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Campaigning for consumers in communications: A consultation

http://www.accan.org.au/news_item_full.php?id=26

Submission to the Australian Communications Consumer Action Network (ACCAN)

October 2009

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Welcome to ACCAN

The Australian Privacy Foundation (APF) welcomes ACCAN as much needed strengthened voice for consumers in communications policy in Australia. We have had a long and productive association with the ACCAN's predecessor organisation – the Consumers Telecommunications Network (CTN), jointly campaigning and lobbying on telecommunications privacy and related issues since the mid 1990s, albeit with limited success, given the power and resources of the governments and businesses with whom we have sought to engage.

In the consultation document, ACCAN asks some specific questions. We answer each of these in turn below.

We refer in places to the Australian Law Reform Commission's 2008 Report 108 For Your Information: Australian Privacy Law and Practice ("ALRC privacy report"). This report addressed many generic privacy issues which apply to communications industries, but also has specific chapters on Telecommunications privacy (Part J). A government response to the ALRC report is awaited. APF was disappointed with some aspects of the report, including the telecommunications specific sections, but strongly supports many of the ALRC's recommendations. We urge ACCAN to use the ALRC privacy report as a reference point for its ongoing work.

The Communications Landscape

- What should ACCAN's primary objectives be?
- What communication needs and services should ACCAN focus on?

We note that there appears to be no specific commitment to cover postal communications, where Australia Post is still the dominant service provider. Given that there is no effective consumer

representative organisation monitoring the activities of Australia Post, and given the increasing convergence between traditional and electronic communications, we submit that ACCAN should expressly address consumer issues in postal communications.

Effective Advocacy & Representation

- What should ACCAN's definition of 'consumer' be?
- What principles should guide ACCAN work?
- How should ACCAN position, organise and conduct work, including strategies?
- What activities should ACCAN not engage in?
- Should ACCAN have 'super complaint' powers?

We can see the case for ACCAN's brief extending to small business consumers, but make the point that it is often not appropriate to apply privacy principles to incorporated bodies. There is a good reason why most privacy laws only apply to personal information about individuals. In choosing to incorporate, businesses acquire certain responsibilities and obligations which necessarily mean that they cannot enjoy the same privacy rights as individuals. We also caution against allowing small business commercial interests to unduly influence ACCAN's policy positions. ACCAN should only represent small business interests where they coincide with the interests of individual consumers – where these interests conflict, as they often will, the interests of individual consumers should prevail – a 'compromise' will rarely be appropriate.

APF strongly supports the development by ACCAN of "a set of consumer rights and responsibilities for the communications market in Australia, based on work done on human rights, consumer rights and digital rights." (Consultation Paper, page 6). We also support the proposed values, profile, network connections and framework for action set out in the paper.

The proposed core functions seem appropriate, as does the list of things that ACCAN will not do. In relation to 'super-complaint' powers, we are not sure that ACCAN should have legislative powers – this would seem to be an inappropriate for such a representative body. If on the other hand by powers you mean the *ability* to bring 'super-complaints' together with *a requirement on regulators* to accept them, then we agree. We note that there are already provisions in some relevant laws for 'representative complaints' (e.g. the Privacy Act 1988 (Cth), ss.36 & 38-39) although it is often ambiguous whether an organisation can bring such complaints on behalf of a class of individuals without at least one individual being a party – we support legislative amendments that clearly provide for this.

On a related issue, we note the proposal on p.10 that ACCAN should "have legislative power to bring evidence of market failure to the attention of government, with assurance of a response". While we support this objective, ACCAN should not be given a privileged role in legislation – any bona fide non-government organisation should be able to do this and be assured of a meaningful response.

We do not disagree that 'Consumer rights and empowerment will be at the core of communications policy' (Action plan, page 10) but we caution against the often asserted (by industry) assumption that provided consumers are given enough information, they can be left to make their own choices free of 'heavy handed' regulation. Our extensive experience leads us to the conclusion that there can never be an effective 'free market' in relation to some important issues, and that some industry practices are simply not acceptable. We have no ideological commitment to regulation for its own sake but neither do we accept that it is inherently undesirable and to be minimized. There should be 'as much regulation as is necessary, but no

more than is required' to deliver agreed policy outcomes.

We strongly support a 'responsive regulation' model that includes all levels from education and awareness activity, through conciliation and mediation of complaints and compliance monitoring to vigorous proactive enforcement activity by regulators to address serious or repeated non-compliance and systemic failures.

Issues

- What are the top five issues ACCAN should focus on?

This section of the Consultation paper groups issues under five headings – we believe all are important, although as you might expect, a priority group for us is the one labeled *Guarding security, privacy, and fair use*.

Security and privacy are often confused. While security is an important privacy principle, privacy interests are much wider. Information privacy laws encompass rights to notice about processing of personal information, and of participation, choice and access and correction. More broadly, privacy interests include proportionality, rigorous justification and limitations on surveillance and monitoring of individuals' activities; effective safeguards and accountability mechanisms, and accessible and affordable complaints processes with effective remedies and sanctions. Privacy interests overlap with the proposed 'fair use' issue – indeed in some jurisdictions information privacy principles are known as 'fair information practices'.

Privacy issues also overlap with some of the issues you raise in the group labeled *Making the market work for consumers*, particularly those of fair contracts and adequate information. Consumers are rarely put in a position where they can give truly *free* (and therefore revocable) and *informed* consent to particular uses of their personal information. The practice of 'bundled consent' whereby consumers are asked to agree to secondary uses as a condition of a primary service, is contrary to fundamental privacy principles. Unfortunately the ALRC privacy report largely avoided making recommendations to address the weakness of privacy laws in dealing with consent issues.

- Do you agree with ACCAN's action plan for these issues?
- Are the strategies ACCAN has identified the best way to approach these issues?

Generally, we answer yes to both questions.

The consultation paper notes that access to emergency services and warning systems from popular emerging technologies like Voice over IP (VOIP) is not guaranteed, and that this raises a number of challenges to the effectiveness of the system and consumer awareness of arrangements (p.12). While we agree that this is a challenging issue, we caution against policy that denies consumers access to new technologies on the basis that they cannot meet some standards which, whilst desirable, are not essential. We are particularly concerned that emergency services access arguments may be used as a 'trojan horse' for law enforcement interests, denying consumers the choice of anonymous or less easily traceable communications. We refer you to our recent submission to ACMA on the Emergency Call Services Determination – see <http://www.privacy.org.au/Papers/ACMA-ECSDetermin-090927.pdf> . Consumer awareness of the limitations of technologies is of course essential.

We support the proposed action plan in relation *Guarding security, privacy and fair use*. The plan includes "Developing a set of security and privacy principles from which to develop policy" (page 14). We note that this should not require 're-inventing the wheel' – despite the weakness of the ALRC recommendations on telecommunications privacy, international best

practice principles are well understood and the need is more for a thoughtful and consistent application of these principles to new technologies and business and service delivery models, rather than new principles.

We note the importance of ensuring that the work on *Guarding security, privacy and fair use* is carried over into the proposed activity in relation to *Shaping the National Broadband Network*.

Conclusion

The APF welcomes the professional approach that ACCAN is taking to the development of its strategic plan, supports the overwhelming majority of the proposals in the consultation paper, and looks forward to a continuing association with ACCAN as we pursue our common interests.

We hope that ACCAN will be prepared to work closely with APF in relation to privacy and related issues (and also with other relevant NGOs such as Electronic Frontiers Australia, ISOC-AU and CHOICE). We remind ACCAN that APF is composed entirely of volunteers and the time we can devote to issues is necessarily limited. On the other hand we do have members with particular experience and knowledge which CTN found valuable in the past, and hope that we can have a similar partnership relationship with ACCAN.

For further contact on this submission please contact
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Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.