



**Australian
Privacy
Foundation**

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16 December 2011

Mr C. Chapman
Chair
Australian Communications and Media Authority
P.O. Box Q500
Queen Victoria Building NSW 1230

cc. Ms Cecilia Rice, Project Manager, Broadcasting Investigations Section
cc. Prof. J. McMillan, Information Commissioner
Mr T. Pilgrim, Privacy Commissioner

Dear Mr Chapman

Re: ACMA Privacy Guidelines for Broadcasters

I refer to Ms Rice's letter of 16 December, addressed to Nigel Waters of APF and PI, responding to APF's submission of 14 October, and advising the outcomes of the review of the Privacy Guidelines.

Most of the amendments that are outlined in the letter appear to be fine, but two are so seriously detrimental to privacy as to undermine both the credibility of the Guidelines and the credibility of ACMA in this important area.

1. 'Highly Offensive'

The fourth bullet says:

- a person's seclusion will be intruded upon where there is an expectation of privacy and an ordinary person of reasonable sensibilities would consider the broadcast to be *highly offensive* (replacing the *inappropriate or offensive* test previously proposed)

This represents a very substantial reduction in privacy protections. If this change were made, ACMA would be authorising a huge number of 'inappropriate and offensive' actions. This would result in the agency completely losing its credibility with the community.

Such wording was proposed by the ALRC in relation to the privacy cause of action. However, it is appropriate to have a higher hurdle than for the Guidelines for Broadcasters. And, even then, we submitted to the Government that:

"the threshold of 'highly offensive' is too high, as it would exclude many offensive intrusions that are deserving of remedies. A plaintiff should be required to show that: ...
(b) the act complained of is sufficiently serious to cause, to a person of ordinary sensibilities, substantial offence or distress, in the relevant context ('offensive intrusion')."

APF's submission is at <http://www.privacy.org.au/Papers/PMC-SCofAction-111104.pdf>

We urgently request that the 'inappropriate or offensive' test be reinstated.

2. The Public Interest

The ninth and final bullet-point says:

- whether material that invades privacy is in the public interest, will depend on all the circumstances including whether a matter is capable of affecting the community at large so that citizens might be legitimately interested in or concerned about what is going on" (emphasis added).

The highlighted expression confuses 'the public interest' with 'what the public is interested in', to the serious detriment of privacy.

This is addressed in the APF's Policy Statement, at:
<http://www.privacy.org.au/Papers/Media-0903.html>

The primary elements of the public interest were summarised in the APF's Submission to the current Media Inquiry, at <http://www.privacy.org.au/Papers/MediaInq-Sub-111118.pdf>, as follows:

"relevance to the performance of a public office, to the performance of a corporate or civil society function of significance, to the credibility of public statements, to arguably illegal, immoral or anti-social behaviour, to public health and safety, or to an event of significance"

Working with your current wording, we urgently request deletion of the words "interested in or", so that the test becomes "whether a matter is capable of affecting the community at large so that citizens might be legitimately concerned about what is going on".

We urgently request that you give further consideration of these two aspects, and address them prior to publication of the Guidelines.

Thank you for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roger Clarke', written over a faint rectangular stamp or box.

Roger Clarke
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