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Commercial Law e-alert - Australian Consumer Law

Government's Issues Paper further fuels the debate on whether there should be a **right to sue for invasion of privacy**

Recently the Federal Government released an Issues Paper entitled "*A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*" for public consideration and comment ("**Issues Paper**").

The Issues Paper outlines the proposal of whether a statutory cause of action, that is, a right to sue, for breach of privacy should be introduced in Australia, and if so, what form it might take.

The Issues Paper is in response to the report released in 2008 by the Australian Law Reform Commission ("**ALRC**") on the effectiveness of the *Privacy Act 1988* (Cth) which suggested that the most serious invasions of privacy could best be addressed through the introduction of a statutory cause of action for privacy¹. If introduced, this would mean individuals would have the right to sue other individuals and companies over serious invasions of privacy.

The Minister for Privacy and Freedom of Information, The Hon Brendan O'Connor MP, said it is important that Australia's privacy laws continue to evolve and keep pace with technological changes².

Both the New South Wales Law Reform Commission ("**NSWLRC**") and the Victorian Law Reform Commission ("**VLRC**") have also recommended that a statutory cause of action for a serious invasion of privacy be introduced into Australia.

In its report the ALRC set out 295 recommendations for reform in a range of areas, including telecommunications, credit reporting information, health records and privacy protection generally. An exposure draft of the Australian Privacy Principles was released in June of last year containing many of these recommendations.

Current Position

Over the years, privacy law in Australia has evolved dramatically from the position taken by Chief Justice Latham in a 1937 High Court case, "Any person is entitled to look over the plaintiff's fence and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence."³

Although the protection of a person's privacy has developed considerably in Australia, there is currently no clear cause of action for invasion of privacy in statute or at common law. Although, many have argued that existing laws and industry codes of conduct adequately protect privacy in Australia, it is widely acknowledged that there is a need for a statutory cause of action for the most serious privacy invasions.

Such a cause of action exists, either in statute or at common law, in New Zealand, the United States, Canada, the United Kingdom and the European Union.

Issues Paper

The Issues Paper poses 19 questions that should be addressed by legislators and the community when considering whether this cause of action should be introduced. It also considers developing the statute to govern such a cause of action. Some of the questions for consideration are:

¹ Australian Law Reform Commission, Report 108 – For Your Information: Australian Privacy Law and Practice (2008), www.alrc.gov.au/publications/report-108

² Issues Paper – *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Department of the Prime Minister and Cabinet, September 2011, http://www.dpmc.gov.au/privacy/causeofaction/docs/issues%20paper_cth_stat_cause_action_serious_invasion_privacy.pdf

³ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 494 (Latham CJ)

1. Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?
2. Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?
3. Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?
4. How best could a statutory cause of action recognise the public interest in freedom of expression?
5. What should be included as defences to any proposed cause of action?
6. Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?
7. Should any proposed cause of action be restricted to natural persons? Meaning the proposed legislation would not apply to corporations.
8. Should the legislation prescribe a maximum award of damages for non-economic loss and, if so, what should that limit be?

The Issues Paper is based on the findings and recommendations from the ALRC, NSWLRC and VLRC. Although all three bodies are unified in their stance that a cause of action for a breach of privacy be introduced, there are some differences in their suggested approach. Examples of this mixture of a unified, and at times at variance, approach are:

1. There are concerns that a cause of action would impede freedom of expression, artistic freedom and freedom of the press. The NSWLRC stated that "the provision of a statutory base for the protection of privacy alone would unfairly tilt the balance in favour of the interest in privacy at the expense of the interest in freedom of expression, which would not itself be protected by statute." The Issues Paper provides that all three bodies have concluded that while there are significant benefits to individuals and the community at large with the introduction of such a cause of action, it will be important that any reform balances privacy with various public interests.
2. All three bodies are of the view that the best approach for the evolution of a cause of action is by statutory development opposed to common law development. The Issues Paper provides that legislation "may provide a clearer legal structure for the cause of action".
3. The ALRC and the NSWLRC did not see eye-to-eye that the creation of a statutory cause of action be a federal law. The ALRC is of the view that the cause of action be included in a Commonwealth Act as "it is important to ensure that a consistent regime is enacted".⁴ However, the NSWLRC recommends that each State and Territory enact parallel legislation⁵ 'recognising that the province of private law is foremost a matter of State law within Australia's federal system'. Such uniform laws would be enacted separately but concurrently by each jurisdiction in the same terms, and then ensuring any amendments to such legislation over time were made simultaneously and in the same terms.
4. All three bodies recommended that the plaintiff show that there had been, in the circumstances, a reasonable expectation of privacy when considering the test for the cause of action. The ALRC and VLRC further recommended that the plaintiff should also be required to meet an objective test of seriousness or offensiveness: that the invasion of the expected privacy would be highly offensive to a person of ordinary sensibilities. The NSWLRC considers the 'highly offensive' test as an "unwarranted" qualification on an individual's reasonable expectation of privacy.
5. The ALRC has called for a cause of action that requires a respondent's act or conduct to be intentional and reckless. The VLRC disagreed with the ALRC saying "it is unnecessary to expressly exclude negligent acts".⁶ The proposed bill put forward by the NSWLRC does not explicitly contain a requirement for acts or conduct to be intentional or reckless.
6. The ALRC and NSWLRC agree that the legislation should contain a non-exhaustive list of the types of invasion that fall within the cause of action so the courts do not start with a "relatively blank canvass".⁷ However, ultimately it will depend on the facts of each case to determine if an invasion has occurred.

⁴ Australian Law Reform Commission, Report 108 – *For Your Information: Australian Privacy Law and Practice (2008)* at 2582, www.alrc.gov.au/publications/report-108

⁵ New South Wales Law Reform Commission, Report 120: *Invasion of Privacy (2009)* at 73, [www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/R120.pdf/\\$file/R120.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/R120.pdf/$file/R120.pdf)

⁶ Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18 (2010)* at 152, www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+Public+Places/

⁷ Issues Paper – *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Department of the Prime Minister and Cabinet, September 2011, Pg. 41, http://www.dpvc.gov.au/privacy/causeofaction/docs/issues%20paper_cth_stat_cause_action_serious_invasion_privacy.pdf

7. The ALRC and NSWLRC share the view that, as part of the proposed statutory cause of action, a broad range of flexible and adaptable remedies be provided for such as damages, including aggravated damages (but not exemplary damages), an account of profits, an injunction or a correction order⁸. The VLRC recommended that damages, injunctions and declarations be available.
8. There has been a suggestion that there should be a limitation on monetary damages. The NSWLRC proposes a maximum of \$150,000 be imposed. The ALRC and the VLRC do not believe there is a need for a maximum amount to be imposed, with the VLRC concluding a maximum amount is unnecessary "given the modest sums likely to be awarded"⁹.
9. All three bodies recommend that the cause of action only be available to individuals – opposed to the broader concept of 'legal persons' which would include corporations.

Whatever the final make-up will be, it appears Australians are destined to have a right to sue for a serious invasion of privacy.

The Federal Government has invited all interested parties to submit comments and suggestions on the Issues Paper by 4 November 2011.

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⁸ Australian Law Reform Commission, Report 108 – *For Your Information: Australian Privacy Law and Practice* (2008) at rec 74-5, www.alrc.gov.au/publications/report-108

⁹ Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18* (2010) at 163, www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+Public+Places/