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Our ref:A11/0395
Your ref:

Dear Ms Rice

Re: Review of the ACMA Privacy Guidelines for Broadcasters

Thankyou for the opportunity to provide a submission on the ACMA Privacy Guidelines for Broadcasters and for the extended period of time to provide the submission.

1. Firstly I suggest that the ACMA draft separate Guidelines under the various Codes made under the *Broadcasting Services Act 1992* (Cth). The language used to describe the means by which privacy will be protected by broadcasters differs from Code to Code with the unfortunate consequence that the standard of privacy protection differs according to the type of the broadcaster. It seems that the Guidelines are an attempt to harmonise or regularise the language and the privacy standard across the Codes. In my view this is an ambitious undertaking because as the case studies attached to the draft and the 2005 Guidelines show, the ACMA decisions are based on the language used in the Codes. An example of this is the different language used to describe the means by which privacy will be protected. The ABC Code of Practice 2011 prohibits the broadcast of information which constitutes an 'Intrusion into a person's private life without consent' unless the intrusion is 'proportionate' and it can be 'justified in the public interest', while the Commercial Television Code of Practice 2010 prohibits the broadcasting of information 'relating to a persons private life or private affairs, or which invades an individual's privacy' unless there is 'an identifiable public interest reason' for doing so¹. In the latter case the term 'intrusion into private life' is not used but the draft Guideline includes it as one of the elements of the protection of privacy. The other element is protection from the 'disclosure of person information'. The Commercial Television Code of Practice does not use this term but instead refers to the 'use of material relating to a person's personal or private affairs'. It is not clear from the Guidelines whether 'use' excludes or includes pre-broadcast matters.

¹ I also note that there is no 'proportionality' test in the Commercial Television Code of Practice.

While such matters may appear to be mere technicalities, the inconsistent use of terminology in Guidance material could result in time-wasting, self serving disputation and could ultimately be used by broadcasters as a means of avoiding responsibility for privacy complaints especially if the Guidelines have piecemeal reference to privacy-related case law. Broadcaster-specific Guidelines would ideally be limited to using language appearing in the respective Codes and as such would avoid arguments about the inconsistent use of language and its effect on decision-making.

The second reason for drafting 'broadcaster specific' Guidelines is that the identification threshold will vary from medium to medium because of the means of transmission of information. For instance an image of an individual shown on television is immediately recognisable to the family, friends and colleagues of an individual, whereas the broadcast of their voice over the radio might not be recognisable without other information.

2. The Guidelines do not appear to canvas the exception in the Commercial Television Code of Practice regarding children, which provides that consent to broadcasting information about children is not required if 'the public interest' or 'exceptional circumstances' exist². I suggest that Commercial Television broadcasters should have clear guidance about the very limited circumstances in which this exception should apply, particularly given the broad appeal of commercial television, and I suggest that the public interest and exceptional circumstances tests should contain a very high threshold given the potential for harm to a child which could arise following such a broadcast. As you may recall from our discussions on this issue, the broadcast of such footage (eg: the male orphan of the Christmas Island shipwreck tragedy from December 2010 grieving at the interment of his parents and other family members), may be such an example whereby if the treatment was sensitively edited the exceptional circumstances and high public interest threshold might be achieved.

3. In my view the opening statement in the draft Guideline and in the 2005 Guideline sets a defensive tone. I suggest that in place of this statement there should be a short description about the application of privacy law to broadcasters, along the lines of the following paragraph in the 2005 Guideline:

Section 7B(4) of the Privacy Act provides an exemption for 'acts and practices engaged in by media organisations in the course of journalism'. A media organisation is an organisation whose activities consist of the collection, preparation and dissemination of news, current affairs, information or documentaries.

A media organisation can claim the exemption if it is publicly committed to observing written standards 'which deal with privacy in the context of the activities of a media organisation.' Such standards can be published by the organisation itself or a representative body.

...

² At 4.3.5.2

In respect of their *non journalistic* activities, media organisations are subject to the National Privacy Principles and reference should be made to each media organisation's privacy policy. Generally speaking this will provide information on how the organisation handles personal information *outside of* its journalistic activities.

If the ACMA decides to continue with a single Guideline to cover the various codes of Practice for Broadcasters I suggest that more effort may be required to sufficiently harmonise the terms so that any ACMA investigation of complaints and subsequent decisions, can be adjudicated in an equitable and consistent manner when applying different facts across the different types of broadcast spectrum.

4. I note that both the 2005 and the draft Guidelines append case studies to be read conjunction with the Guidelines. I suggest that it would be more workable/practical to include hypothetical scenarios based on those case studies, perhaps appearing near the body of the section to which they refer which could offer more than one way of approaching a particular scenario based on slightly different facts. This would be of particular value where those scenarios identified the different standards applicable to the various media.

5. While I recognise that the practical application of a privacy standard in broadcasting is affected by the immediacy of the medium I suggest hat the Guidelines should not be viewed a tool of post facto exculpation, but rather as real-time check and balance tool to be applied prior to broadcast, even if it is limited to the editing phase of production.

6. Following are suggestions relating to a number of technical matters in the draft Guidelines which concern privacy:

- Given that stated purpose of the Guidelines is to 'assist broadcasters to better understand their privacy obligations under the various broadcasting codes' I suggest that the section entitled Investigation steps should be moved from the first page to the final section so that it is clear that broadcasters should firstly inform themselves about the applicable standards, the elements of the possible exceptions to the standard. I suggest that the final sections should deal with first instance complaints to the broadcaster, providing advice about investigation and the possible means of resolution followed by information about the means by which the ACMA will deal with matters which have not been resolved at first instance.
- The section entitled Identifiable person states that 'For the Codes to be breached a particular person must be identifiable from the broadcast and that this person could be 'an everyday citizen'. Not all Australian residents are citizens and because this term has a particular meaning at law, it could be interpreted narrowly to exclude individuals who are

permanent residents or visitors to Australia. I suggest that the second sentence be deleted or that it should state that it is not a requirement that the identifiable person is a public figure.

- I suggest that for ease of reading that the sections dealing with Seclusion, Consent, Children and vulnerable people and the Public Interest be re-drafted so that they open with the general concept or prohibition, then expand upon the concept/prohibition and then canvass the possible exceptions to the concept. This would enable the reader to understand that there is a general rule stemming from the applicable Code and that there are elements to the rule and finally that there are certain exceptions to the rule.
- I commend the use of the flow chart to support these sections but in my view in addition the flow chart should reference the various Codes and the relevant sections of the Code.
- The part of the Public Interest section which deals with public figures advises that the broadcast of information about such individuals may be in the public interest if among other things the information relates to 'the person's capacity to carry out his or her duties' or 'conduct or behaviour that contradicts the person's stated position on an issue'. I suggest that there should be a limitation on this element to the extent that the use of such information should be directly related to their public role.

Finally I note the statement that 'not all matters that interest the public are in the public interest'. This is to my mind the keystone to how decisions leading to the continued investigation of a matter of preliminary interest, and escalation of such investigation (including invasive type techniques), should be appropriately managed prior to any decision to broadcast. It is the potential to invade privacy by actions on location or in the field, which are part of the broader process leading to privacy issues associated with the broadcast of that material.

I hope these comments are of assistance to you. If you have any further queries regarding this letter please contact Ms Jenner at of my Office on (02) 8019 1603.

Yours sincerely

John McAteer
Acting Privacy Commissioner
Information & Privacy Commission