



Submission to the Australian Law Reform Commission's *Serious Invasions of Privacy in the Digital Era* Discussion Paper

12 May 2014

Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Australian Law Reform Commission's (ALRC) *Serious Invasions of Privacy in the Digital Era* Discussion Paper ('the Discussion Paper').

About ASTRA

ASTRA is the peak industry body for subscription television (STV) in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) television and radio platforms, narrowcasters and program providers came together to represent a new era in competition and consumer choice. ASTRA's membership includes the major STV operators, as well as over 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations. In 2012-13, STV invested around \$700 million in Australian content production, employing 6600 Australians and adding \$1.6 billion to the Australian economy.

General comments on privacy and the subscription broadcasting industry

As ASTRA detailed in our submission to the Issues Paper, ASTRA's members take very seriously the protection of personal information supplied to them by their subscribers and, more generally, the privacy of the public at large. ASTRA's members are committed to ensuring that they protect the personal information of their subscribers and, in relation to broadcasting, the privacy of members of the public.

While ASTRA acknowledges that there is no general right to privacy under Australian law, special statutory provisions and enforceable industry codes of practice relating to privacy apply to television broadcasters that, in ASTRA's view, provide sufficient protection to individuals who are concerned about serious invasions of their privacy by STV broadcasters and narrowcasters. Existing provisions in the ASTRA Codes of Practice, which are subject to enforcement by the Australian Communications and Media Authority (ACMA), are sufficient remedies in the context of STV broadcasting. As ASTRA noted in its submission to the Issues Paper, the number of complaints regarding news and current affairs programming (and content generally) on STV is extremely small. The ACMA has never found a breach of the ASTRA Codes in relation to privacy. Indeed, ASTRA is unaware of any complaints to STV broadcasters in relation to the privacy obligations under the ASTRA Codes.

Australian law presently recognises the special place that media organisations hold in relation to the dissemination of information that may be deemed to be personal, or private, information. The law seeks to provide a balance between respecting individual privacy and acknowledging the media's role of informing the public. Media organisations are presently exempt from the operation of the Australian Privacy Principles to the extent that they engage in "acts or practices...in the course of journalism", provided that the media organisation is publicly committed to observing written standards "which deal with privacy in the context of the activities of a media organisation".¹

In the context of broadcasting, ASTRA believes that the current regulatory regime is appropriate because it allows for broadcasters to liaise directly with aggrieved persons to address their concerns and, if a complainant is not satisfied with the response provided by the broadcaster, allows the complainant to take their complaint to the industry regulator for independent review. Such a complaint process is undertaken in an efficient and streamlined manner, which is in the interest of both parties.

¹ *Privacy Act 1988* (Cth), s 7B(4).

In short, there is no evidence that existing privacy provisions as they relate to the operation of subscription broadcasters are inadequate, or that further legislative intervention is required. As a general principle, new or additional regulatory measures should only be contemplated when there is clear evidence of a ‘problem’ that needs to be ‘solved’, and only then where the effectiveness of regulation in achieving the public interest objective clearly outweighs the detrimental effect on media business activities.

Response to proposals and questions in the Discussion Paper

Notwithstanding the fact the ASTRA does not support the introduction of a tort for serious invasions of privacy, we provide the following comments on specific proposals and questions in the Discussion Paper:

Chapter 2: Guiding principles

The ALRC notes that consultation on its Issues Paper revealed strong support among stakeholders for the principle that the protection of privacy must be balanced with other fundamental freedoms and matters of public interest (principle 3). Importantly, the ALRC notes that “no stakeholders submitted that privacy should be regarded as an absolute right”.²

While ASTRA agrees that privacy is a fundamental value worthy of legal protection (principle 1) and that there is a public interest in protecting privacy (principle 2), we reiterate our strong support for the principle that interests in privacy must be balanced with interests in freedom of speech, including the freedom of the media, and freedom of artistic and creative expression and innovation—among other matters of public interest listed in the Discussion Paper.

ASTRA agrees that other principles set out by the ALRC are relevant, including those relating to technology neutrality (principle 5) and coherence and consistency (principle 7). We agree that any law or regulation should be clear and certain (principle 6), but that does not mean that difficult concepts such as what is in the ‘public interest’ should be the subject of a prescriptive legislative definition.³ As previously submitted by ASTRA, it is essential that there be an assessment, on a case-by-case basis, of whether there is a serious invasion of privacy.

Given that our members provide national services, ASTRA agrees with the principle that there should be legal uniformity across Australia. However, any moves to harmonise laws must represent the minimum necessary to achieve intended public policy objectives and must not impose unnecessary restrictions on the legitimate news gathering operations of media organisations.

Furthermore, ASTRA agrees with the ALRC’s analysis in the Guiding Principles chapter that privacy is about individual freedoms, leading to the conclusion that corporate entities, government bodies and elected groups should not have the right to sue under any proposed cause of action.⁴

Finally, STV broadcasters have always taken a highly responsible approach in relation to an individual’s privacy and their private information, including where ostensibly ‘private’ information may be voluntarily disclosed (through, for example, social media websites and applications). ASTRA would, however, agree with the ALRC that in the digital era the responsibility for ensuring privacy is protected is one that must, by necessity, be shared by all, including the individual concerned. We agree with the ALRC’s statement that, “[p]rovided they have the

² Discussion Paper, para 2.18, p 31.

³ We agree with the ALRC that “...the law should be precise and certain but also flexible and able to adapt to changes in social and technological conditions” (Discussion Paper, para 2.24, p 33).

⁴ Discussion Paper, para 2.11, p 29.

power and means to do so, individuals bear a measure of responsibility for the protection of their own privacy and the privacy of others”.⁵

Chapter 5: Two Types of Invasion and Fault

Types of invasion

In our earlier submission ASTRA noted that any proposed cause of action should not be drafted too broadly given the risk that the threat of legal action under a broad action could stifle coverage of matters of public importance and prevent people (and media organisations in particular) from doing things in the public interest for fear of liability.

In addition, ASTRA did not support the inclusion in legislation of a list of examples of invasions of privacy that may fall within the cause of action, considering that even a non-exhaustive list could become a ‘check list’ or be seen as de facto elements of the cause of action. It was considered that addressing a list of examples could divert attention from the important exercise of balancing interests on a case-by-case basis.

In relation to these matters ASTRA notes that the ALRC has attempted to confine the types of invasion of privacy which would be actionable under the new tort, and does not propose to include a list of examples of invasions. Instead, the ALRC suggests that, within the two sub-categories specified, the application of the tort to specific circumstances is best left to courts to consider on a case-by-case basis.

It is noted that the sub-categories of privacy invasion that would be actionable—intrusion upon seclusion or private affairs and misuse or disclosure of private information—are very similar to those dealt with in the ACMA’s *Privacy guidelines for broadcasters* (the ACMA Guidelines),⁶ which relate to the application of privacy protections in existing broadcasting codes of practice. To the extent that a new tort covering these types of invasion of privacy is intended to have normative or deterrent effect on broadcasters, we submit that the existing ASTRA Codes, supported by the ACMA’s guidance on how these protections are to be administered, already have this effect.⁷

Fault element

The ALRC has recommended that the proposed cause of action include a fault element and cover intentional and reckless, but not negligent, invasions of privacy. This is consistent with ASTRA’s submission to the Issues Paper. ASTRA agrees with the ALRC that unintentional ‘common human errors’ resulting in invasions of privacy should not be actionable, and a tort, should one be deemed by Government to be necessary, should certainly not attract strict liability.⁸

The ALRC distinguishes an intention to invade privacy and an intention to do an action which has the unintended consequence of invading privacy, proposing that the tort should only be actionable where an intention to *invade privacy* is made out.⁹

The Discussion Paper uses an illustrative example from the media industry, noting that a media organisation may publish a story without knowledge of the facts that make it an invasion of

⁵ Discussion Paper, para 2.36, p 35.

⁶ Australian Communications and Media Authority, *Privacy guidelines for broadcasters*, December 2011 – available at <http://www.acma.gov.au/~media/Broadcasting%20Investigations/Information/pdf/Privacy%20guidelines%20for%20broadcasters.PDF>.

⁷ For example, in relation to the concept of intrusion upon seclusion, the ACMA’s Guidelines note that an invasion must be more than fleeting, and that it is possible that there may be an intrusion upon seclusion in a public place.

⁸ Discussion Paper, para 5.59, p 78.

⁹ Discussion Paper, paras 5.89, p 84.

privacy. It goes on to say such circumstances should not attract liability. ASTRA concurs—it would be completely inappropriate for the fault element to be made out merely because the media organisation’s intention to publish or broadcast was established. This would expose outlets to unacceptable risk, especially given the large volume of information that is sourced, collated and reported on services such as a 24 hour news channel.¹⁰

Chapter 6: A Reasonable Expectation of Privacy

If a statutory cause of action for serious invasions of privacy was implemented, ASTRA would continue to support robust threshold tests for establishing a cause of action, including that the plaintiff should be required to prove that a person in their position would have had, in all the circumstances, a reasonable expectation of privacy.

ASTRA agrees with the ALRC that “[m]atters which an individual or community may reasonably expect will remain private will change between cultures and over time”.¹¹ For example, consider the evolution of society’s understanding of what is a private matter since the advent of publicly available social media profiles—which can legitimately be the subject of news reporting by broadcasters in reporting matters of public importance.

Of the non-exhaustive list of factors proposed by the ALRC for assisting to determine whether a person in the plaintiff’s position would have had a reasonable expectation of privacy, ASTRA supports, in particular, consideration of consent given by the plaintiff. We agree with the ALRC that “[a] plaintiff cannot generally expect privacy where they have freely consented to the conduct that compromises their privacy”.¹²

As ASTRA has previously submitted, consent—whether given overtly (for example, in writing) or impliedly (for example, when a person agrees to an interview)—should be a factor which displaces an expectation of privacy. In addition, we agree that consent should be considered when establishing whether there is a cause of action, rather than as a defence.

ASTRA generally supports the other factors proposed by the ALRC, including consideration of the place where the intrusion occurred (where the ALRC suggests that a person will generally have a lower expectation of privacy when in a public place). As submitted above, this will be relevant to filming in public where it may be more difficult to establish that an ordinary reasonable person would have an expectation of privacy in the circumstances.

Furthermore, we support consideration of whether or not private information was already in the public domain, such as on public social media profiles (as noted above); as well as consideration of certain attributes of the plaintiff, such as whether they were a public figure¹³ and whether or not they courted publicity.¹⁴

The ALRC suggests that the means used to obtain private information or to intrude upon seclusion will sometimes be relevant to determining if there is a reasonable expectation of privacy. One example given is the use of a long distance camera lens to peer into a plaintiff’s home—where the ALRC argues that the surreptitious nature of capturing the photograph could be an indication that there was a high expectation of privacy. Arguably, in this circumstance it is

¹⁰ We note the good examples given by SBS and cited by the ALRC in the Discussion Paper of the types of news footage which include an accidental invasion of privacy and which should not be actionable under a tort—such as wide-angled shots of members of the public coming and going from a building relevant to the subject of a news report (noted at para 5.83).

¹¹ Discussion Paper, para 6.8, p 88.

¹² Discussion Paper, para 6.50, p 97.

¹³ We note the ALRC’s suggestion that ‘[a] professional sportsperson or a politician, for example, cannot reasonably expect the same level of privacy as other members of the public, although they can reasonably expect some privacy’ – Discussion Paper, para 6.45, p 96.

¹⁴ We agree with the ALRC that ‘[a] person who has courted publicity cannot expect the same level of privacy as people who have not’ – Discussion Paper, para 6.55, p 89.

the place in which the person is photographed, not the means by which the photograph was taken, that would give rise to the expectation of privacy. It is difficult to see how a person could form an expectation of privacy based on a use of technology of which they are unaware.

Chapter 7: Seriousness and Proof of Damage

ASTRA has previously submitted that to be actionable the relevant breach of privacy should be unreasonable by reference to the standard of the ordinary reasonable person; and, that such serious breaches should cause, or be reasonably likely to have been intended to cause serious harm.

ASTRA notes the ALRC's proposal that the word 'serious' would be used in establishing the threshold, with the Court being given discretion to consider certain factors when determining whether the invasion was 'serious'—being whether or not the invasion was “likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff”.¹⁵

It is agreed that a threshold relating to seriousness would be essential to “...avoid an undue imposition on competing interests such as freedom of speech”,¹⁶ and that the assessment of seriousness should be an objective test. However, while the ALRC recommends that it should be interpreted as setting a bar higher than 'not trivial', ASTRA submits that the ALRC should seek to set the bar significantly higher than that. The ALRC's subsequent proposal that the threshold for 'serious', while not being defined in legislation, should be somewhere above 'substantial' is more appropriate.¹⁷

In relation to the factors a Court may consider, ASTRA suggests that caution should be exercised in introducing tests relating to offensiveness, even where the qualification 'highly' is used. Whereas ASTRA has already noted its view that there should be a link between seriousness and harm to the plaintiff, the ALRC has noted that both a high degree of offence and the level of distress and harm caused by an invasion are suitable matters to consider.¹⁸

Chapter 8: Balance Privacy and Other Interests

The ALRC notes that “[t]he public interests that will perhaps most commonly conflict with a plaintiff's interest in privacy are the public interest in freedom of speech and in a free media”.¹⁹

ASTRA strongly supports assessment of public interest considerations, including freedom of speech and freedom of artistic expression, and a balancing of these against the plaintiff's interest in privacy, when establishing whether a breach of privacy is actionable under the proposed tort. This balancing exercise is consistent with the process our members already undertake under the privacy provisions in the ASTRA Codes of Practice.

As previously submitted, ASTRA believes that interests in freedom of speech should have an equal weight with interests in privacy and that the plaintiff should bear the onus of proof in showing that any expectation of privacy was not outweighed by public interest factors. Notwithstanding that we support determination of what is in the public interest on a case-by-case basis (as opposed to including a definition of 'public interest' in the legislation), we reiterate our view that there is likely to be a chilling effect on media coverage of matters of public importance while precedent on what is in the 'public interest' is developed by the Courts. This is one of the reasons we do not support the introduction of the tort.

¹⁵ Discussion Paper, para 7.3, p 99.

¹⁶ Discussion Paper, para 7.10, p 100.

¹⁷ Discussion Paper, para 7.32, p 104.

¹⁸ Discussion Paper, para 7.28, p 103.

¹⁹ Discussion Paper, para 8.45, p 117.

Nonetheless, consistent with ASTRA's preferred design should a tort be introduced, it is noted that the ALRC has recommended that:

- the plaintiff must prove their interest in privacy outweighs the defendant's interest in freedom of expression *and* any broader public interest; and
- that this assessment should be a discrete exercise in establishing the action, rather than undertaken when establishing other elements like reasonable expectation of privacy.

ASTRA agrees that building public interest considerations in to the establishment of any tort is all the more important given the lack of an Australian statutory human rights framework or express constitutional protection of freedom of speech.²⁰

ASTRA would strongly support the proposed ALRC test for matters which may be in the public interest, which would avoid definitions of "public interest" and instead provide a non-exhaustive list of matters which are likely to be in the public interest. However, the test raises the question as to how such matters of public interest would be determined by the courts. The ALRC did not give consideration as to whether this question of fact is a matter to be determined by a jury, or a judge.

What is in the public interest is ultimately a value judgment by the person who is making that determination. Arguably, a representative sample of the community, rather than a judge, may be in a more suitable position to determine whether a matter is in the public interest and should outweigh expectations of privacy.

The use of juries would not be a precedent for causes of action with their origins in torts. For example, in defamation proceedings juries consider whether a person has been defamed first before a defendant is required to argue defences.

It is submitted that the ALRC should consider this matter further so that this key limb of a public interest test will not produce court decisions incongruent with the community's expectations of a public interest issue. ASTRA recognises this would need to take account of the resource burdens on the Courts and the efficient administration of justice.

Chapter 9: Forums, Limitations and Other Matters

Consistent with the Guiding Principles that privacy laws should be clear and certain, and that they should be applied coherently and consistently, if a new tort for serious invasions of privacy is implemented, ASTRA strongly supports the ALRC's proposal that federal, state and territory courts should have jurisdiction to hear actions in relation to the new tort. As set out in our response in relation to Chapter 15, we strongly disagree with the proposal that the ACMA (or any other government regulatory authority) be empowered to make a determination that a complainant should be compensated where a broadcaster's conduct amounts to a serious invasion of privacy in breach of a broadcasting code of practice. In our view, granting such powers to tribunals or government regulatory bodies increases the likelihood of the tort being interpreted and applied inconsistently which in turn reduces the clarity and certainty of the scope of the law.

If the new tort is implemented, ASTRA agrees with the ALRC's view that the new tort should be limited to natural persons, and should not survive for the benefit of the plaintiff's estate or against the defendant's estate. As the ALRC noted, "an action in privacy is designed to remedy a personal, dignitary interest".²¹ Such an interest will not exist in the case of a corporation, government agency or other organisation, and will cease to exist after the person has died.

²⁰ Discussion Paper, para 8.5, p 109.

²¹ Discussion paper, para 9.34, p 126.

ASTRA reiterates its view that it is important that there is a short limitation period. This is important not only to encourage the proper and timely administration of justice²², but also to ensure that complainants are not advantaged (in terms of a possible damages award or an increased number of possible defendants to pursue) by delaying commencing proceedings.

Consistent with ASTRA's overriding view of the importance of limiting the ability for complainants to double-dip and forum shop, ASTRA considers that any position in the proposed Act in relation to damages must take into account whether or not a party took reasonable steps to resolve the dispute without litigation, as well as the outcome of any ADR process including any process conducted by a regulatory body such as the ACMA.

Chapter 10: Defences and Exemptions

As set out in its previous submission, ASTRA considers that the scope of appropriate defences can only be determined once the elements of the cause are finalised. However, ASTRA believes that the following defences should be available as a minimum:

- where the act or conduct:
 - was required by or authorised by law;
 - was incidental to the exercise of a lawful right of defence of person or property;
 - was a publication or disclosure which would be covered by qualified or absolute privilege under defamation law, a fair comment or fair report;
 - was considered by the person acting to be reasonably necessary to eliminate or reduce a possible health, safety or security risk to themselves or another person(s);
 - was a publication of the information for the purpose of exposing a public fraud, misfeasance or corruption;
 - was taken for the purpose of rebutting an untruth;
- where the disclosure was “user generated content” and was removed by the defendant in a timely manner once it became aware of the disclosure; and
- where the information was already publicly available including where it has already been published or was contained on a publicly viewable social media page.

While the ALRC has noted that certain of the defences proposed above overlap with the balancing of the public interest (which is currently proposed to take place in determining whether the elements of the cause have been made out), ASTRA considers that the defences listed above are necessary in the interests of certainty.

For example, while the fact that information is already publicly available might be taken into account when determining whether an individual has an expectation of privacy, ASTRA does not consider that a complainant should be able to “defendant shop” which could be a possibility if an action was available against a re-publisher of private information rather than just the original publisher.

Chapter 11: Remedies and Costs

As the award of damages for emotional distress is unlikely to put the complainant in the position that they would have been had the serious invasion of privacy not occurred, ASTRA considers that the principal effect of granting damages might be to act as a deterrent against future invasions of privacy.

²² Discussion paper, para 9.54, p 131.

However, ASTRA is concerned that the remedies proposed by the ALRC, and the manner in which they are proposed to be calculated will not result in a consistent deterrent against all potential defendants and does not reflect a technology neutral approach. For example, an award of exemplary damages or an award based on an account of profits is likely to be more effective against a large, established company than against a fledgling web-based media outlet which is more concerned with generating “likes” or “followers” than generating profit during its initial period—we consider that this (coupled with the lack of a defence for persons who are not the first publisher) is likely to result in defendant shopping. ASTRA considers that further discussion and consideration in relation to remedies and costs is required—including how the proposed tort will be effective to deter all kinds of invaders of privacy including those for whom profit is not a material concern.

As previously submitted, ASTRA does not consider that the calculation of damages by reference to a hypothetical licence fee is appropriate as, if an individual is willing to grant a licence for an invasion of privacy (especially when subject to payment of a fee), this should not be actionable under the proposed new tort.

Consistent with our previous submission, ASTRA considers that a statutory power to grant injunctions to protect against serious invasions of privacy is neither appropriate nor necessary. Under broadcasting legislation, STV broadcasters already face sanctions for breaches of privacy requirements under the ASTRA Codes of Practice, with potential significant impacts on their broadcasting operations, ranging from remedial action as agreed with the ACMA to the suspension or cancellation of the relevant broadcasting licence.

As previously submitted, ASTRA does not consider it appropriate to include a remedy requiring the defendant to rectify its business or information technology practices as part of a new cause of action for serious invasions of privacy. ASTRA opposes the extension of any new cause of action relating to such circumstances which it considers are already sufficiently dealt with under new provisions of the Privacy Act.

ASTRA strongly opposes any remedies that would compel apologies or corrections, for a number of reasons:

- the broadcasting of statements at the compulsion of the regulator raises significant free speech concerns;
- existing provisions in the ASTRA Codes, which are subject to enforcement by the ACMA, are sufficient remedies in the context of STV broadcasting. Correcting errors is a matter of good journalistic practice, and the number of complaints regarding news and current affairs programming (and content generally) on STV is extremely small, with no complaints at all in relation to privacy obligations under the ASTRA Codes;
- where there has been a serious invasion of an individual's privacy, discussion of the relevant information may result in further harm to the individual concerned rather than being an effective remedy; and
- where there has been a publication of untrue information (which is the context in which we consider a correction may be a useful remedy) an action in defamation seems more appropriate.

Chapter 12: Breach of Confidence Action for Misuse of Private Information

The ALRC proposes that:

- if a statutory cause of action for privacy is not enacted, appropriate federal, state and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of

private information, the Court may award compensation for the claimant's emotional distress; and

- relevant Court Acts should be amended to provide that, when considering whether to grant injunctive relief before trial to restrain publication of private (rather than confidential) information, a Court must have particular regard to freedom of expression and any other countervailing public interest of the material.

ASTRA recognises the ALRC's expectation that, in the absence of a statutory cause of action for serious invasions of privacy, an equitable action for breach of confidence is the most likely way in which the common law may develop greater protection for privacy in relation to disclosure of private information. However, as we argue above, we consider the current regime, comprised of legislation, common law and industry codes of practice, provides sufficient privacy protection for individuals, including sanctions for breach of privacy. We do not consider there is any evidence to justify the establishment of legislative grounds for compensation for emotional distress for the disclosure of private information—the current regime provides sufficient cause for media organisations to exercise appropriate care and restraint in relation to the disclosure of private information.

In circumstances where a Court was considering whether to grant injunctive relief to prevent the publication of private information, ASTRA would agree that the Court must have regard to freedom of expression and other public interest concerns. The power of courts to prevent the media from reporting news and current affairs must remain extremely limited and should not unduly impede the ability of media organisations to report on issues of public interest and concern.

However, ASTRA considers that similar public interest concerns should also be considered in relation to an award for compensation for emotional distress in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information (if such a proposal were implemented). ASTRA notes that, under its Codes of Practice, STV licensees must not, in the broadcast of news or current affairs programming, use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there are identifiable public interest reasons for the material to be broadcast.²³ As noted in the ACMA's Privacy Guidelines for Broadcasters, a breach of privacy obligations will not be found where the invasion of privacy is in the public interest.²⁴ It would be an inappropriate outcome where a disclosure of private information that is justifiable in the public interest could still be subject to an award for compensation for emotional distress.

Chapter 14: Harassment

The ALRC proposes that a Commonwealth harassment Act be enacted to consolidate and clarify existing criminal offences for harassment and, if a new tort for serious invasion of privacy is not enacted, provide for a new statutory tort of harassment (alternatively, the states and territories should adopt uniform harassment legislation).

ASTRA would welcome any moves to harmonise laws relating to harassment, provided such laws represent the minimum necessary to achieve the intended public policy objective of protecting individuals from harassment and without imposing unnecessary restrictions on the legitimate news gathering operations of media organisations. However, ASTRA would not support the inclusion of a civil action for harassment under any new Commonwealth Act or uniform state and territory legislation. Existing laws and codes regulating the behaviour of broadcasters in relation to privacy, combined with existing criminal offences relating to harassment, are sufficient protection for serious invasions of privacy.

²³ SBT Code, cl 2.2(c)

²⁴ ACMA, [Privacy guidelines for broadcasters](#), December 2011, p.2

Chapter 15: New Regulatory Mechanisms

Expanding the ACMA's powers

The ALRC proposes that the ACMA be empowered to make a determination that a complainant be compensated where a broadcaster's conduct in breach of a broadcasting code of practice amounts to a serious invasion of privacy. The ALRC argues this would be similar to existing powers of the Office of the Australian Information Commissioner (OAIC). ASTRA strongly opposes this proposal.

Such a proposal would represent a significant shift in the functions and powers of the ACMA. The ACMA does not currently have the power to order compensation be paid to an individual in relation to a breach of any broadcasting code of practice, broadcasting licence condition or any other obligation on broadcasters established under the *Broadcasting Services Act 1992* (BSA). This does not represent a 'limitation'²⁵ of the ACMA's powers under the BSA—rather, it reflects of the intention of the regulatory framework for broadcasting established by Parliament. As the ACMA noted in its submission to the Issues Paper for this Inquiry:

...the industry-specific regulatory framework administered by the ACMA has a role to play that is distinct from that of the proposed statutory cause of action. For example, the ability of the ACMA to investigate breaches of a broadcasting code of practice and to take action as a result fulfils the public policy objective of encouraging broadcasters to reflect community standards in the provision of program material.²⁶

This regulatory framework for broadcast content was never intended as means for individuals to seek redress for individual grievances, but to establish rules for broadcasters based on contemporary community standards and expectations.

ASTRA further disagrees with the ALRC's assessment that the ACMA has "limited enforcement powers" where a code of practice is breached.²⁷ In our view, this conclusion does not appropriately reflect the legislative context that underpins the development of broadcasting codes of practice under the BSA, and does not fully acknowledge the investigative and enforcement powers available to the ACMA to compel compliance with broadcasting codes of practice.

As ASTRA detailed in its submission to the Issues Paper, under the BSA the STV industry develops, in consultation with the ACMA, codes of practice applicable to the broadcasting operations of STV services. By law, the ACMA may only register a code of practice if it is satisfied that:

- the code of practice provides appropriate community safeguards for the matters covered by the code;
- the code is endorsed by a majority of providers of broadcasting services in that section of the industry; and
- members of the public have been given adequate opportunity to comment on the code.

The codes are part of a *co-regulatory* framework overseen by the ACMA, which gives the ACMA powers to ensure codes work effectively or impose standards where codes fail to provide adequate community protection.

Under the ASTRA codes, STV licensees are responsible for compliance with the codes of practice, and receive complaints directly from subscribers in relation to any matters under the codes. However, where a complainant is unsatisfied with the response from a licensee, the

²⁵ Discussion Paper, para 15.14, p.221.

²⁶ ACMA submission to the ALRC Privacy Issues Paper, p.1.

²⁷ Discussion Paper, para 3.29, p.43.

complainant may take their complaint to the ACMA. The ACMA has a range of enforcement options in relation to STV licensees, from agreed remedial measures and enforceable undertakings, to an additional licence condition, up to and including the suspension or cancellation of a broadcasting licence. Further, if the ACMA is concerned that a code of practice is not working effectively in relation to a particular matter, it may make a standard in relation to that matter, with which all STV licensees must comply.

The regulatory framework provides ample incentive for broadcasters to comply with privacy obligations under broadcasting codes. As ASTRA noted in its submission to the Issues Paper, the ACMA has never found a breach of the ASTRA Codes in relation to privacy. Indeed, ASTRA is unaware of any complaints to STV broadcasters in relation to the privacy obligations under the ASTRA Codes. The overall effectiveness of the existing regime is also reflected in the extremely small number of complaints regarding breaches of privacy obligations for commercial, national and community broadcasters (as noted in the Discussion Paper).²⁸

The evidence would strongly suggest that the regulatory framework established under the BSA is highly effective in ensuring broadcasters are achieving an appropriate balance between respect for personal privacy and the reporting of news and current affairs issues of public interest and concern. While this may well mean, as the ALRC contends, that the proposed extended powers of the ACMA “may be rarely used”,²⁹ equally it demonstrates there is very little evidence of a problem that needs to be ‘solved’ by extending the ACMA’s powers.

Further, the regulatory framework for broadcasting administered by the ACMA would not be the appropriate forum to enable an individual to seek compensation for the disclosure of personal private information. In this regard, the roles and functions of the ACMA are not comparable to those of the OAIC under the *Privacy Act 1988* (Cth). The Privacy Act, while developing general rules for the protection of private information, is also specifically directed towards the protection of personal privacy, including avenues of redress, via the OAIC, for individuals affected by breaches of privacy obligations by entities subject to the Act.

In contrast, the BSA is intended to achieve broad public policy objectives in relation to the scope and structure of the broadcasting industry, such as the promotion of a diverse range of radio and television services; providing a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; encouraging diversity in control of the more influential broadcasting services; and promoting the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity.³⁰ The regulatory policy underpinning the BSA includes the intention that broadcasting services in Australia be regulated in a manner that enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on the providers of those services.³¹ The ACMA’s regulation of broadcasting industry participants has always been directed towards the achievement of these broader public policy goals.

A new privacy principle for deletion of personal information

ASTRA does not support the ALRC’s proposal of a new Australian Privacy Principle for deletion of personal information. We note that, under APP 11, entities which collect personal information are already required to take reasonable steps to delete or de-identify information when it is no

²⁸ The ACMA noted that, in 2012-13, of the 2,178 written complaints to the ACMA relating to commercial, national and community broadcasters, only 7 led to investigations by the ACMA that found a breach and raised issues of privacy under broadcasting codes. In other words, only **0.32%** of all written complaints resulted in the ACMA finding a breach of codes in investigations which raised issues of privacy (ACMA submission, p.7).

²⁹ Discussion Paper, para 15.21, p.223.

³⁰ See BSA, s 3.

³¹ BSA, s 4(2).

longer required for the purpose for which it was collected. Unsolicited information must also be destroyed unless it is needed for a legitimate business purpose.

ALRC argues that “deletion would be required not only when the personal information is no longer useful but also when the individual requests its deletion”.³² However, it would be completely inappropriate to allow a person to request destruction or de-identification of information held for a legitimate business purpose while it is still needed for that purpose. For example, where a business holds contact and billing details in order to charge for the provision of goods or services, the business should not be required to delete those details until the business relationship is concluded.

The Discussion Paper refers to a proposed exemption where information is required by law to be retained, but this would not be sufficient where the information was required for business purposes but not law.

³² Discussion Paper, para 15.26, p 224.