

10 December 2007

The Executive Director
Australian Law Reform Commission
GPO Box 3798
SYDNEY NSW 2001



To whom it may concern,

**RE: Australian Law Reform Commission's 'Review of Australian Privacy Law'
Discussion Paper 72: Submission by Communications Alliance**

Thank you for providing us with the opportunity to comment on the Australian Law Reform Commission's 'Review of Australian Privacy Law' Discussion Paper 72. Our comments are set out below.

Please let us know if you have any queries regarding these comments.

Yours sincerely,

Anne Hurley
Chief Executive Officer
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Australian Law Reform Commission's
'Review of Australian Privacy Law' Discussion
Paper 72
Submission by Communications Alliance

REVIEW OF AUSTRALIAN PRIVACY LAW DISCUSSION PAPER 72

COMMUNICATIONS ALLIANCE SUBMISSION

Communications Alliance is pleased to have this opportunity to provide comments on the Australian Law Reform Commission's (ALRC) Discussion Paper 72, *Review of Australian Privacy Law*.

Communications Alliance represents over 100 members in the Australian telecommunications sector. Our membership includes telecommunications carriers and carriage service providers, both large and small, internet service providers, equipment manufacturers and organisations with close relationships to the sector, such as the Department of Defence. Our mission is to promote the growth of the Australian communications sector and protect consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance.

1. Scope

This submission is in addition to our preliminary response to the ALRC's Issues Papers 31 and 32 – Review of Privacy. It may be treated as non-confidential.

Communications Alliance will respond to privacy issues which have a general impact on the telecommunications sector and will leave it to its industry members to respond to the more specific proposals and questions raised throughout the paper.

2. Proposal 7-1

Communications Alliance supports the proposal that the *Privacy Act* be made technology neutral to allow it to be flexible enough to take account of technological change. This has been the approach taken by Communications Alliance when drafting industry codes and standards and is also the approach taken in the *Telecommunications Act 1997 (Cth)* and has proven to be generally effective to date.

3. Proposal 7-2

Our industry members are concerned that they may be presented with privacy and security legislation for relevant technologies into which they have had little input. The consequence to our industry members could be far-reaching and a "one size fits all" approach which may introduce inequities, particularly in relation to smaller organisations which would need to be carefully considered.

Given the implications of the legislative imposition of standards on our industry members, more rather than less consultation is generally expected in the telecommunications sector. This is particularly the case as the determination will be the responsibility of the Attorney-General, rather than the Minister for Broadband, Communications and the Digital Economy.

It is our submission that a light hand should be used if considering creating more legislative imposition on an already heavily regulated sector. Australia has a well developed and accepted system of self-regulation in the telecommunications sector

which Parliament has said should be given the “greatest practicable use” (s 4: *Telecommunications Act*).

4. Proposal 7-5

Communications Alliances’ members would be very concerned if the Office of the Privacy Commissioner developed guidelines in relation to technologies that impact on privacy without extensive prior consultation with the communications industry. Guidelines developed in isolation by the OPC could lead to increased costs to Australian residential and business users of telecommunications services, delay in cancellation of new services or products, and supply of an increased number of services from outside Australia, with associated jurisdictional issues for agencies.

5. Proposal 63-1

Communications Alliance submits that a thorough and far-reaching review of both the *Telecommunications Act 1997 (Cth)*, the *Telecommunications (Interception and Access) Act 1979 (Cth)* and other relevant legislation is timely, given the changed realities created by the convergence of telecommunications, broadcasting and information technology. Communications Alliance agrees that the matters articulated in Proposal 63-1 should be addressed but submits that they form part of a much larger review of Australia’s broadband future.

Broadband technologies are dramatically changing the way that information is transmitted, used and consumed and any legislative approach needs to take into account the fact that the boundaries between all of the players are rapidly dissolving. The old legislative and regulatory silos that were developed when the delineation between the activities of telecommunications service providers, media companies and computer companies were clear are no longer effective.

Communications Alliance submits that the Government should consider developing a comprehensive framework of legislative and administrative measures that are purpose-built for the broadband world, and not bolted on to the legacy tools of the pre-digital era.

It is fundamentally important that all telecommunications stakeholders are consulted and agree on a vision for Australia’s broadband future. Any broadband framework should be driven by agreed policy principles which could include:

- Technological neutrality
- Openness and transparency
- Deregulation – less regulation and more industry self-regulation
- Removal of barriers to industry development
- National economic growth and social well-being
- Long-term interests of end-users
- Promotion and preservation of a competitive market environment
- Facilitation of efficient investment for industry/national economic growth and policy outcomes
- Fostering the development of innovative services
- International competitiveness.

Communications Alliance agrees that it would be helpful to the communications industry if the roles and functions of the various bodies currently involved in regulation were clearly defined. We anticipate that that DCITA would initiate this review and that the

parties involved would agree on outcomes which would mesh with an overall review of communications legislation.

5. Question 63-6

When considered from a legal jurisprudential perspective, Communications Alliance believes that civil rather than criminal penalties are more appropriate for breaches of Divisions 2, 4 and 5 of Part 13 of the *Telecommunications Act* and supports the reasoning detailed in paragraph 63.156 of Discussion Paper 72.

6. Proposal 63-11

Communications Alliance, ACMA, the OPC and the TIO have agreed in principle to develop guidelines that address the impact of new technologies on privacy related issues. Communications Alliance submits that any such guidance must be industry led and would welcome the opportunity to draft an industry led solution, given its experience of working with, creating, and helping to implement rules for the legal and policy environment created by the *Telecommunications Act 1997*.

Communications Alliance has been taking a lead role in framing the industry self-regulatory environment since 1997 and is continuing to do so. We have worked with all industry stakeholders to facilitate the collaborative development of concrete outputs such as the current suite of self-regulatory codes and standards and agreed inter-operator processes.

7. Codes and standards

Communications Alliance advised in its original submission that it was in the process of preparing a single industry code which would capture the majority of its consumer industry codes, most of which contain privacy provisions. This single code has been finalised and published, and has been submitted to the Australian Communications and Media Authority. Communications Alliance consulted widely in developing the single code, including with the Office of the Privacy Commissioner.

We note the remarks of the Australian Privacy Foundation in paragraph 63.174 of Discussion Paper 72 that the use of codes under the *Telecommunications Act* has been unsuccessful. It is unclear whether this view is formed from a substantive or an enforcement perspective, however from working with the Australian telecommunications sector over a 10 year period, we have observed that the industry has clearly and consistently demonstrated its ability to embrace the self-regulatory model to develop industry standards.

Communications Alliance also notes that the TIO's Annual Report which was released last week shows that the levels of confirmed breaches of Communications Alliance codes remain static, in spite of an ever increasing number of telecommunications services being offered and the consequential increase in telecommunications subscribers.

8. Proposals 63-12 and 63-13

Communications Alliance is currently required to obtain a mandatory certificate from the Office of the Privacy Commissioner prior to registering any of its codes. Consequently, we have no objection to the regimes proposed in 63-12 and 63-13 but strongly submit

that very clear parameters and criteria are developed for the proposed consultation and approval process.

9. Proposal 63-15

Communications Alliance agrees that Part 13 of the *Telecommunications Act 1997 (Cth)* would benefit from redrafting. In particular, we submit that s 285 should be amended to include reference to location dependent carriage services. As an overall observation, we submit that the redrafting process should form part of an overall review of telecommunications sector legislation as discussed above in relation to proposal 63-1.

10. Proposal 64-5

Communications Alliance supports the development of a memorandum of understanding outlined in proposal 64 -5 but strongly recommends that given the fundamental role that it plays in telecommunications regulation (as noted in paragraph 64.118 of Discussion Paper 72), it should also be a party to the proposed MOU.

We also recommend that the parties to the MOU produce a guidance document for the public and communications industry which clearly articulates how the each of them interacts with the others.

11. Proposal 64-7

Communications Alliance, the OPC, ACMA and the TIO have agreed in principle that they should develop some form of guidance in accordance with the principles outlined in P 64-7 (a), (b) and (c) to assist the public to understand all aspects of privacy regulation as it applies to the communications sector.

12. Conclusion

Communications Alliance and the telecommunications industry recognise the need for privacy regulation and the importance of consumer confidence in the protection of their personal information, especially as consumers increasingly take up new generation technology services. We submit that rather than taking a piece meal approach, legislation impacting on the communications sector should be reviewed from a holistic perspective to ensure that Australia's legislative framework will accommodate convergence of technologies, networks and services.