



**Australian
Privacy
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9 January 2012

Mr R. Finkelstein
Chair
Media Inquiry
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Dear Mr Finkelstein

**Supplementary Submission to the Independent Media Inquiry
An Appropriate Public Regulatory Body**

The APF provided a Submission to your Inquiry on 18 November 2011.

There has been a subsequent, highly relevant development, in that ACMA published, on the last business day before Christmas, a revised set of 'Privacy guidelines for broadcasters'.

These raise very serious issues, which bring into question the capacity of ACMA to achieve a satisfactory balance between the freedom of the press and the privacy interest.

We accordingly attach a brief Supplementary Submission to your Inquiry.

We would appreciate it if you would accept the Submission despite its lateness.

Thank you for your consideration.

Yours sincerely

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Australian Privacy Foundation
Supplementary Submission to the Independent Media Inquiry
ACMA's Revised Privacy Guidelines for Broadcasters

9 January 2012

1. Introduction

On 23 December 2011, the Australian Communications and Media Authority (ACMA) published a revised version of its Privacy Guidelines for Broadcasters:

ACMA (2011b) 'Privacy Guidelines for Broadcasters 2011' Australian Communications and Media Authority, December 2011, at http://www.acma.gov.au/WEB/STANDARD/pc=PC_100133

This contains serious deficiencies.

2. Deficiencies in the Privacy Guidelines for Broadcasters

Under the new Guidelines, for a complaint to succeed, it has to survive six hurdles, four of which are expressed in ways that are inimical to privacy protection (p. 2):

(1) a person has to have been "**identifiable from the broadcast material**"

This provision has the effect that ACMA will not consider a complaint if the person is only identifiable by combining the data in the publication with other data – even if the other data is readily available and the media organisation should have known that to be the case.

(2) the broadcast material has to have disclosed personal information or intruded upon the person's seclusion in more than a fleeting way. For intrusion upon a person's seclusion to have occurred, two conditions must be satisfied (p. 4):

- the person would have a reasonable expectation that his or her activities would not be observed or overheard by others; and
- a person of ordinary sensibilities would consider the broadcast of these activities to be highly offensive

The test applied under the 2005 version was "likely to cause harm or distress to a reasonable person in the position of the individual" (ACMA 2005, p. 2). The new test is much more advantageous to media organisations and much less sympathetic to the individual.

The effect of the "**highly offensive**" term is that ACMA will not find in favour of a complainant if the broadcast of the activities causes a relevant person to be concerned, annoyed, upset, distressed or distraught, nor if a relevant person finds it merely offensive or very offensive.

The effect of the "**person of ordinary sensibilities**" reference-point is that ACMA will not find in favour of a complainant if the person affected and/or the complainant is annoyed, upset, distressed or even distraught, nor if the person affected and/or the complainant considers the broadcast of the activities is offensive, very offensive or even highly offensive.

(3) the broadcast material must not have been "**readily available from the public domain**".

This provision has the effect that ACMA will consider only the first breach. Hence both parallel but slightly later publication, and the scores and even hundreds of instances of republication, not only will not be investigated, but are all absolved.

- (4) the invasion of privacy must not have been **"in the public interest"**.

ACMA's definition of 'the public interest' expressly extends beyond what the term reasonably means to include a great of 'what the public is or may be able to be interested in'. This has the effect that ACMA will reject many complaints about publications that are clearly not justified 'in the public interest'.

The reason for this deficiency is that ACMA has adopted the same faulty definition as the APC. This derives from *London Artists v Littler* (1969) 2 QB 375 at 391. Lord Denning, then Master of the Rolls, promulgated that definition in the very specific context of defamation law, in which the defence of fair comment is dependent on the comment being made 'on a matter of public interest'. Any suggestion that Denning's interpretation of the term 'a matter of public interest' has any legal authority in relation to the meaning of 'in the public interest' in the very different context of privacy is entirely spurious.

3. Conclusion

APF's Submission to the Inquiry of 18 November 2011 argued for what we referred to as a 'public regulatory body' with broad scope encompassing all traditional print and broadcast and all digital and networked media.

The Submission suggested that consideration be given to transforming the Australian Press Council (APC) in order to create such a comprehensive public regulatory body. It opposed the use of a 'government regulatory agency', but did not expressly comment on ACMA's suitability.

The serious deficiencies in ACMA's revised Guidelines make clear to the APF that ACMA, and the documents that have been produced under ACMA's oversight, are incapable of providing a satisfactory balance between the freedom of the press and the privacy interest.

We accordingly re-emphasise the APF's belief that your Inquiry should propose either the creation of a new public regulatory agency with comprehensive scope, or the transformation of APC into such a public regulatory agency.