALRC in taking a rigorous approach by asking for submissions about the types of activities that may be prevented or redressed by a statutory cause of action for a serious invasion of privacy.

Lastly, our industry submits that due consideration should be given to the significant likely chilling effect that the introduction of a statutory cause of action for a serious invasion of privacy will have if it is not paired with a corresponding statutory right to freedom of expression.

## CONTRIBUTION OF THE DIGITAL INDUSTRY TO AUSTRALIA

### *Overall Contribution*

Australia has a healthy and promising digital industry which is set to provide further growth and opportunity to Australians. A recent study by Deloitte Access Economics estimated that the direct contribution of the internet to the Australian economy was worth approximately \$50 billion or 3.6 per cent of GDP in 2010<sup>1</sup>. That is expected to increase by at least \$20 billion over the next five years to \$70 billion.

In Australia there are 190 000 people employed in occupations that are directly related to the internet including IT software firms, Internet Service Providers (ISP) and companies providing e-commerce and online advertising services.

Deloitte Access Economics also found that there were also wider economic benefits which are not fully captured through GDP calculations including \$27 billion in productivity increases to business and government and the equivalent in \$53 bn in benefits to households in the form of added convenience (eg online banking and bill paying) and access to an increased variety of goods and services and information.

### *ecommerce*

From an ecommerce perspective, worldwide ecommerce sales have now exceeded \$1 trillion. This milestone was reached in 2012, a year in which sales were increased 21 per cent from the previous year. It is expected revenue will grow another 18 per cent in 2013, with worldwide sales topping \$1.3 trillion and the Asia Pacific surpassing North America to become the world's number one market for B2C commerce.<sup>2</sup>

Ecommerce platforms enable thousands of Australian businesses to grow. For example eBay has reported that their top 2000 sellers grew by 45 per cent year on year providing significant export opportunities for Australia.

### *Ad Supported Internet Ecosystems*

More recently Price Waterhouse Coopers (PwC) has found that Australia's ad-supported internet ecosystem generated significant economic activity contributing \$17.1 billion directly to economic output (GDP) and providing over 162 000 jobs. The PwC report identified that this contribution is likely to grow to \$26.5 bn by 2017 with an annual average growth rate of 7.5 per cent<sup>3</sup>.

Access to these online services and content generates additional welfare benefits worth approximately \$70 bn on top of its contribution to economic output and jobs.

These benefits include

- Consumer value - \$43 bn in benefits from decreased transaction costs, ability to find products that better match preferences and availability of new products and

---

<sup>1</sup> The Connected Continent: How the internet is transforming the Australian economy, Deloitte Access Economics, August 2011  
[https://www.deloitteaccessconomics.com.au/uploads/File/DAE\\_Google%20Report\\_FINAL\\_V3.pdf](https://www.deloitteaccessconomics.com.au/uploads/File/DAE_Google%20Report_FINAL_V3.pdf), page 2

<sup>2</sup> ebay inc, Commerce 3.0 Enabling Australian Export Opportunities 2013,  
[http://www.ebaymainstreet.com/sites/default/files/eBay\\_Commerce-3.0\\_Enabling-Australian-Export-Opportunities.pdf](http://www.ebaymainstreet.com/sites/default/files/eBay_Commerce-3.0_Enabling-Australian-Export-Opportunities.pdf)

<sup>3</sup> Price Waterhouse Coopers and Interactive Advertising Bureaux Australia, Digital Dollars, How internet advertising is fuelling the Australian economy & society, March 2013, page 2  
[http://www.iabaustralia.com.au/en/About\\_IAB/Media\\_Releases/2013\\_-\\_Internet\\_advertising\\_fuelling\\_Australian\\_GDP\\_to\\_value\\_of\\_17-1bn.aspx](http://www.iabaustralia.com.au/en/About_IAB/Media_Releases/2013_-_Internet_advertising_fuelling_Australian_GDP_to_value_of_17-1bn.aspx)

services, access to information, access to products that are only available in other countries or different parts of Australia, access to entertainment, access to government / public services

- Producer value - \$27 bn in benefits from decreased production and research and development (R&D) costs, ability to find new markets and improved information flows
- Community value – substantial qualitative benefits from the strengthening of communities and access to information

Ad-supported ecosystems provide a platform for social good where social investment, philanthropy and social enterprises are able to increase their reach and scope through technology. Such ecosystems are enabling increased efficiency in the not-for-profit sector through enhanced communications and providing platforms that allow donors to easily make donations via online platforms.

Lastly, digital platforms help us stay connected during good times and bad.

Research by the Cooperative Research Centre for Young People, Technology and Wellbeing (YAW-CRC) found that:

*There are a number of significant benefits associated with the use of social networking services (SNS) including: delivering educational outcomes; facilitating supportive relationships; identity formation; and, promoting a sense of belonging and self-esteem. Furthermore, the strong sense of community and belonging fostered by SNS has the potential to promote resilience, which helps young people to successfully adopt to change and stressful events.<sup>4</sup>*

Perhaps more importantly digital platforms provide free services that allow people to stay in contact with loved ones and their communities during natural disasters.<sup>5</sup>

The funding models for organisations participating in the Australian internet ecosystem are diverse and many organisations have multiple sources of funding. Consumers pay directly for internet access and for some of the content they access. Some e-commerce sites are sustained by earning commission on the goods and services they sell to consumers. Other content sites do not charge for the services they provide and are financed through selling advertisements. Many of the economic and much of the consumer, producer and community value would not be possible without the services that are provided through advertisements.

These compelling benefits are translating into increased use of the internet by consumers. As testament to this fact the Australian Communications and Media Authority has recently reported that the number of Australians using the internet more than once a day has grown steadily from 56 per cent at June 2010 to 62 per cent at June 2012.<sup>6</sup>

Importantly the full potential of the internet has still not been tapped. As at July 2012 there are 1.5 bn social networking users worldwide and 80% of these users regularly interact online. From a business perspective 70% of companies report using social technologies (90% of these report receiving a business benefit from this) and workers

---

<sup>4</sup> <https://s3.amazonaws.com/yawcrc/Publications/The-Benefits-of-Social-Networking-Services.pdf>

<sup>5</sup> [http://www.theaustralian.com.au/media/digital/how-online-communities-kept-us-in-picture/story-fna03wxu-1226747887415?from=public\\_rss&utm\\_source=The%20Australian&utm\\_medium=email&utm\\_campaign=editorial&net\\_sub\\_uid=89260592](http://www.theaustralian.com.au/media/digital/how-online-communities-kept-us-in-picture/story-fna03wxu-1226747887415?from=public_rss&utm_source=The%20Australian&utm_medium=email&utm_campaign=editorial&net_sub_uid=89260592)

<sup>6</sup> ACMA Communications Report 2011 -2012, page 121  
<http://www.acma.gov.au/theACMA/Library/researchacma/Digital-society-research/communications-report-2011-12-series>

spend on average 28 hours per working week writing emails, searching for information and collaborating using social technologies.<sup>7</sup>

More importantly even still is the estimation that \$900 bn - \$1.3 trillion of annual value can be unlocked by social technologies, one third of all consumer spending can be influenced by social shopping and that twice the current value can be extracted from better enterprise communication and collaboration with a 20-25% potential increase in possible knowledge worker productivity.

McKinsey Global Institute provided some insight into how this value is generated. McKinsey found that:

*Improved communication and collaboration through social technologies could raise productivity of interaction workers – high skill knowledge workers, including managers and professionals – by 20 to 25 per cent.<sup>8</sup>*

## **COMMITMENT TO PRIVACY**

The continued and increasing popularity of digital services means that more personal information is entrusted to our industry each and every day. The responsibilities that this places on our industry are not underestimated or misunderstood.

Our industry holds and keeps safe billions of users' data. We provide a number of privacy protection mechanisms only some of which are outlined in this submission.

Our industry meets key aspects of privacy frameworks both in traditional ways, such as providing clear privacy policies, but also in fresh and innovative ways that allow users to access plain English explanations of how their data is handled, used, secured and how they can exercise choice with respect to who sees their information and with whom they can share their information.

Our industry provides plain English explanations to users with respect to how advertising works on the various platforms and how individuals can exercise choice in this regard.

Our industry also takes significant steps to ensure that user data is secure and we provide privacy and security mechanisms to assist users who are using unsecured networks and wish to take additional steps to protect their privacy through security enhancing mechanisms such as two-factor authentication.

### Privacy Policies

Our members provide privacy policies that outline in plain English how they collect, handle and manage personal information.<sup>9</sup>

---

<sup>7</sup> McKinsey Global Institute, *The social economy: Unlocking value and productivity through social technology*, July 2012, page vi and vii

<sup>8</sup> McKinsey Global Institute, *The social economy: Unlocking value and productivity through social technology*, July 2012

[http://www.mckinsey.com/insights/mgi/research/technology\\_and\\_innovation/the\\_social\\_economy](http://www.mckinsey.com/insights/mgi/research/technology_and_innovation/the_social_economy)

<sup>9</sup> Examples of which include <https://selz.com/privacy>, <http://pages.ebay.com.au/help/policies/privacy-policy.html?rt=nc>, <http://www.google.com.au/intl/en/policies/privacy/>, [https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy), <http://info.yahoo.com/privacy/au/yahoo/#1>, <http://auspost.com.au/privacy.html>, [https://www.paypal.com/webapps/mpp/ua/privacy-full?country.x=AU&locale.x=en\\_AU](https://www.paypal.com/webapps/mpp/ua/privacy-full?country.x=AU&locale.x=en_AU), <http://www.pandora.com/privacy>, <http://www.freelancer.com/page.php?p=info/privacy>, <https://selz.com/privacy>,

However our members also understand, despite privacy policies being presented in as simple language as possible, that privacy policies can present as long, legal documents for some.

To address this potential concern key Digital Policy Group members have created designated privacy resources that provide plain English, easy to understand information about how digital content service providers and ecommerce platforms manage the personal information entrusted to them. Importantly key information is generally never more than a click away.

Key examples of such tools include the eBay Protecting Your Privacy website<sup>10</sup> and AdChoice program, which lets users choose whether they wish to receive customised advertising on eBay<sup>11</sup>, Google's Good to Know<sup>12</sup> website, Facebook's Basic Privacy and Tool Settings Help Center<sup>13</sup> and Yahoo!'s Privacy Center<sup>14</sup>.

At these centres users can also access information on how to employ two factor authentication, how to prevent identity fraud and other significant privacy and other important digital literacy skills that can be used across multiple platforms.

### Privacy Tools

Our industry also provides robust interactive tools that put consumers in control of their information and exercise choice with respect to advertising and their advertising preferences.

Such tools include information on how to clear your browser of cookies<sup>15</sup>, how to browse anonymously (examples include Incognito Mode whilst using Chrome<sup>16</sup>), Facebook's Cookies, Pixels and Other Technologies<sup>17</sup>, Facebook's Interactive Tools that provide users with clear information on how advertising works on the Facebook platform and gives them access to tools that are used by advertisers so that they can see that advertisers see when placing an ad<sup>18</sup>, Google's Ad Settings<sup>19</sup>, Yahoo! Ad Interest Manager<sup>20</sup>. These tools enable users to find information on how advertising works on digital platforms and how to manage their ad preferences accordingly.

### Data Security

Our industry spends a lot of time working on the security aspects of our products. Securing network-based applications against would-be hackers and ensuring that data can be easily and securely retrieved by users on demand is key to ensuring success of any system.

---

<https://help.gumtree.com.au/knowledgebase.php?article=121>

<sup>10</sup> <http://pages.ebay.com.au/help/account/protecting-privacy.html>

<sup>11</sup> <http://pages.ebay.com.au/help/account/adchoice.html#what>

<sup>12</sup> <http://www.google.com.au/goodtoknow/>

<sup>13</sup> <https://www.facebook.com/help/325807937506242>

<sup>14</sup> <http://info.yahoo.com/privacy/au/yahoo/#1>

<sup>15</sup> <https://support.google.com/chrome/answer/95582?hl=en>

<sup>16</sup> <https://www.google.com/intl/en/chrome/browser/features.html#privacy>

<sup>17</sup> <https://www.facebook.com/about/privacy/cookies>

<sup>18</sup> Facebook's Interactive Tools Target an Ad <https://www.facebook.com/about/privacy/tools>

<sup>19</sup>

[https://www.google.com/settings/u/0/ads?hl=en&sig=ACi0TCh9BfDjeiDIJhtqrDG2U\\_3I2m4I1cp1K2rzXVXNzyC6wdf9u93yzoH8nOJyRjtS\\_ACwh2y93y1VQKEG8ZjX-QqCCxmlF-F3TiPQgJduQVU65eHcRTCs5xXQRWEPBV6o-\\_RmwFxKHI2CehWTuO6o4VSgiaN1oLP4kaYO6fTq310fKL\\_xnhVAZp3P3PrzpIdW40bVSD8UdRIIOmSQoT-CTbV7UTT\\_Q](https://www.google.com/settings/u/0/ads?hl=en&sig=ACi0TCh9BfDjeiDIJhtqrDG2U_3I2m4I1cp1K2rzXVXNzyC6wdf9u93yzoH8nOJyRjtS_ACwh2y93y1VQKEG8ZjX-QqCCxmlF-F3TiPQgJduQVU65eHcRTCs5xXQRWEPBV6o-_RmwFxKHI2CehWTuO6o4VSgiaN1oLP4kaYO6fTq310fKL_xnhVAZp3P3PrzpIdW40bVSD8UdRIIOmSQoT-CTbV7UTT_Q)

<sup>20</sup> [http://info.yahoo.com/privacy/au/yahoo/opt\\_out/targeting/details.html](http://info.yahoo.com/privacy/au/yahoo/opt_out/targeting/details.html)

Our industry invests billions of dollars in technology, people and processes to ensure data is safe, secure and private. Our industry employs world leading security professionals and privacy technologists who are responsible for designing in security from the onset, reviewing all design, code and finished product to meet the strictest standards.

We note also that digital platforms are also primary enablers of secure ecommerce transactions, through such services like Selz<sup>21</sup> and PayPal.

#### The ability to delete accounts and information

Lastly, we note that some individuals on balance after using the digital industry's products and services may decide that they no longer want to use their accounts. Our industry provides individuals with the capability to do this<sup>22</sup>.

Further a number of organisations offer the ability for people to manage their online presence<sup>23</sup> should issues occur.

### **IMPORTANCE OF DIGITAL CITIZENSHIP SKILLS AND PROACTIVE APPROACH OF INDUSTRY**

The Issues Paper contemplates potential alterations to legal remedies available to aggrieved individuals that may arise as a result of inappropriate use of technology, such as smart phones or social media.

An important antidote and preventative mechanism to prevent these issues arising in the first place is increased digital citizenship skills and awareness within Australia.

Online safety requires ongoing effort that is a shared responsibility of industry, government, the community and individuals that requires conversations and increased understanding of the tools that are available online within the community.

The two essential elements of digital citizenship are education and empowerment.

Digital Citizenship describes the rights and also the responsibilities that each of us has in the online world. They are similar to the rights and responsibilities that we all have in the offline world.

Being a capable and responsible digital citizen is about:

- having the necessary skills to be smart, safe and responsible online
- understanding how to use the significant tools and resources that are available online

---

<sup>21</sup> <https://selz.com/trust>

<sup>22</sup> <https://www.paypal.com/au/webapps/helpcenter/article/?solutionId=15421&topicID=3000039&m=TCL>,  
<https://support.google.com/accounts/answer/32046?hl=en>,  
<https://www.facebook.com/help/www/224562897555674>,  
[http://help.yahoo.com/kb/index?locale=en\\_AU&page=content&y=PROD\\_ACCT&id=SLN2044&actp=lorax&pir=VdSXp8tibUIYIOGc\\_t3BMjXRmkCsA6L\\_mtgPiwS6sw--](http://help.yahoo.com/kb/index?locale=en_AU&page=content&y=PROD_ACCT&id=SLN2044&actp=lorax&pir=VdSXp8tibUIYIOGc_t3BMjXRmkCsA6L_mtgPiwS6sw--), <http://pages.ebay.com.au/help/account/closing-account.html>, <http://www.freelancer.com.au/faq/view.php>

<sup>23</sup> <http://www.sigmainfotech.com.au/sigma-reputation-management.html> ,  
<http://www.freelanceseo.com.au/reputation-management.php>,  
<http://www.onlinereputationcorrection.com/?gclid=CPaR5MfD4boCFUdKpgod-H8A6w>,  
<http://www.areputation.co.uk/orm.html>

- treating other individuals with respect
- standing up for others online if they are being subject to hurtful communications

### Tools provided by industry to promote digital citizenship

Our industry is keenly aware that one of the fundamental prerequisites to people using our service is their confidence in being able to use the service comfortably, safely and securely. To assist individuals to understand their digital citizenship rights our industry provides leading edge tools to promote and support digital citizenship including:

- clear policies<sup>24</sup>
- reporting and social resolution tools that leverage the online community to identify content that violates our policies<sup>25</sup> based on world leading research on conflict resolution<sup>26</sup>
- a reporting infrastructure that includes teams of reviewers that review and take action on those reports
- other technical tools to allow people to control their online experience and ensure it is safe and positive and aligned with their particular individual preferences<sup>27</sup>
- education and awareness raising through our online informational resources, partnerships with leading Australian and international child safety organisations (including the National Association for the Prevention of Child Abuse and Neglect (NAPCAN), Inspire Foundation, Family Online Safety Institute (FOSI), the Alannah and Madeline Foundation, Kids Helpline and Bravehearts , and support for key safety initiatives such as BackMeUp<sup>28</sup>, Be Bold Stop Bullying<sup>29</sup>, R U OK?<sup>30</sup>

We note that our industry quickly removes online content that breaches our terms of service. In addition social resolution tools are effective in prompting the removal of unwanted content.

---

<sup>24</sup> <https://www.facebook.com/legal/terms>, <http://info.yahoo.com/legal/au/yahoo/utos/en-au/>, <http://info.yahoo.com/legal/au/yahoo/utos/en-au/>, <https://www.google.com/policies/?hl=en>, <http://www.youtube.com/t/terms>, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines), <http://www.youtube.com/yt/policyandsafety/>,

<sup>25</sup> <http://au.safely.yahoo.com/>, <http://pages.ebay.com.au/help/account/safety.html>, <http://www.youtube.com/yt/policyandsafety/reporting.html>,

<sup>26</sup> [http://greatergood.berkeley.edu/article/item/can\\_science\\_make\\_facebook\\_more\\_compassionate](http://greatergood.berkeley.edu/article/item/can_science_make_facebook_more_compassionate)

<sup>27</sup> <https://www.facebook.com/safety>, <https://www.google.com/policies/technologies/>, <http://pages.ebay.com.au/help/account/protecting.html>,

<sup>28</sup> <http://backmeup.somethingincommon.gov.au/content/cyberbullying-info>

<sup>29</sup> <https://www.facebook.com/beboldstopbullyingau>

<sup>30</sup> <https://www.ruokday.com/>



## **AUSTRALIAN PRIVACY LAW**

Australian privacy law is currently in the midst of the most significant reform since the introduction of the national privacy principles (as they apply to the private sector) in 2000.

The *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* encompasses significant changes to obligations that rest on the private and public sector including new provisions that:

- require all Australian Privacy Principle entities to adopt a 'privacy by design' approach
- change Australia's approach to cross-border data transfer to one which places the responsibility for any data that is disclosed overseas onto the Australian Privacy Principle entity
- provide the Australian Privacy Commissioner with the ability to conduct own motion investigations and as a result of these investigations impose sanctions and penalties
- provides the Australian Privacy Commissioner greater enforcement powers and the ability to impose higher penalties for those organisations that do not take appropriate steps to protect personal information from misuse, interference, loss, unauthorised access, modification and disclosure

These changes have been made specifically in response to the advances in technology that have arisen over the last decade and specifically to respond to the digital age.

The Digital Policy Group notes that the Australian Privacy Commissioner currently has the ability to investigate complaints on behalf of individuals for potential breaches of the National Privacy Principles (and Australian Privacy Principles from March 2014) and will continue to have these powers under the new regime. The Privacy Commissioner has the power to enforce a number of remedies including ordering access to personal information, apologies, ordering companies to pay compensation, change procedures, counsel staff and other remedies.<sup>31</sup>

In light of the above the Digital Policy Group respectfully submits that the ALRC should be circumspect in its consideration of the merit of introducing a statutory cause of action for a serious invasion of privacy and should consider whether such an examination should occur later.

## **OTHER RELEVANT LAWS**

The Digital Policy Group notes that a list of relevant Commonwealth Laws were provided in the Issues Paper including surveillance laws, harassment and stalking offences, *Telecommunications Act 1997* and criminal sanctions against indecent photography.

We wish to add that there are other significant protections including section 474.17(1) of the *Criminal Codes Act 1995* (Cth) that provides:

- (1) A person is guilty of an offence if:

---

<sup>31</sup> Office of the Australian Information Commissioner, Annual Report 2012-2013 [http://www.oaic.gov.au/images/documents/about-us/corporate-information/annual-reports/Annual-report-2012-13/Complete\\_pdf\\_AR\\_2012-13.pdf](http://www.oaic.gov.au/images/documents/about-us/corporate-information/annual-reports/Annual-report-2012-13/Complete_pdf_AR_2012-13.pdf), Chapter 7

- (a) The person uses a carriage service; and
- (b) The person does so in a way (whether by the method of use of the content of the communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years.

In addition we note the use of offences such as section 60(1) of the *Crimes Act 1900* (ACT) in the prosecution of Mr McDonald in the recent case involving the Australian Defence Force Academy cadets Daniel McDonald and Dylan DeBlaquiere<sup>32</sup>.

Section 60(1) of the *Crimes Act 1900* (ACT) provides that

60 Act of indecency without consent

- (1) A person who commits an act of indecency on, or in the presence of, another person without the consent of that person and who is reckless as to whether that other person consents to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.

The Digital Policy Group also notes that the *Privacy Amendment (Privacy Alerts) Bill 2013* (the Bill) to deal with privacy data breaches was tabled in the 43<sup>rd</sup> parliament and passed the House of Representatives. Whilst the re-introduction of this Bill, if enacted, is a matter for the 44<sup>th</sup> parliament the bill would provide for Australian Privacy Principle entities to:

- notify individuals that a serious data breach has occurred when it is likely there is a real risk of serious harm provide notice to the Australian Privacy Commissioner if certain conditions are met
- provide notice via their website and a major newspaper if general publication conditions are met.

## **FREEDOM OF EXPRESSION**

The introduction of a statutory cause of action for a serious invasion of privacy could have significant consequences for freedom of expression here in Australia. The effect will be to reduce the freedom of individuals to make comment or observations for fear of being sued.

The Digital Policy Group submits that it is absolutely vital that a statutory cause of action for a serious invasion of privacy should not be introduced before a legal right to freedom of expression is in place in Australia.

The ALRC should give serious consideration to recommending whether it would be advisable that freedom of expression laws accompany a statutory cause of action for a serious invasion of privacy.

---

<sup>32</sup> [www.courts.act.gov.au/supreme/judgement/view/7699/title/r-v-mcdonald-and-deblaquiere](http://www.courts.act.gov.au/supreme/judgement/view/7699/title/r-v-mcdonald-and-deblaquiere)

## **IMPLICATIONS FOR SMALL BUSINESS**

50% of the Australian Interactive Media Industry Association are small business operators.

We note that the introduction of a statutory cause of action for a serious invasion of privacy will result in the inclusion of small businesses within the auspices of Australian privacy legislation. Current policy settings ensure that small business that have an annual turnover of less than \$3m are not subject to Australian privacy law except in certain circumstances such as when the primary role of the business relates to personal information<sup>33</sup>. We submit that full consideration should be given to the size and extent of the implications for small business before a statutory cause of action for serious invasions of privacy are enacted.

## **ASSESSMENT OF LAWS**

The creation of a statutory cause of action for a serious invasion of privacy has the potential to add another layer of privacy regulation whilst industry is still in the midst of implementing very significant privacy reforms.

The introduction of a statutory cause of action for a serious invasion of privacy will likely create a situation where individuals will have protections under both the Privacy Act and the statutory cause of action for serious invasions of privacy. This is unnecessary duplication as it relates to issues that may occur between individuals and the private sector.

The ALRC should take into consideration how best to address potential situations that may be the subject of an action that are identified during this inquiry and assess whether they would already be satisfactorily addressed under existing laws currently.

We also submit that the ALRC inquiry should widen its research and consider the broader, non-privacy specific protections that exist within other laws on the basis that laws which have existed for many years still apply, and are being successfully prosecuted, within a digital context.

We suggest that changes to existing tort law such as enabling courts to award compensation for mental or emotional distress, examination of actions under nuisance (which does not require physical or tangible damage) including damages for psychiatric injury or illness, introduction of a tort for harassment, transformation and expansion of the equitable action for a breach of confidence provide fertile ground for exploration in this regard also.

## **RELEVANT DEFENCES**

Finally we note that the ALRC has sought comment with respect to exemptions in Question 15 and asks for consideration as to whether an exemption for social networking platforms or other internet sites should be apply with respect to material posted by third parties.

The Digital Policy Group submits that internet intermediaries and internet hosts should not be exempt from any cause of action in privacy, given their accountability to respect

---

<sup>33</sup> Find reference

and protect the information privacy of their customers and users. However, where an individual breaches another individual's privacy while using the service as a platform, it would be oppressive to hold the platform hosts liable for a breach of privacy. To do so would significantly limit the openness of these platforms and the public interest derived from freedom of expression.

Further we propose that a provision should exist which deems a subordinate distributor to be liable where notice is given to that distributor that a serious invasion of privacy may have occurred, and where that distributor is or was involved in the dissemination of the material, for example on social networking sites. The subordinate distributor is deemed to have knowledge of the material constituting a serious invasion of privacy and would face liability for knowingly assisting in the breach. The framework for accessorial liability could be modelled on the framework in the *Competition and Consumer Act 2010*.