the Privacy Commissioner can exercise his power against ISPs bound by the Code who breach the *National Privacy Principles.*

The Code also reminds ISPs that if they disclose customer information to anyone other than law enforcement agencies, they are at risk of breaching the *Telecommunications Act 1997* (Cth) and exposing themselves to the possibility of criminal penalties and up to two years imprisonment.

The IIA has also drafted an Industry Code of Practice for Internet Privacy.

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New Australian Right to Protection From 'Highly Offensive' Invasions of Privacy

Duncan Giles & Gayle Hill examine the impact of the recent decision in Grosse v Purvis

In a very significant shift in Australian privacy law, the Queensland District Court has recently[1] found that a new common law right to compensation exists where a person's conduct intrudes on another's *"privacy or seclusion in a manner which would be highly offensive to a reasonable person of ordinary sensibilities".*

On 16 June, in the case of *Grosse v Purvis*[2], Senior Judge Tony Skoien of the Queensland District Court awarded the mayor of Maroochydore $178,000 to compensate her, not for inappropriate dealing with her personal information, but for invasions of her privacy generally.

DEVELOPMENT OF THE TORT

The decision in *Grosse* is particularly significant because it does not rely on any legislative privacy obligation, instead it seeks to develop the independent tort hinted at by the High Court in its 2001 decision in *ABC v Lenah Game Meats*[3].

In *Lenah*, Justice Michael Kirby noted that courts in a number of other jurisdictions have recently looked at the availability of such a common law actionable wrong of invasion of privacy. Justice Kirby's view was that this trend was stimulated in part by invasions (including by the media) deemed unacceptable to society and, in part, by the influence of modern human rights jurisprudence that recognises of a right to individual privacy. He went on (at page 278) to say:

> *"(W)hether... it would be appropriate for this Court to declare the existence of an actionable wrong of invasion of privacy is a difficult question. I would prefer to postpone an answer to the question. Upon my analysis, no answer is now required."*

The potential for the development of the *Grosse* right was therefore clearly signposted.

CHARACTERISTICS

The Australian *Privacy Act 1988*, and all other Australian state and territory privacy statutes, regulate the way in which 'personal information' can be collected, stored, used and disclosed. These laws therefore focus solely on regulating the appropriate processing of information about individuals (or from which their identity can reasonably be ascertained). The right formulated in *Grosse* provides a very different means of redress for those disturbed by conduct amounting to an 'invasion of privacy'.

In the judgment, which he admitted was a bold first step in Australia, and is subject to an appeal likely to be heard later this year, Judge Skoien declared that Australian law allows the recovery of damages for harm (including mental, psychological or emotional suffering), embarrassment, hurt, distress and post traumatic stress disorder, where a deliberate act intrudes on the private affairs or seclusion of another in a way which would be reasonably regarded as highly offensive. He also held that damages could be awarded for any enforced changes of lifestyle caused by such an intrusion.

Although Judge Skoien recognised his judgment was at the leading edge of Australian privacy law, he considered it to be both logical and desirable. He found that:

- following, watching, approaching or loitering near a person;
- contacting a person in any way, including by telephone, mail, fax, email or any other technology;
- loitering near, watching, approaching or entering a place where a person lives, works or visits;
- giving offensive material to a person or leaving it where it can be found by the person;
- an intimidating, harassing or threatening act against a person, whether or not involving a threat of violence;
- an act of violence, or a threat of violence, against any property;

may justify an action for invasion of privacy if such conduct intruded on an individual's privacy or seclusion in a highly offensive way and caused harm or hindered them in doing an act they were lawfully entitled to do.

CONSEQUENCES

A non-statutory, common law right to the protection of private matters opens a large and unexplored new area for Australian privacy law. If the right survives the appeal process, or other similar actions are successful, it can be expected that a considerable body of new jurisprudence will evolve which will be very different for the statutory rights available under existing legislation.

The new right to take action at common law also has significant implications in an number of specific areas including the media and employment.

It is likely, for example, that if journalists and media organisation engage in highly offensive intrusions into people's personal affairs, they may be exposed to new actions for damages for any emotional

harm and distress caused. As the new law is unrelated to the *Privacy Act*, the defences and exemptions in that Act do not apply, although a defence of public interest may be available.

Also, under Australia's current employment laws, the types of conduct that Judge Skoien found to constitute invasion of privacy, are dealt with under equal opportunity legislation (harassment and discrimination) and occupational health and safety legislation (bullying).

It is unlikely that an employer would be found vicariously liable for the tort of invasion of privacy, as such behaviour is unlikely to be in the ordinary course of conduct as an employee. However, Australian employers should consider their general duty under the law of negligence to prevent reasonably foreseeable harm. An employer who had reason to suspect that an employee was engaged in a highly offensive invasion of privacy that related to the workplace in some way, and took no steps to prevent it would risk incurring liability in negligence, as well as under equal opportunity and occupational health and safety legislation.

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1 16 June 2003

2 [2003] QDC 151

3 (2001) 208 CLR 199

Telecommunications Networks – Carriers' Powers Again Under Review

Shane Barber reviews the results of a recent appeal brought by Hurstville City Council against the Land and Environment Court of NSW's confirmation of telecommunications carriers' powers

In the previous edition of this bulletin, we examined a recent decision of the New South Wales Land and Environment Court in the case of *Hurstville City Council v Hutchison 3G Australia Pty Limited* [2003] NSWLEC 52. In that case, the Land and Environment Court confirmed the powers of telecommunications carriers to maintain and install their networks using certain powers and immunities in Schedule 3 of the *Telecommunications Act 1997* (**Act**).

Hurstville City Council (**Council**) has since brought an appeal in the New South Wales Court of Appeal against the judgment of the Land and Environment Court. On 8 July 2003, the Court of Appeal delivered a judgment which effectively reversed the decision of the Land and Environment Court.[1]

The issue of telecommunications carriers' powers to maintain and install networks has been the subject of much recent contention. In order to clarify these powers, Hutchison 3G Australia Pty Limited (**H3GA**) has applied to the High Court of Australia for special leave to appeal. The High Court has granted expedition to consider this application in early October 2003.

BACKGROUND

As noted in the previous edition of this bulletin, telecommunications carriers are granted certain powers and immunities under:

- Schedule 3 of the Act; and
- the associated *Telecommunications Code of Practice 1997* (**Code**); and
- the *Telecommunications (Low-Impact Facilities) Determination 1997* (**Determination**).

The combined effect of the Act, Code and Determination is to give telecommunications carriers certain powers to:

- inspect land;
- install certain facilities; and
- maintain certain facilities.

The expression "facilities" is defined in section 7 of the Act to mean:

"(a) any part of the infrastructure of a telecommunications network; or

(b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network."

Provided that the strict requirements of the Act, Code and Determination are complied with by carriers, clause 37 of Schedule 3 of the Act will serve to exempt them from complying with many State and Territory laws when rolling out their networks.

In the present case, H3GA had examined several sites in the Oatley area of NSW for a suitable location to install infrastructure to be used as a part of its proposed 3G network. H3GA determined that a sports light pole located in Oatley Park would be the most appropriate location for some panel antennas and a parabolic dish to be placed atop the pole. This pole was owned by the Council.

Using the powers and immunities granted under Schedule 3 of the Act, H3GA proposed to carry out two activities. The first was to "maintain" the existing pole in the Park by making it strong enough to support the infrastructure at the top of the pole. This involved removing the existing pole and replacing it with one that was of the same height and apparent volume. That pole would remain owned by the Council. H3GA was of the view that this "maintenance activity" complied with clause 7 of Schedule 3 of the Act, which expressly permits the removal and replacement of a pole in certain circumstances.

The second activity, which was not in contention in the Court of Appeal, was the installation of "low impact facilities" (as defined in the Determination) at the top of the pole, in addition to a low impact equipment shelter in close proximity to the pole.

Council did not lodge any formal objection, as provided for by the Code, to the statutory notice issued by H3GA to Council regarding these activities. Instead, Council removed the pole in what the Court of Appeal considered as an attempt to frustrate H3GA's ability to undertake the maintenance activity.

H3GA continued with the activity and undertook to replace the pole anyway. This prompted the Council to bring an action in the New South Wales Land and Environment Court in order to prevent the activity being completed.