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29 January 2007

Associate Professor Leslie McCrimmon
Commissioner
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Mr McCrimmon

Review of the Privacy Act 1988: Issues Paper 31

Free TV Australia (**Free TV**) represents all free-to-air commercial television broadcasters in Australia. We thank the Commission for the opportunity to comment on the review of the Privacy Act 1988 (**Privacy Act**). The submissions set out in this letter represent the views of all our members.

Executive Summary

Free TV notes views expressed by stakeholders that:

- the media exemption provided for in the current Privacy Act is too broad and requires reconsideration;
- the Privacy Commissioner should have the power to determine the adequacy of privacy standards developed by the media;
- the Australian Communications and Media Authority (ACMA) should be required to consult with the Privacy Commissioner when developing Privacy Codes; and
- current enforcement mechanisms for dealing with privacy breaches by the media are inadequate.

Free TV disagrees with these views. In Free TV's view the media privacy regime currently in place provides effective safeguard for the protection of private rights and interests and strikes an appropriate balance between these rights and the fundamental rights of freedom of expression and the need for free flow of information on matters of public concern. In Free TV's experience, the current framework is effective and working well.

The current media privacy framework: why it is effective

Under section 7B of the Privacy Act acts and practices engaged in by media organisations in the course of journalism are exempt from the operation of the Act provided that the organisation is publicly committed to observe published standards that deal with privacy in the media context.

The provision of the media exemption appropriately recognises:

- the vital role played by the media in informing the public about matters of public interest;
- that the Privacy Act is aimed at data protection and is not appropriately designed to address issues of privacy and the media; and
- that issues of privacy and the media are already appropriately governed by a range of Federal and State laws and industry codes of practice.

Australian media are subject to a range of Federal and State laws which provide protection against inappropriate or unfair means of gathering or disclosing personal information and images. These include the laws of trespass, nuisance, breach of confidence, malicious falsehood, contempt, the use of listening devices and the myriad of laws restricting reporting of specific matters such as national security, adoption, juries and particular court proceedings.

Broadcast media are subject to further privacy requirements under their industry codes of practice. The industry codes of practice are subject to public consultation and review and can only be registered when the Australian Communications and Media Authority is satisfied that community safeguards and expectations have been addressed.

Free TV's members are regulated by the Commercial Television Industry Code of Practice, which contains extensive provisions in relation to privacy. In particular, clause 4.3 of the Code provides that in broadcasting news and current affairs programs, licensees:

- 4.3.3 should have appropriate regard to the feelings of relatives and viewers when including images of dead or seriously wounded people. Images of that kind which may seriously stress or offend a substantial number of viewers should be displayed only when there is an identifiable public interest reason for doing so;
- 4.3.5 must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast;
- 4.3.5.1 for the purpose of this clause 4.3.5, licensees must exercise special care before using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child. The consent of a parent or guardian should be obtained before naming or visually identifying a child in a report on a criminal matter involving a child or a member of a child's immediate family, or a report which discloses

sensitive information concerning the health or welfare of a child, unless there are exceptional circumstances or an identifiable public interest reason not to do so;

- 4.3.6 must exercise sensitivity in broadcasting images of or interviews with bereaved relatives and survivors or witnesses of traumatic incidents;
- 4.3.7 should avoid unfairly identifying a single person or business when commenting on the behaviour of a group of persons or businesses;
- 4.3.8 must take all reasonable steps to ensure that murder and accident victims are not identified directly or, where practicable, indirectly before their immediate families are notified by the authorities.
- 4.3.9 should broadcast reports of suicide or attempted suicide only where there is an identifiable public interest reason to do so, and should exclude any detailed description of the method used. The report must be straightforward and must not include graphic details of images, or glamourise suicide in any way.

There are similar provisions in relation to privacy which govern the public broadcasters, commercial radio and subscription television.

Unlike the provisions of the Privacy Act, which are aimed at data protection, the provisions of the various industry codes of practice are specifically adapted to addressing issues of privacy in the media context.

These provisions are overseen and administered by a federal regulator that has specific knowledge and understanding of the media industry. They are, together with all provisions of the various industry codes, subject to public consultation and review and can only be registered when the ACMA is satisfied that community safeguards and expectations have been met. The codes play an important role in informing the public about what to expect from the media and instructing journalists on what is expected from them when dealing with sensitive situations. As noted in the Issues Paper, journalists are also subject to privacy requirements through the Journalists' Code of Ethics.

The co-regulatory scheme sets out a specific complaints process for matters covered by the Commercial Television Industry Code of Practice. This provides a quick and effective mechanism by which public concerns about code breaches can be addressed. At first instance written complaints are directed to the relevant broadcaster. A substantive written response must be provided within 30 working days. Where complaints disclose a possible breach of a privacy requirement, or any other code requirement, the relevant broadcaster will act on the complaint and take action to address the issue. Where the broadcaster is satisfied the complaint does not disclose a breach of the Code, it will respond explaining why that is the case. If the complainant is not satisfied with the explanation it may refer the matter to the ACMA for investigation and, if necessary, appropriate action. Where the ACMA determines that a breach of the Code has occurred it will take action to ensure that broadcasters remedy the breach and/or put in place procedures to ensure that it does not recur. It may also impose conditions on a broadcaster's licence. Breaching a

licence condition is a serious matter and can result in the imposition of fines and/or suspension/cancellation of a broadcaster's licence.

Free TV members are sensitive to privacy concerns and consider and weigh up the interest of the individual concerned before deciding to broadcast a story. All commercial television stations have agreed by their adoption of the Code, that certain private or personal matters should only be broadcast where it is in the public interest to do so, or where it would not cause undue distress to victims' families.

The effectiveness of the current co-regulatory media privacy framework in ensuring sensitivity to privacy concerns is evidenced by the low number of privacy related complaints that commercial television broadcasters receive. In the period 1 October 2003 to 30 June 2006, 42 privacy related complaints were lodged with commercial television broadcasters representing approximately 1.5% of all complaints.

Many of these were referred to the ABA/ACMA for consideration. The ABA/ACMA conducted 18 investigations representing approximately 9.1% of all commercial television investigations. 3 investigations resulted in breach findings representing approximately 5.2% of all breaches.

It is also relevant to note, as discussed in the Issues Paper, that the Office of the Privacy Commissioner (OPC) has received very few inquiries and complaints about media organisations. In Free TV's view this indicates that the public is generally satisfied with the treatment of privacy in the media. We disagree that this indicates, as the Australian Privacy Foundation has suggested, a widespread view that the media is above the law. In Free TV's experience, and as is evidenced by Free TV's complaints reporting to the ACMA, the public has a keen interest in what is and is not shown on television and is vocal about raising its concerns with broadcasters and relevant regulators.

Compliance with privacy requirements in the commercial television industry is at a sophisticated level and is guided by a formal guideline issued by ACMA, "Privacy Guidelines for Broadcasters".

Free TV confirms its support for the broad framework of the Privacy Act. We think there is a proper place for regulation of privacy issues in the media, and that the current regulatory framework achieves the right balance most of the time.

Yours sincerely



Julie Flynn
Chief Executive Officer