

20 December 2011

Mr Roger Clarke
Chair, for the Board of the Australian Privacy Foundation
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ACMA file reference: ACMA 2010/618

Dear Mr Clarke

ACMA PROJECT – Review of the ACMA Privacy Guidelines for Broadcasters 2005

I refer to your letter of 16 December 2011 in which you express the Australian Privacy Foundation ('APF's) concern over two outcomes of the ACMA's review of its *Privacy Guidelines for Broadcasters*.

I write to address the APF's concerns

'Highly offensive'

The APF's first concern is that by using a '*highly offensive*' rather than an '*inappropriate or offensive*' test to divide permissible from impermissible intrusions on seclusion, the ACMA is substantially reducing privacy protections.

Having reflected carefully on the APF's concern, I do not accept that any such reduction results.

The *Privacy Guidelines for Broadcasters* do not, themselves, contain any privacy protections. Rather, they are a guide as to how the ACMA has and will approach the protections contained in the various broadcasting industry codes.

The ACMA's current guidelines offer no insights on invasions of privacy involving intrusions on seclusion. Indeed, this was one of the factors which prompted the review and was noted in the ACMA's investigation report no 2027 of June 2009. The expansion of the guidelines to address intrusions on seclusion represents a significant change to the current guidelines and will almost certainly result in a heightened and positive focus on these issues by broadcasters.

The 'highly offensive test' on which the ACMA has now settled:

- Reflects the ACMA's previously published approach to invasions of privacy (see, for example, ACMA investigation report number 2027 of June 2009);
- Reflects the approach currently take by Australian Courts to similar questions (see, for example *Grosse v Purvis* [2003] QDC 151 at par 431 *ABC v Lenah Games Meats* 208 CLR 199 at par 42); and

- Reflects the Australian Law Reform Commission's recommendations concerning protection of personal privacy (Rec 74-2 ALRC Report 108 *For Your Information: Australian Privacy Law and Practice*).

The decision to incorporate the 'highly offensive' test in the guidelines was not a decision which the ACMA took lightly. It took close account of all submissions and preferred the test that kept the ACMA's guidelines in step with the approach adopted in comparable legal situations.

In the event that the application of the 'highly offensive' test in the context of the various broadcasting codes results in poor outcomes from the APF's perspective (and I hope that conclusion doesn't subsequently ensue), the opportunity always exists to make submissions in respect of the broadcasting codes themselves, when they are next being reviewed.

The public interest

I appreciate the APF's concerns over the use of the words '*might be legitimately interested in*' in the public interest paragraph which the ACMA is now re-instating from the current guidelines. However, the reviewed guidelines will also include the statement, '*Not all matters that interest the public are in the public interest*', as well as further comment, making it clear that public interest matters are quite distinct from matters that are merely of interest to public.

Some submitters to the consultation sought reinstatement of that paragraph to maintain consistency with standards applied to the print media by the Australian Press Council. Others expressed concern that without the paragraph, it might be thought that once any link to public interest had been established an invasion of privacy would be justified.

Again, after careful consideration of submissions, the ACMA accepted that the relevant paragraph should be reinstated. As it includes references to '*all the circumstances*', requires a matter in the public interest to be capable of affecting the community at large and is qualified by the word '*legitimately*', the ACMA considers that the term '*interested in*' will be read in its proper context.

I trust that this information addresses the APF's concerns. I do appreciate the APF's submission in the context of this review and value the APF's on-going engagement on privacy issues cross the ACMA's remit more broadly.

Yours sincerely,



Chris Chapman
Chairman

cc. Prof. J McMillan, Information Commissioner
Mr T Pilgrim, Privacy Commissioner