



Submission on the Australian Government discussion paper 'A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy'

4 November 2011

www.astra.org.au

ABN 18 851 051 883

Introduction

ASTRA welcomes the opportunity to comment on the Australian Government's discussion paper 'A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy' (the "Discussion Paper").

About ASTRA

ASTRA is the peak industry body for subscription television in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major subscription television operators, as well as channels that provide programming to these platforms, including a number of major local and international news channels such as Sky News Australia, Sky News Business, CNN and BBC World.

The subscription TV industry is the undisputed leader of digital broadcasting. A dynamic sector that is constantly evolving and growing, it is received nationally by 34% of Australians through their homes and many more through hotels, clubs and other entertainment and business venues.

General comments on the subscription television industry and privacy

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 news and current affairs reporting, 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.

Australian law presently recognises the special place that media organizations 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 organizations are presently exempt from the operation of the National Privacy Principles to the extent that they engage in 'acts or practices...in the course of journalism', provided that the media organization is publicly committed to observing written standards 'which deal with privacy in the context of the activities of a media organisation'.¹

As set out below, ASTRA's members have demonstrated a long-standing commitment to privacy protection by the inclusion of relevant provisions in successive codes of practice registered by the Australian Communications and Media Authority (the ACMA).

¹ Section 74B(4), Privacy Act 1988 (Cth).

ASTRA's Codes of Practice

The *Broadcasting Services Act 1992* (Cth) (“the BSA”) provides for matters pertaining to privacy to be set out in the industry codes of practice with which subscription television providers must comply. The Subscription Broadcast Television Codes of Practice (the “ASTRA Codes of Practice”) provide that:

*“In broadcasting news and current affairs programs licensees must not 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.”*²

References to “licensees” are to broadcasters that hold subscription broadcasting television licenses. The ASTRA Codes of Practice further require that licensees will collect, use, disclose and store subscribers’ personal information in accordance with the *Privacy Act 1988* (“Privacy Act”) and National Privacy Principles.³

It is important to note that under section 123(4) of the BSA, the ACMA cannot include a code of practice in the Register of Codes of practice—and thereby give it legal effect—unless it is satisfied that the code provides appropriate community safeguards for the matters it covers. Section 123 of the BSA notes that it is the intention of the Parliament that in developing codes of practice relevant industry groups take into account research conducted by the ACMA; and, it is also a pre-condition to registration of a code that members of the public have been given an adequate opportunity to comment on it.

These provisions mean that the relevant industry-specific regulator is already empowered to ensure that appropriate privacy provisions are included in broadcasting codes of practice. The BSA establishes a framework which ensures that this assessment is conducted in light of relevant research and feedback from members of the public. Moreover, the regular review of codes of practice ensure that they keep pace with community standards.

In addition, the privacy provisions of the ASTRA Codes of Practice are supported by the ACMA’s Privacy Guidelines for Broadcasters (the “Privacy Guidelines”). The ASTRA Codes of Practice and the Privacy Guidelines recognize the important role played by the media of informing the public while balancing this right with the need to respect individual privacy. The Privacy Guidelines provide guidance to media organisations on dealing with material that relates to a person’s private affairs and identifying what constitutes a ‘public interest’ which may justify an intrusion into an individual’s privacy.

The ACMA has the power to investigate complaints relating to alleged breaches of the ASTRA Codes of Practice. People who believe that their privacy has been invaded, either by reason of reporting by a media organisation or from the collection, use, storage or disclosure of their personal information that is held by licensee broadcasters, may in the first instance direct their complaint to the relevant licensee and, if not satisfied with the response, then escalate the complaint to the ACMA. If the ACMA finds that a licensee has breached the ASTRA Codes of Practice, then a number of remedies are available to the ACMA to deal with that breach, from rectification notices to, ultimately, revocation of a

² Subscription Broadcast Television Code of Practice, cl 2.2(c).

³ Subscription Broadcast Television Code of Practice, cl 4.3.

licence. ASTRA notes that the ACMA has never found a breach of the ASTRA Codes of Practice in relation to privacy.

ASTRA and its members are committed to the ASTRA Codes of Practice and the Privacy Guidelines and believe that this system works well, as it ensures appropriate protections are in place to protect an individual's privacy without imposing unnecessary financial or operational burdens on industry. In addition, the current scheme provides industry with flexibility to respond to community standards while minimising the burden on government and the court system, and avoiding the expense and distress of litigation for individual complainants.

Existing protections are sufficient

ASTRA does not believe that the introduction of an additional cause of action for serious invasion of privacy will, in so far as such legislation applies to media organisations in the operation of their news gathering and reporting activities, provide protection that is not already available to people who believe that their privacy has been invaded in a serious manner.

Government has already appreciated the potential issues raised in the Discussion Paper by requiring subscription television broadcasters to have in place published standards which deal with privacy in order to claim the journalism exemption under the Privacy Act (s 74B(4)). This is achieved by inclusion of privacy provisions in the ASTRA Codes of Practice.

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, taking their complaint to the industry regulator for independent review. Such a complaint process is undertaken in an efficient and streamlined manner, where the complainant is not required to incur significant costs initiating a complaint or become involved in complex or overly legalistic negotiations or discussions with broadcasters.

ASTRA is concerned that the introduction of a new cause of action could create confusion for complainants as to their potential avenues for making complaints and obtaining remedies for privacy breaches and result in prolonged court or administrative appeals actions. In our view the co-regulatory framework is most appropriate because it allows a complainant to address the problem directly with the relevant broadcaster and, if such discussions fail, then with the industry regulator as an impartial third party adjudicator. The ASTRA Codes of Practice, supported by the ACMA's Privacy Guidelines have the intended effect of dealing with the issues raised in the Discussion Paper, and this regime has worked well for both industry and the public.

Other laws that provide recourse for invasion of privacy

The most serious issues that arise as a result of invasion of privacy are also covered by a number of other laws.

Laws regarding defamation can deal with information that is broadcast about a person that is not true or not in the public interest and anti-discrimination laws cover vilification and discrimination of individuals that may arise by disclosure of personal information.

Intercepting voicemail messages, private telephone conversations, email accounts or other personal property of individuals are covered by criminal laws pertaining to interception, and civil actions are available for trespass or breaches of confidentiality.

While there have been concerns recently over high profile incidents in the United Kingdom where an individual's privacy has been compromised by interception of voicemail messages by media organisations, there has been no suggestion that any such activity has occurred in Australia. Even if such conduct were to occur, the act of intercepting a telephone communication itself is a criminal act under Australian law under the *Telecommunications (Interception and Access) Act 1979* ("Interception Act").

An additional concern is that many of the issues that have given the public cause for concern relate to online media, and in particular social media—it is clear from the introduction to the Discussion Paper that online privacy breaches are also a key area of concern for government. However, as the providers of many of the most popular social media services (such as Facebook and Twitter) are based offshore there may never be an adequate remedy available under Australian law for an aggrieved person.

As it is therefore doubtful the introduction of a new cause of action for serious breaches of privacy would give any viable recourse for invasions of privacy on the most popular online services, a new law would increase regulatory burden for Australian media organisations without being well targeted to the problem area.

Comments on the Discussion Paper

ASTRA provides the following specific comments in relation to a number of questions raised in the Discussion Paper. However, as ASTRA does not support the introduction of a new cause of action, no comment is provided in relation to questions of detail about the potential tort.

Notwithstanding this position, as a general comment ASTRA submits that if the government is minded to introduce a cause of action for serious invasions of privacy, then such a cause of action should not apply where an industry code dealing with matters pertaining to an individual's privacy has been developed and approved by a governmental regulator.

<p>1. <i>Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?</i></p>
--

ASTRA does not believe that the development of new technologies means that additional ways of protecting an individual's privacy are necessary. The Privacy Act, including changes already proposed by government to that Act and the Privacy Principles, as well as numerous other laws (such as the Interception Act, the State defamation acts and the common law actions for trespass and breach of confidence) cover, or can be amended to specifically cover, dissemination of information by new forms of technology.

2. *Is there a need for a cause of action for serious invasion of privacy in Australia?*

ASTRA does not believe that there is a need for the introduction of a new cause of action relating to invasion of privacy. As stated above, the ASTRA Codes of Practice and the Privacy Guidelines already provide appropriate protections to individuals who feel that their privacy has been invaded, and that the regime in place for dealing with any such complaints is efficient and effective in dealing with privacy complaints. With respect to non-news related breaches, ASTRA believes that the Privacy Act and Privacy Principles adequately deal with these complaints.

3. *Should any cause of action for serious invasion of privacy be created by statute or be left to development of common law?*

Based on the current regulatory environment, and the fact that no ASTRA member has to date been held to be in breach of the privacy provisions of the ASTRA Codes of Practice by the ACMA, ASTRA does not believe that there is any need to implement a statutory based cause of action pertaining to a serious invasion of privacy.

4. *Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?*

ASTRA does not make any comment in relation to this matter.

5. *Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?*

ASTRA does not make any comment in relation to this matter.

6. *How best could a statutory cause of action recognize the public interest in freedom of expression?*

ASTRA does not make any comment in relation to this matter.

7. *Is the inclusion of 'intentional' or 'reckless' as fault elements for any proposed cause of action appropriate, or should it contain difference requirements as to fault?*

ASTRA does not make any comment in relation to this matter.

8. Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?

ASTRA does not make any comment in relation to this matter.

9. Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?

ASTRA does not make any comment in relation to this matter.

10. What should be included as defences to any proposed cause of action?

ASTRA does not make any comment in relation to this matter.

11. Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

As noted above, although ASTRA does not support a new cause of action, if one were legislated, ASTRA believes that, where an organisation is subject to a set of privacy conditions or guidelines required by legislation and enforced by an industry regulator if escalated by a complainant, such organisations should be exempted from the operation of any proposed cause of action.

12. Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

ASTRA does not make any comment in relation to this matter.

13. Should the legislation prescribe a maximum award of damages for non-economic loss, and if so, what should that limit be?

ASTRA does not make any comment in relation to this matter.

14. Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?

ASTRA does not make any comment in relation to this matter.

15. Should any proposed cause of action also allow for an offer of amends process?

ASTRA does not make any comment in relation to this matter.

16. Should any proposed cause of action be restricted to natural persons?

ASTRA does not make any comment in relation to this matter.

17. Should any proposed cause of action be restricted to living persons?

ASTRA does not make any comment in relation to this matter.

18. Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?

ASTRA does not make any comment in relation to this matter.

19. Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?

ASTRA does not make any comment in relation to this matter.

ASTRA would be happy to discuss further any of the issues raised in this submission.

Yours sincerely



Petra Buchanan
CEO