



**ASTRA submission to the Australian Communications and Media Authority  
paper 'Review of the Privacy Guidelines for broadcasters'**

**7 October 2011**

## Introduction

The Australian Subscription Television and Radio Association (**ASTRA**) welcomes the opportunity to comment on the Australian Communications and Media Authority (**ACMA**) paper 'Review of the Privacy Guidelines for Broadcasters'.

## 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.

The subscription television (STV) 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.

## Privacy and Co-regulation

ASTRA supports an industry co-regulatory regime, which ensures appropriate protections are in place without imposing unnecessary financial or operational burdens on industry. In addition, co-regulatory schemes provide industry with flexibility to respond to community standards while minimising the burden on government.

The *Broadcasting Services Act 1992*, allows for provisions relating to privacy specific to the subscription television broadcasting industry to be set out in the Subscription Broadcast Television Codes of Practice (ASTRA Codes of Practice). The ASTRA Codes of Practice state 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"<sup>1</sup>.*

The subscription television industry is committed to the ASTRA Codes of Practice and takes its obligations relating to privacy very seriously. ASTRA believes that the current system works well and notes that the ACMA has never found a breach of the Codes of Practice in relation to privacy.

## Proposed Amendments to the Privacy Guidelines

ASTRA notes that *"the obligations concerning the use of private information are clear but recent decisions have suggested that much better guidance is required around those concerning invasions of privacy"<sup>2</sup>.*

While the draft revised guidelines are similar to the Guidelines currently in use, ASTRA is concerned that some changes could have the effect of widening the scope of the ACMA's approach to invasion of privacy:

- the general principle is now based on disclosing personal information or intruding on a person's "seclusion", which could include activities carried out in a public place; and
- the scope of 'public interest' appears to have been narrowed.

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<sup>1</sup> Subscription Broadcast Television Code of Practice, cl 2.2(c).

<sup>2</sup> ACMA, Reviewed Privacy Guidelines for Broadcasters', [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_410122](http://www.acma.gov.au/WEB/STANDARD/pc=PC_410122)

## **“Seclusion”**

ASTRA notes the inclusion of the concept of a person’s seclusion arises from concerns that the existing Guidelines do not adequately deal with material that invades a person’s privacy. While ASTRA agrees that care should be taken by broadcasters in relation to activities where a person may have a reasonable expectation that his or her activities would not be observed and overheard by others, ASTRA would be concerned if the ACMA’s implementation of this more explicit new provision had a chilling effect on the reporting on events which occur in public and for which there would be a legitimate public interest in the event being reported.

## **The Public Interest**

It is through the media that Australians are kept informed of issues that are important to them. The existing guidelines recognise the general principle that it is consideration of the public interest that strikes the balance between the privacy of individuals and the media’s role in informing the public. However, explicit recognition of the public interest has been removed from general principles as set out in the revised guidelines. ASTRA submits that a general principle under the revised guidelines should expressly refer to and recognise the importance of the public interest, which is of critical importance in a broadcasting context.

In order to investigate a complaint relating to an invasion of privacy, the ACMA is required to determine whether an issue is important to the public. ASTRA notes the findings of the *‘Community Research into Broadcasting and Media Privacy’* reaffirmed the need for privacy issues to be assessed on a case-by-case basis:

*“In keeping with the ACMA’s current practices, the research confirms that each intrusion of privacy complaint against broadcasters be assessed on a case-by-case basis as this is also how the research participants considered privacy issues”<sup>3</sup>*

ASTRA supports the continued assessment of privacy issues on a case-by-case basis.

## **“Not all matters that interest the public are in the public interest”**

ASTRA agrees with the principle in the draft guidelines that *‘not all matters that interest the public are in the public interest’*. However, while many matters may be unequivocally in the public interest, there are circumstances in which it may not be as apparent. In these cases, it is unclear from the draft guidelines what criteria or factors the ACMA must take into account when making its assessment. ASTRA is concerned that this process may lack transparency and recommends that the ACMA set out a clear methodology for deciding whether a matter is in the public interest.

ASTRA also notes that the existing Guidelines state that:

*“The use of private material without consent may be warranted if there is an identifiable public interest in the material being broadcast.”*

The corresponding passage in the revised guidelines state that:

*“The use of material in a broadcast will not be an invasion of privacy if there is a clear and identifiable link between it and the public interest at the time of broadcast”.*

‘An identifiable public interest reason’ is the language used in the relevant clause of the ASTRA Codes of Practice. ASTRA submits that the new form of words amount to a narrowing of the scope for public interest justification of the broadcast of material that could otherwise be regarded as “private material”.

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<sup>3</sup> Gagg, K & Jennings A, Community Research into Broadcasting and Media Privacy, August 2011, GfK bluemoon, p16

ASTRA submits that the existing Guidelines have generally worked well to balance privacy concerns with public interest considerations and contends that, to avoid confusion and for consistency with the ASTRA Codes of Practice, the revised guidelines should refer to 'an identifiable public interest' as per the existing Guidelines.

### ***Other Issues***

#### *Investigative Steps*

The investigatory steps under the existing general principle require the ACMA to investigate:

- (1) whether material relating to a person's private affairs have been broadcast, and if so, then
- (2) whether that broadcast is warranted in the public interest.

This approach is consistent with the relevant provision of the ASTRA Codes of Practice.

However, under the revised guidelines the key tests are:

- (1) whether a person was identifiable from a broadcast and
- (2) whether the broadcast disclosed personal information or intruded on the person's seclusion.

If so '*there will be a potential breach of code privacy provisions*', and it is only once this prima facie breach has been established that the "defences" to a potential breach (e.g. consent; whether the material was already in the public domain; and the public interest test), arise.

ASTRA submits that the investigative steps and proposed tests under the revised guidelines are not as clearly consistent with the relevant provision of the ASTRA Codes of Practice as the existing Guidelines.

#### *Children and vulnerable people*

With respect to children and vulnerable people, the draft revised guidelines state that '*a parent or guardian's consent should always be obtained expressly before using material that invades a child's privacy*'. While there is a corresponding provision in the Commercial Television Industry Codes of Practice, it is not in the ASTRA Codes of Practice and it is not clear how such a provision might work in conjunction with the public interest test. ASTRA contends that this ambiguity could be an issue for broadcasters.

#### *Material in the public domain*

The revised guidelines state that '*using material that is already in the public domain will generally not be an invasion of privacy*'. ASTRA submits that the inclusion of the word 'generally' is not helpful and would recommend that if there are to be exceptions to the general principle, then those exceptions should be clear and specifically listed.