

Regulatory guide No. 3: Information sharing under Part 7A of the *Australian Communications and Media Authority Act 2005*

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Overview

The Australian Communications and Media Authority (ACMA) issues regulatory guides to assist both industry and the community by:

- > giving practical guidance (for example, guidance about the ACMA's approach to a particular issue or describing the steps of a process)
- > describing the principles underlying the ACMA's approach in particular areas
- > explaining the ACMA's view on the interpretation of the law or its application to a regulated industry
- > explaining when and how the ACMA will exercise specific powers under the legislation it administers.

A regulatory guide does not constitute or replace legal advice on obligations under the relevant legislation.

1. Purpose of this guide

- 1.1 Part 7A of the *Australian Communications and Media Authority Act 2005* (ACMA Act) creates a class of information called [authorised disclosure information](#) (defined in section 3 of the ACMA Act), which can be shared by the ACMA.
- 1.2 The purpose of this guide is to explain the nature of the discretion conferred on the ACMA under Part 7A of the ACMA Act to share authorised disclosure information. It also highlights the range of factors that may impact on the ACMA's decision to share information (whether as a result of it receiving a request or when it is self-initiated).
- 1.3 This guide does not constitute legal advice.
- 1.4 The ACMA has also entered into memoranda of understanding (MOUs) with a number of domestic and international agencies. These MOUs assist the ACMA and the other relevant signatory to respond appropriately to, and manage requests for, assistance including access to information held by the ACMA. This regulatory guide should be read in conjunction with these MOUs, which are available on the ACMA's website at www.acma.gov.au.

2. Overview of the information-sharing provisions

- 2.1 Part 7A of the ACMA Act confers a discretion on the ACMA to disclose authorised disclosure information obtained in the performance of its functions and the exercise of its powers to other regulatory and administrative bodies and personnel in certain instances (see [Part 4](#) below).
- 2.2 The provisions in Part 7A are designed to enable the ACMA to share information in appropriate circumstances, thereby reducing overlapping or duplicative requests for information made to the ACMA's regulated community by other regulators, including foreign regulators (see section 59D).
- 2.3 A disclosure may be made by the ACMA upon a request being made or of its own volition. However, Part 7A does not impose any obligation upon the ACMA to make a disclosure. It is a matter for its discretion (see [Part 6](#) below).
- 2.4 The Act makes clear that the provisions in Part 7A do not limit the circumstances in which authorised to disclose information may otherwise be disclosed by the ACMA (section 59J). For example, the ACMA may disclose information under the *Freedom of Information Act 1982*.
- 2.5 Part 7A does not authorise disclosure of information that is prohibited by Part 13 of the *Telecommunications Act 1997* (section 59K).
- 2.6 The Act also provides that regulations may be made that authorise disclosure in specified circumstances (section 59H). No regulations have been made to date.

3. What information can be disclosed under Part 7A?

- 3.1 As noted above, the ACMA has had conferred upon it a discretion to disclose authorised disclosure information. Authorised disclosure information is broadly defined to be:
 - (a) information that was given in confidence to the ACMA in connection with the performance of any of the ACMA's functions or the exercise of any of its powers; or
 - (b) information that was obtained by the ACMA as a result of the exercise of any of its powers under:
 - (i) Part 2, 5, 7 or 13 of the *Broadcasting Services Act 1992*; or

- (ii) Chapter 3, 5 or 6 of the *Radiocommunications Act 1992*; or
 - (iii) Part 3, 6, 21, 26 or 27 of the *Telecommunications Act*; or
 - (iv) Schedule 3A of the *Telecommunications Act*; or
 - (v) Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or
 - (vi) Part 3, 4 or 5 of the *Interactive Gambling Act 2001*.
- (c) information that was obtained by the ACMA as a result of the exercise of powers under a provision that:
- (i) allows the ACMA or an ACMA official to require a person to give information or to produce a document; and
 - (ii) is a provision of an Act or a legislative instrument; and
 - (iii) is not a provision described in paragraph (b); or
- (d) information that was given in confidence to the ACMA by a government authority of a foreign country.

(See section 3 of the ACMA Act.)

Information given in confidence

- 3.2 Under general legal principles, confidential information can only be used and disclosed for the purpose for which it was obtained unless the other use or disclosure is impliedly or expressly authorised by the provider of the information or the recipient of the information is a person who is legally entitled to that information.
- 3.3 Part 7A of the ACMA Act provides a statutory basis for disclosure to third parties and thereby extends the purposes for which the ACMA may disclose information given to it in confidence (see paragraphs (a) and (d) of the definition of **authorised disclosure information** above).
- 3.4 In order for information to be 'given in confidence', the information must be:
- > confidential in character (that is, not public knowledge); and
 - > communicated in a relationship of confidence or in circumstances imparting an obligation of confidence (that is, given to and received by the ACMA in confidence (which involves a mutual not unilateral understanding) or given in circumstances where there is an express or inferred understanding that the information will be kept confidential).
- 3.5 Information will not necessarily be given to the ACMA 'in confidence' simply because the confider of information asserts that it is. Information that is otherwise public cannot be rendered confidential by the mere assertion of the person supplying it. Equally, a confider of information cannot, in providing information, fetter the ACMA's lawful use of that information or impose any higher duty of confidence than that imposed on the ACMA under law.
- 3.6 Not all **authorised disclosure information** is confidential. Whether information is 'given in confidence' is determined in light of all of the circumstances of the matter.

Information produced under compulsion

- 3.7 Under general legal principles, in the absence of statutory authorisation, information acquired under compulsory process can only be used and disclosed for the purpose for which the compulsory power was enacted.

- 3.8 The ACMA has been conferred power to compel the production of information and documents (see, for example, sections 521 and 522 of the Telecommunications Act and section 173 of the *Broadcasting Services Act 1992*).
- 3.9 Part 7A of the ACMA Act extends the purposes for which the ACMA may disclose information produced under its compulsory powers by providing statutory authorisation to disclose compelled information to third parties.

Summaries and statistics

- 3.10 Summaries of, and statistics derived from, authorised disclosure information may also be released by the ACMA provided the summaries or statistics are not likely to enable the identification of a person (section 59G).
- 3.11 The provision of information in the form of a summary or statistics may be an appropriate alternative to provision of the **authorised disclosure information** in a different form (see the discussion below concerning [procedural fairness](#)).

Publicly available information

- 3.12 The ACMA may disclose authorised disclosure information that is publicly available (section 59F). It is not a pre-condition for disclosure that the ACMA has made the information publicly available, merely, that it is publicly available.
- 3.13 Whether the relevant authorised disclosure information is publicly available is a question of fact.

Information that relates to the affairs of a person

- 3.14 Authorised disclosure information that relates to the affairs of a person may be disclosed by the ACMA with that person's consent (section 59E).
- 3.15 Any disclosure by the ACMA must be in accordance with the consent given.

4. Persons to whom information may be disclosed

- 4.1 Authorised disclosure information may be disclosed to an authority specified in section 59D of the ACMA Act if the Chair is satisfied that the information will enable or assist the relevant authority to perform or exercise any of its functions or powers.
- 4.2 The authorities specified in section 59D include:
- > the Telecommunications Industry Ombudsman
 - > the Australian Competition and Consumer Commission
 - > the Australian Securities and Investments Commission
 - > the Australian Prudential Regulation Authority
 - > the Commissioner of Taxation
 - > the Director of Public Prosecutions
 - > the Australian Federal Police
 - > the Australian Bureau of Statistics
 - > the Australian Security Intelligence Organisation
 - > the Australian Signals Directorate
 - > the eSafety Commissioner
 - > the Regional Telecommunications Independent Review Committee;
 - > the Secretary of the Department administered by the Minister administering the *Telecommunications (Interception and Access) Act 1979* or an APS

employee in that Department whose duties relate to telecommunications or law enforcement

- > the Secretary of the Department administered by the Minister administering Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* or an APS employee in that Department whose duties relate to that Part
- > the Secretary of the Department administered by the Minister administering the *Migration Act 1958* or an APS employee in that Department whose duties relate to the *Migration Act 1958*¹
- > the Secretary of the Department administered by the Minister administering the *Foreign Acquisitions and Takeovers Act 1975* or an APS employee in that Department whose duties relate to that Act
- > the Secretary of the Department administered by the Minister administering the *Classification (Publications, Films and Computer Games) Act 1995* or an APS employee in that Department whose duties relate to that Act
- > an authority of a State or Territory responsible for enforcing one or more laws
- > an authority of a foreign country responsible for regulating matters relating to communications or media
- > an authority of a foreign country responsible for regulating matters relating to the provision of gambling services²
- > a non-corporate Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) not otherwise covered by subsection 59D(1) that is responsible for enforcing one or more laws of the Commonwealth.

4.3 The ACMA may also disclose authorised disclosure information to:

- > its Minister
- > the Secretary of, and an APS employee in, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts
- > other Ministers of Parliament where the information relates to a matter arising under an Act that they administer and to the Secretary of, and an APS employee in, their Department
- > a Royal Commission within the meaning of the *Royal Commissions Act 1902*.

(Sections 59A-59C of the ACMA Act.)

4.4 The disclosure to a Secretary and an APS employee is for the purpose of advising the relevant Minister (see section 59B). The APS employee must be authorised in writing by the relevant Secretary for the purpose of section 59B of the ACMA Act.

¹ See too section 3 and subsection 59D(1A) of the ACMA Act and section 4 of the *Interactive Gambling Act 2001*.

² See fn1.

5. Discretionary factors

- 5.1 Each provision in Part 7A of the ACMA sets out who may make the decision to disclose.
- 5.2 The persons who may be empowered to make the disclosure are:
- > the Chair of the ACMA
 - > a member and associate member of the ACMA
 - > a member of staff of the ACMA
 - > a person who is seconded to the ACMA under section 55(1) of the ACMA Act.

(See sections 3 and 59L of the ACMA Act.)

6. Assisting the ACMA

- 6.1 A disclosure may be made by the ACMA upon a request being made or of its own volition. Part 7A does not, however, impose any obligation upon the ACMA to make a disclosure. The decision to disclose information will be made in light of the facts. There is a range of discretionary factors that may have a bearing on whether a disclosure should be made, some of which are discussed below.

Impact of the disclosure on ACMA

- 6.2 In determining whether the ACMA should exercise its discretion and disclose information under Part 7A of the ACMA Act, the ACMA will consider what, if any, implications the disclosure may have on our compliance and enforcement activities. Where, for example, the authorised disclosure information relates to a current investigation, the ACMA will consider whether disclosure may prejudice that investigation and any possible regulatory or enforcement action it has or may take.
- 6.3 The ACMA will also consider what, if any, resource implications the disclosure may have on its day-to-day activities. Where, for example, a request has been made for the disclosure of authorised disclosure information, the ACMA will assess the resources that may be required to respond.

Procedural fairness

- 6.4 The ACMA may have an obligation to afford an opportunity to be heard to a person who is directly and materially adversely affected by the disclosure. The adverse effect may result from, for example, the disclosure of confidences or damage to a person's reputation.
- 6.5 The nature and extent of any obligation to afford procedural fairness is a factor that will be considered by the ACMA in determining whether disclosure should occur and, if it is to occur, the conditions upon which the disclosure will be made (subsections 59C(2) and 59D(2)) (see paragraphs 6.10–6.13 below).
- 6.6 There is a range of the factors that have a bearing on whether the ACMA has an obligation to afford procedural fairness and the content of that obligation including:
- > the nature of the information (for example, sensitive personal or commercial/business information)
 - > the circumstances in which ACMA acquired the information (for example, voluntarily/under compulsion/subject to conditions)
 - > the proposed use/s of the information (for example, an investigation)

- > any statutory obligations imposing restrictions on the use that the recipient of the information may make of information provided to it (for example, the confidentiality provisions in the *Taxation Administration Act 1953*, *Australian Prudential Regulation Authority Act 1998* and the *Australian Securities and Investments Commission Act 2001*)
 - > whether the information is to be or may be published (for example, used in proceedings before a court or tribunal that are open to the public, published in a report or other publication, for inclusion in a public register/database)
 - > the particular circumstances of the matter (for example, the urgency of the matter).
- 6.7 The ACMA may consider whether it is, in the circumstances, appropriate to delete information that may directly and materially adversely affect a person and release the remainder.
- 6.8 It may also consider whether the authorised disclosure information can be provided in a form that preserves the anonymity of a person who would otherwise be directly and materially adversely affected (for example, provision of aggregated or statistical data (see section 59G)).
- 6.9 The conditions imposed by the ACMA may also mean that there is no direct and material adverse effect on a person (see below).

Conditions

- 6.10 When authorised disclosure information is disclosed to an authority under section 59D or a Royal Commission under section 59C, the Chair or their delegate may impose conditions on the disclosure (subsections 59C(2) and 59D(2) and section 59L of the ACMA Act). The type of conditions attached to the disclosure of the authorised disclosure information will turn on the facts of the matter.
- 6.11 There is a range of conditions that may be appropriate, including:
- > limitations on further disclosure or publication
 - > restrictions on the use to which the information may be put
 - > specifications as to who may have access to the information
 - > restrictions on copying of the information
 - > requirements to return or destroy the information.
- 6.12 The ACMA may impose conditions relating to the manner in which the information may be used or published (for example, it may specify that the information may only be used for the purpose of an investigation and it may not be further disclosed).
- 6.13 The conditions imposed may also affect the ACMA's procedural fairness obligations. As noted above, the ACMA may have an obligation to give a person who is directly and materially adversely affected by the proposed disclosure an opportunity to be heard before the decision to disclose is made. The conditions imposed by the ACMA may mean that the potential for the 'detriment' to the person is reduced or eliminated.