



**Submission by
Free TV Australia**

Australian Communications and Media
Authority

Privacy guidelines for broadcasters

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EXECUTIVE SUMMARY

- The Commercial Television Industry Code of Practice strikes an important balance between the public's 'right to know' and respect for individual privacy. The Guidelines supplement the Code and provide guidance to Free TV and other broadcasters in relation to their privacy obligations under the Code.
- It is critical that the Guidelines:
 - are consistent with and do not extend the scope of broadcasters' obligations under the codes; and
 - provide clarification and accurately reflect the ACMA's interpretation of the various privacy protections under broadcasting codes of practice but do not, in doing so, encroach into a de facto policy-making exercise.
- Free TV is concerned that the drafting amendments to the Guidelines expand the scope of privacy protection under the Free TV Code in a number of respects, in particular by:
 - Emphasising the importance of privacy to the community above the importance of freedom of speech and the free flow of information;
 - Incorporating matters which are defined to be 'sensitive information' under the *Privacy Act 1988* as a definitive list of matters which would be captured as matters that relate to a person's 'personal or private affairs' under the Code;
 - Incorporating opinions in the scope of what is considered private, regardless of whether or not the opinion has any relationship with factual information about a person's personal or private affairs; and
 - Introducing a new requirement that material in the public domain must have come to be there 'legitimately'.
- The proposed changes to the Amended Guidelines have removed important procedural protections for broadcasters by:
 - Removing a statement indicating that a breach of code privacy provisions will be investigated by the ACMA after a code privacy complaint has first been made to a broadcaster; and
 - Replacing it with a statement that a breach of code privacy provisions may be investigated by the ACMA in the exercise of its discretion.
- Free TV is concerned to ensure that broadcasters continue to be afforded procedural fairness in the handling of investigations that relate to privacy matters. The Code is a co-regulatory instrument, and the process envisaged in s148 of the *Broadcasting Services Act 1992* (Cth) should remain the predominant mechanism by which ACMA investigations are initiated. Investigations conducted by the ACMA under the Code can result in serious consequences for broadcasters. Broadcasters should have a presumptive

opportunity to resolve matters with complainants prior to an investigative process undertaken by the ACMA. Free TV recommends that the Amended Guidelines be amended as follows:

- The Introduction section should address the critical role of broadcasters in balancing freedom of speech and the free flow of information in the public interest with individual privacy.
- Any examples of matters that may be considered to be private should be illustrative rather than definitive and the Guidelines should clarify that this will depend on the particular circumstances of the broadcast.
- The Guidelines should make clear that while opinions may be captured in exceptional circumstances, this will only be the case where they disclose information not in the public domain relating to a person's actual personal or private affairs (i.e. where they are based on facts).
- The references to a new requirement that material must not only be in the public domain but that it must be there 'legitimately', should be deleted.
- The guidelines should reinstate the procedural steps required prior to an investigation by the ACMA.

Introduction

Free TV welcomes the opportunity to comment on the ACMA's proposed update to the Privacy guidelines for broadcasters ("the Amended Guidelines").

Free TV Australia (Free TV) represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by more than 13 million Australians.

Free TV recognises that it is fundamentally important to strike an appropriate balance between the public's 'right to know' and respect for individual privacy. The existing Commercial Television Industry Code of Practice ("the Free TV Code") strikes this balance by prohibiting the broadcast of material which relates to a person's personal or private affairs, or which invades an individual's privacy, except in limited circumstances. It provides:

3.5 Privacy

3.5.1 In broadcasting a news Program or Current Affairs Program, a Licensee must not broadcast material relating to a person's personal or private affairs or which invades a person's privacy, unless:

- a) there is a public interest reason for the material to be broadcast; or*
- b) the person has provided implicit or explicit consent for the material to be broadcast (or in the case of a person under 16, a parent or guardian has given implicit or explicit consent).*

3.5.2 For the purposes of clause 3.5.1, a Licensee must exercise special care before broadcasting material relating to a Child's personal or private affairs in a report of a sensitive matter concerning the Child.

Note: The broadcast of material that is publicly available or recorded in a public place will generally not be material relating to a person's personal or private affairs or an invasion of privacy.

As part of the overall framework of privacy protections applicable to broadcasters, this provides a strong level of protection for individuals.

The ACMA's Privacy Guidelines for broadcasters ("the Guidelines") supplement the Code and provide further and more specific guidance to broadcasters in relation to their privacy obligations under the Code. They play an important role in providing broadcasters and the community with guidance in relation to how the ACMA will investigate a broadcasting privacy complaint and promote consistent decision-making.

It is critical that the Guidelines continue to provide clear and practical guidance to broadcasters in a manner that is consistent with the balance between the public's 'right to know' and respect for individual privacy that has been achieved in the Free TV Code.

In doing so, the Guidelines should clarify the approach adopted by the ACMA in interpreting clause 3.5.1 but should not operate to extend the obligation set out in the Code, create supplementary obligations or encroach into a policy making exercise.

Framing of the guidelines

1. General approach

Guidelines should not expand scope of Free TV Code

While Free TV is pleased that the ACMA has indicated it does not intend to change its approach to privacy matters through this update to the Guidelines,¹ Free TV is concerned that on the face of it, the Amended Guidelines purport to expand the scope of privacy protection under the Free TV Code in a number of respects (detailed below).

As set out on the ACMA's website, guidelines are intended to assist industry by giving practical guidance in relation to the ACMA's interpretation of the law.² They are subsidiary to the codes and should provide guidance and increase certainty in relation to interpretation of the codes. They are not policy in their own right, have not been subjected to the code registration process and should not increase the scope of obligations that exist under the law.

Free TV acknowledges that the guidelines apply to all broadcasting codes and therefore the wording needs to reflect this. However this should not be done in a manner that extends the obligations under any individual code.

For example, in outlining the general principle on page 2, the Amended Guidelines suggest that all codes protect the concept of 'private life', which is not the case and raises definitional issues around the scope of 'private life' being a term which is not used in the Free TV Code, or in the available jurisprudence on privacy more generally.

The privacy provision in the Code has two separate limbs which are clearly identified – either a) the broadcast of material relating to a person's personal or private affairs or b) the broadcast of material which invades a person's privacy. The introduction of a further consideration of whether there has been a broadcast of material relating to a person's "private life", or material that intrudes into their "private life" creates new elements to the test that do not logically proceed from an ordinary construction of clause 3.5.1.

It is by no means clear that the broadcast of material which invades a person's privacy equates to the broadcast of material which intrudes into their "private life". For example, in the age of social networking, individuals frequently publish online material about their "private life". If a broadcaster uses such material the ACMA may conclude there has been an intrusion into their private life, but whether there is an invasion into an individual's privacy is a different question. The importing of new terminology and new concepts into the codes by way of amendment to the Guidelines introduces uncertainty rather than providing practical guidance to broadcasters.

The Amended Guidelines should expressly acknowledge that each code contains its own privacy obligations, and that while the Guidelines provide guidance in relation to all of those obligations, they are not intended to increase their scope.

¹ Background information at <http://www.acma.gov.au/theACMA/update-of-the-acmas-privacy-guidelines-for-broadcasters>

² <http://www.acma.gov.au/theACMA/About/The-ACMA-story/Regulating/regulatory-guides-guidelines-limitations-on-control-acma>

Recommendations:

The Guidelines should be drafted in a manner that does not extend commercial free-to-air broadcasters' obligations under the Free TV Code.

The Guidelines should:

- remove the references to “private life”; and
- expressly acknowledge that while they provide guidance in relation to all broadcasting codes, they are not intended to increase the scope of those obligations.

2. The importance of privacy in the context of broadcasting

Balancing privacy with freedom of speech and the free flow of information

The Introduction section of the Amended Guidelines now states that:

“Privacy is a matter of enduring relevance to the community”.

Free TV is concerned that in framing the guidelines, the introduction should set out the importance of privacy specifically in the context of broadcasting and provide guidance in relation to how privacy protections should operate in that environment, rather than make more general comments about how the community views privacy.

In the context of broadcasting, Free TV's view is that the importance of privacy cannot be separated from the importance of freedom of speech and the free flow of information. Both are important public interests and neither is absolute. The challenge for broadcasters is to achieve a balance between the two in a fast-paced news and current affairs environment.

This was recognised in the ACMA's Contemporary Community Safeguards Report, which noted that while submissions showed support for safeguards relating to privacy, submissions also “stressed the fundamental importance of ensuring that there is an appropriate balance between respecting the privacy of individuals and the right of the public to be informed on matters of public importance, and the essential role which the ‘public interest’ test plays in this context”.³

These competing interests must be appropriately balanced and the guidelines should at the outset acknowledge that while privacy may be important to the community, the challenge for the media is not only to ensure that privacy is protected, but that it is protected appropriately so that freedom of speech is not inhibited.

Free TV notes that footnote 2 relies on data from 2011, which predates the CCSI inquiry. The Amended Guidelines should reflect the most recent and relevant data available.

Complaint numbers

Free TV's figures show that, from 2008 to 2013, privacy complaints represented just 3.2% of complaints overall received by broadcasters and from 2011 to 2013, privacy complaints represented just 1.8% of overall complaints received by broadcasters.⁴

³ ACMA, *Contemporary community safeguards inquiry Consolidated Report*, March 2014, 26

⁴ Statistics compiled by Free TV Australia based on complaints received per calendar year.

In 2015 privacy complaints represented 1.89% of overall complaints received and in 2014 1.68% of complaints received. Additionally, the 2014-15 Annual Report of the ACMA showed that, while there were a total of 1012 enquiries and written complaints about commercial, national and community broadcasters during 2014-15, there were only 3 breach findings relating to privacy by commercial television broadcasters, and only 3 non-breach findings. In 2013-14, there were no breach findings relating to privacy, and 5 non-breach findings.⁵

Further, during the most recent review of the Commercial Television Code of Practice (Code), of the 1467 submissions received overall, only seven commented on privacy matters. This represents just 0.5% of all submissions.

This data demonstrates that the public is generally satisfied with the treatment of privacy in the media, and that commercial free-to-air broadcasters are overwhelmingly compliant with the Code.

Recommendation: The Introduction section in the Amended Guidelines should address the importance of freedom of speech and the free flow of information and broadcasters' role in balancing these important freedoms with individual privacy.

Scope of privacy protection under the Free TV Code

There are a number of specific changes in the Amended Guidelines which appear to indicate a change in the ACMA's approach to privacy matters and to expand the obligations set out in the Free TV Code. These are set out below.

3. The concept of personal information and data privacy obligations

Examples of matters considered to be private

The Amended Guidelines provide that:

*"Some assistance can be obtained from having regard to the definitions of 'personal information' and 'sensitive information' (a subset of personal information) in the Privacy Act 1988 (Cwth)."*⁶

The Amended Guidelines also provide a list of matters which would be considered to be 'material relating to a person's personal or private affairs or private life', which mirror the definition of sensitive information under the Privacy Act.

Free TV is concerned that the ACMA is seeking to incorporate concepts taken from data privacy obligations under the Privacy Act, into the guidelines. By conflating the concept of data privacy in the Privacy Act and privacy under the Code, the guidelines appear to broaden the scope of the matters that are considered to relate to a person's personal or private affairs, therefore broadening the obligations under the Code.

Free TV's view is that while data privacy and the concept of privacy under the Free TV code may overlap in some circumstances, they are separate and distinct. Section 7B(4) of the Privacy Act specifically exempts from its operation, acts done and

⁵ ACMA Annual Report, 2014-2015; Statistics compiled by Free TV Australia based on complaints received per calendar year.

⁶ Amended Guidelines, 3.

practices engaged in by media organisations in the course of journalism. This exemption has been recognised to promote the public interest in freedom of expression and the free flow of information critical to the maintenance of a democratic society. It is aimed at ensuring an appropriate balance between the public interest in freedom of expression and the public interest in adequately safeguarding the handling of personal information.⁷

Free TV does not support amendment to the guidelines to incorporate the Privacy Act obligations that would apply if media organisations did not have the benefit of s7B(4). This would be contrary to the rationale behind giving media organisations the benefit of the exemption in the first place.

While Free TV acknowledges that clause 3.5 of the Code requires any matter that is considered by the ACMA to be private to first be weighed against the public interest test at 3.5.1(a) before a broadcaster will be found to be in breach, and while it may be useful to consider examples of matters that may be considered to be private, the wording of the guidelines suggests that all matters considered to be personal information under the Privacy Act would automatically be considered to be material relating to a person's personal or private affairs under the Code. This broadens the scope of the Code rather than providing guidance to its interpretation. The matters listed on page 4 should either be deleted or it should clearly state that these matters *may* be considered to be private depending on the circumstances which should be judged on a case by case basis.

Free TV notes that the current drafting will not be workable in the context of news or current affairs, and could give rise to unintended consequences, for example information in relation to a person's racial or ethnic origin may be obvious from a broadcast in some cases - such as where it can be assumed based on personal appearance or manner of dress. In such a case it would be illogical to conclude that the broadcast included material relating to a person's personal or private affairs. Similarly, while marital status might be considered personal information under the Privacy Act, the broadcast of an image of a person openly wearing a wedding ring should not be considered to disclose material relating to the person's personal or private affairs.

Free TV's view is that while the matters listed will likely be 'personal or private affairs' in some circumstances they should not automatically be considered to fall within the scope of 'personal or private affairs'. It is not simply a matter of determining that information is disclosed which falls within a particular category. What constitutes material relating to a person's personal or private affairs must be considered in light of all the particular circumstances, and cannot be determined in isolation from consideration of what is in the public domain or otherwise openly disclosed or observable.

<p>Recommendation: Any examples of matters that may be considered to be private should be illustrative rather than definitive. Whether or not a matter relates to a person's personal or private affairs in the context of a particular news or current affairs broadcast will depend on the circumstances of the relevant broadcast.</p>
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⁷ Revised Explanatory Memorandum, *Privacy Amendment (Private Sector) Bill 2000* (Cth), 4.

Opinions

The Amended Guidelines also provide:

“The material need not be factual and may include an opinion about a person whether or not it is true.”

As indicated above, Free TV is concerned that this also incorporates a concept from data privacy obligations under the Privacy Act into the Guidelines in a manner which extends the intention behind and scope of the obligations on broadcasters under the Free TV Code.

Clause 3.5.1 refers to the use of material “relating to” a person’s personal or private affairs. Material that can reasonably be considered to “relate to” a person should generally involve disclosures of facts that are specific, unequivocal and capable of independent verification. By their very nature, opinions are contestable and are presented as an expression of personal judgment – to the extent that they “relate to” a person, they relate as an expression of opinion and not as factual assertions. Accordingly, only in exceptional cases could an opinion about a person constitute a disclosure of personal or private information, or form the basis of a breach of the privacy obligation in the Code.

Free TV acknowledges that in limited circumstances, opinions may reveal information about a person’s personal or private affairs in contravention of the Free TV Code, for example if the opinion discloses private information from a person’s medical records, without a justifiable public interest purpose. However, for there to be a disclosure of personal or private *information* there must necessarily be a clearly identifiable assertion that discloses factual material about an individual’s actual personal affairs. Opinions which have no relationship to factual information about a person’s personal or private affairs should not fall within the scope of the Amended Guidelines. The newly added provision in the Amended Guidelines that: “The material need not be factual and may include an opinion about a person *whether or not it is true*” is misplaced. Opinions are often included in news and current affairs broadcasts. They are usually clearly framed as, and understood by the public to be opinions and not incontrovertible fact. If they are not based on facts, then it is difficult to see how they could be interpreted as disclosures of personal or private information. Unfounded opinions or false statements that damage a person’s reputation are the subject of defamation law. Free TV notes that defamation law is not an area of law that the ACMA considers to be within its remit.⁸

The appropriate manner of dealing with false statements is under defamation law. Broadening out the scope of the Code by incorporating opinions and unfounded opinions would stifle the free flow of information.

Recommendation: The sentence “*The material need not be factual and may include an opinion about a person whether or not it is true,*” should be deleted. Alternatively, it should be amended to make clear that opinions may be captured in exceptional circumstances, however this will only be the case where they are factual in nature and clearly relate to and involve the disclosure of a person’s actual personal or private affairs..

⁸ <http://www.acma.gov.au/Citizen/Take-action/Complaints/Broadcast-complaints/complaints-the-acma-does-not-handle>

4. Material legitimately in the public domain

Free TV is extremely concerned that the Amended Guidelines contain a new requirement that material in the public domain must have come to be there 'legitimately'.⁹

Material in the public domain has been understood by media organisations not to be an invasion of privacy. For example, the Free TV Code specifically provides the following note:¹⁰

Note: The broadcast of material that is publicly available or recorded in a public place will generally not be material relating to a person's personal or private affairs or an invasion of privacy.

While the ACMA's background material states that its intention is to "clarify that material may invade privacy where its nature suggests it has been put into the public domain without the affected person's knowledge or consent", the revised section of the Amended Guidelines at page 5 goes much further than this by incorporating the concept of legitimacy as a separate test.

The breadth of this new test may also capture a range of material where it is not at all obvious to the media organisation by the nature of the material that the affected person may not have known or consented. The concept of legitimacy is subjective and imprecise and appears to refer only to how the material came to be in the public domain rather than the nature of the material itself. It could therefore apply to any material regardless of its nature and however inoffensive.

Furthermore, it is unclear how this new test would operate in practice or whether it would impose additional obligations on media organisations to check the source of the relevant content. It may also have implications for how the Amended Guidelines fit with State and Territory laws such as legislation in relation to surveillance devices, which is different in each jurisdiction. This is highly impractical in a fast paced news environment and goes beyond the stated intention of the ACMA. The law already provides a wide range of remedies for persons who consider that personal information has come into the public domain illegitimately, and penalties for unauthorised disclosures, including actions for breach of confidence, powers to courts to make suppression orders and grant injunctions, and legislation dealing with computer hacking, surveillance devices and the communication of images and information obtained through the use of such devices.

Free TV's view is that the intention of the ACMA may be more precisely met by removing the concept of 'legitimacy' from the Amended Guidelines and instead including a specific example of how it might apply the privacy provisions in the codes with respect to material which by its nature makes it clear that the affected person is unaware of it. The example should also make clear that material will only fall into this category if it is inherently offensive, such as revenge porn.

⁹ Amended Guidelines, 5.

¹⁰ Free TV Code, 10.

Recommendation: The references to material in the public domain being required to be there 'legitimately' should be deleted from the section entitled 'Investigation steps', the section entitled 'Material legitimately in the public domain' and from Figure 1. The Amended Guidelines should instead include an example of material which by its nature may be considered to breach the privacy codes, for example, revenge porn.

Procedural fairness and other matters

5. The investigation process

The Guidelines previously referred to the fact that complaints should be directed to the relevant licensee in the first instance. This wording has been removed and replaced with a general statement that the ACMA may investigate privacy breaches at its discretion.

The co-regulatory framework of the Code is clearly stated in the Code and BSA. Section 148 of the BSA establishes a procedure in which complaints can be resolved by broadcasters in the first instance. Free TV is concerned that any approach which emphasises the ACMA's ability to choose to investigate privacy matters of its own volition, is contrary to the co-regulatory processes contemplated by the Code and the Act and is counter to the application of procedural fairness.

Free TV is concerned that the ACMA continues to observe procedural fairness in the handling of privacy matters. The Code is a co-regulatory instrument, and the process envisaged in s148 of the Broadcasting Services Act 1992 (Cth) should remain the predominant mechanism by which ACMA investigations are initiated. Investigations conducted by the ACMA under the Code can involve serious consequences for broadcasters. As a matter of procedural fairness, broadcasters should have a presumptive opportunity to resolve matters with complainants prior to an investigative process undertaken by the ACMA. The ACMA's discretion to instigate an investigation should only be used sparingly in circumstances where no member of the community has felt strongly enough about a privacy matter to raise it with a broadcaster and, if unresolved, refer it to the ACMA.

Free TV is of the view that for accuracy and procedural fairness, the detail of this process, including the fact that complaints should first be directed to the licensee under s 148 of the BSA, should be reinserted in the Amended Guidelines.

Recommendation: The Amended Guidelines should clarify that complaints should first be directed to the licensee and reinstate the procedural steps required prior to an investigation by the ACMA as set out in the previous Guidelines.

6. Consent to Interviews

The Amended Guidelines place an undue emphasis on what consent does *not* amount to, without clarity that if consent is given, then the starting premise is that the privacy protections do not apply.

The Amended Guidelines state that:

"Consent to an interview concerning an individual's personal affairs or private life does not necessarily amount to consent to the use in a broadcast of additional personal information or material intruding upon their seclusion. This

includes details not disclosed in the interview or related footage that has been taken without consent or for a different purpose.”

On one view, it seems to be saying that consent only applies to material for which consent is given. Care should be taken in attempting to proscribe the scope of consent in such a general way, as consideration of the presence, absence or scope of consent will naturally turn on the circumstances of each case. If a person consents to the disclosure of certain information, then in doing so they may well legitimately “open the door” to other matters not expressly consented to in the interview, but impliedly consented to and/or necessary for the proper reporting of a matter.

This statement also fails to clarify that the mere inclusion of additional information or footage taken without consent will not automatically breach privacy protections, but may do, where it involves the disclosure of additional material not in the public domain, without public interest justification.

For similar reasons, the statement “*If the affected person’s consent to broadcast is obtained by deception, privacy protections will apply*” should be “privacy protections are likely to apply.” If the nature and circumstances of the deception is sufficient to invalidate consent, then there will be an absence of consent (and so privacy protections will apply). However, it may be that any deception was justified by the circumstances and/or was unrelated to the validity of the consent.

For example, if a person is trying to scam money by communicating via an online dating site with a person whose identity they do not know (but who happens to be a journalist undercover), and in the course of that communication the person voluntarily discloses personal information (eg. about their apparent financial situation) to the complete stranger (ie. journalist), it could not be reasonable for that person to say later that they did not consent to the disclosure of that information where there was clearly a public interest in exposing the scam.

Recommendation: The Amended Guidelines should clarify that where consent is given, the privacy protections will not apply.

They should delete the statement “*Consent to an interview concerning an individual’s personal affairs or private life does not necessarily amount to consent to the use in a broadcast of additional personal information or material intruding upon their seclusion. This includes details not disclosed in the interview or related footage that has been taken without consent or for a different purpose,*” or otherwise include “where it discloses additional private information” at the end.

The statement ““*If the affected person’s consent to broadcast is obtained by deception, privacy protections **will apply***” should be replaced with the words “may apply”.

7. Case Studies

The Amended Guidelines incorporate new case studies 7, 10 and 11. Both Case Study 7 and Case Study 11 are based on unpublished ACMA Investigation Reports. Free TV is concerned that the use of case studies that are based on unpublished material is inconsistent with the ACMA’s earlier reasons for non-publication.

Each of the case studies appended to the existing Guidelines are each referable to a specified published investigation report for which, presumably, the ACMA considered it unnecessary to constrain publication. Free TV is of the view that case studies should

continue to be based on investigation reports for which the full reasons have been published and made available.

Although the case studies have been anonymised, it is still possible to ascertain the subject matter to which they relate. Free TV is concerned that the publication of case study information in the Guidelines acts as a de facto form of publication in circumstances where the ACMA has already determined publication to be inappropriate.

Recommendation: Case studies 7 and 11 should be removed from the Amended Guidelines.

8. Investigation steps

The Guidelines have previously indicated that when investigating an alleged breach of a code privacy provision, the ACMA will consider the elements of a breach including whether the broadcast of material disclosed personal information or intruded upon the person's seclusion 'in more than a fleeting way'.¹¹ This wording has been removed from the Amended Guidelines.

Recommendation: The words 'in more than a fleeting way' should be reinserted in the section on Investigation steps at page 2.

¹¹ Guidelines, 2011.