



FreeTV
Australia

**Submission by
Free TV Australia Limited**

SCAG Discussion Paper

*'Unauthorised Photographs on the Internet
and Ancillary Privacy Issues'*

14 October 2005

Free TV Australia ('Free TV') is the peak industry body representing all 48 commercial free-to-air television licensees in Australia. Free TV's member groups include the Nine Network, Seven Network, Network Ten, Southern Cross Broadcasting, Prime Television, WIN Television, NBN, Swan Television and Imparja Television.

Free TV welcomes the opportunity to comment on the Standing Committee of Attorney's General's Discussion Paper entitled '*Unauthorised use of photographs on the Internet and ancillary privacy issues*'.

Free TV acknowledges that there are legitimate concerns associated with the use of some unauthorised photographs on the internet. However, these concerns and privacy expectations must be balanced with the public interest in freedom of expression, particularly for media organisations. Free TV welcomes the Committee's recognition of these competing interests throughout the Discussion Paper.

Free TV supports the submission of the Australian Press Council that:

- No general restrictions should be placed on the taking of photographs in a public place;
- To the extent that any additional legislation is necessary to deal with the use of unauthorised photographs on the Internet, it should be minimal and targeted to address specific concerns, (such as the filming of intimate private acts or body parts or using unauthorised photographs for a prurient purpose – particularly photographs of children). Such legislation already exists in a number of jurisdictions.
- If the issues raised in the discussion paper were to be dealt with by the enactment of broad restrictions on either the taking or display of unauthorised photographs (which we would argue is an overly restrictive means of addressing a fairly isolated issue) then an exemption for the media would be necessary to ensure that such regulation did not unduly hamper the freedom of the media, particularly in reporting news and current affairs.

Inappropriate to regulate the “taking” of photographs

Free TV welcomes comments in the Discussion Paper that a requirement that photographs can only be taken with consent would be inconsistent with a free and open society.

As recognised by the Committee, any general restriction on the taking of photographs would severely impact upon the ability of the media to capture and impart visual information. There are many significant circumstances in which it would not be possible for consent to be obtained by the media prior to taking a photograph, including where multiple individuals are captured in footage of a general scene (such as a sporting crowd or shot of a particular building or landscape) and circumstances where subjects would withhold consent because a photograph may evidence some illicit or improper conduct.

In addition to the unwieldy impact on the media, any general regulation of the taking of photographs would require a vast array of carve outs and exemptions in order to allow for the overwhelming number of situations in which people take photographs of others in circumstances that are non-problematic (such as tourists taking photographs of a streetscape or a family photograph taken in a public place where strangers may appear in the background). A consequence of this, as recognised by the Discussion Paper, is that any general regulation regarding the taking of photographs of people without consent would require so many exceptions that it would be likely to be ineffective and unenforceable.

If the Committee did consider enacting any form of general regulation in relation to the taking of unauthorised photographs Free TV would submit that a media exemption should be included in any such legislation, to allow for all material captured in the course of legitimate

broadcast activities. The Press Council has suggested that such an exemption could be drafted along the lines of the media exemption under the Federal Privacy Act. However, for the purpose of television, such an exemption may not be sufficiently broad to capture all circumstances in which unauthorised footage of a person could be taken and displayed.

In particular, Free TV would request that the media exemption should not be limited to filming undertaken 'in the course of journalism', to ensure that the exemption is broad enough to capture material such as people visible in footage of a public place that might be taken for a travel show or other 'infotainment' program, comedy, or drama program.

Free TV supports the view of the Press Council that a media exemption is required and that a carve out for 'public interest' would not be sufficient to enable the media to operate effectively, as many photographs, in isolation and at the time they are taken, would not necessarily be defensible under a public interest test (such as the famous photograph of a young man dancing in the street on VP day).

Free TV members are regulated by the Australian Communications and Media Authority ("ACMA") in accordance with legislative licence conditions in Schedule 2 of the Broadcasting Services Act and the Commercial Television Industry Code of Practice. The Code contains specific provisions in relation to privacy, including detailed requirements in relation to protecting the privacy interests of children. ACMA has also recently published detailed guidelines on these privacy requirements. Therefore, the use of unauthorised photographs by Free TV members is already appropriately regulated.

Existing regulation

The Discussion Paper outlines a number of existing regulations that already restrict the taking of unauthorised photographs, such as regulation of the use of surveillance devices, filming for prurient purposes, offensive use of an internet service and stalking.

To the extent that specific gaps are identified, Free TV would support the Committee in recommendations which ensure that all jurisdictions have appropriate legislation to deal specifically and in a targeted manner with clearly harmful activities, such as "upskirting", unauthorised filming of particular intimate activities (such as using the toilet or showering) or using unauthorised photographs for the purpose of sexual gratification.

National Classification Scheme

As outlined in the Discussion Paper, the National Classification Scheme and the online content provisions under the Broadcasting Services Act 1992 do provide an established system of identifying and removing certain 'prohibited content' from the internet. Under this scheme ACMA can issue internet content hosts with take-down notices in relation to content that is hosted in Australia which:

- Would be classified R18+ and is not subject to a restricted assess system; or
- Would be classified RC or X.

Therefore, to the extent that unauthorised photographs placed on the Internet were sexually explicit, ACMA would be able require their removal, if the material fell within the above categories of 'prohibited content'.

This 'take down' power could capture circumstances where otherwise 'innocent' images of children where placed on a site in conjunction with other text or images that sexualised the content. However, as is noted in the Discussion Paper, in determining whether particular material fell within the categories of 'prohibited content' the Classification Board would only take into account that content that was visually apparent with the image of the unauthorised photograph – 'linked' content would not be taken into account. The example given in the

Discussion Paper is that an innocent photograph of a child with a link titled 'sex with boys pics' might be classified RC and therefore could be subject to a take-down notice. However, if the same photograph was on a webpage with a link simply titled 'more pics' (which was actually a link to a website containing child pornography) the Classification Board would not take into account the content on the linked pages.

However, while the example above may appear to be anomalous, Free TV does not believe it would be appropriate to amend the Classification Scheme or the Broadcasting Service Act to specifically alter this result.

While there may be circumstances in which the National Classification Scheme is able to effect the removal of unauthorised photographs from a website, the purpose of the classification system is to provide the public with information about the likely impact of material and to protect people from exposure to offensive or harmful material. It is not a function of the Classification System to regulate privacy or to control the unauthorised use someone's image.

In addition, to take into account the content on linked sites in assessing the classification of a particular web page would have impacts across the classification system that would be disproportionate to the isolated incidents giving rise to the Discussion Paper.

Free TV does not believe the Classification System is an appropriate means to address the use of images which are not in themselves sexually explicit or offensive and which are not used specifically in an explicit or offensive context.

Free TV appreciates the opportunity to comment of the issues raised in this Discussion Paper and looks forward to working with the Committee to ensure that the outcomes of this inquiry strike an appropriate balance between privacy and freedom of the media.

FREE TV AUSTRALIA

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