If only there was a **privacy app!**

By Paul Telford

Ten years have passed since Justice Callinan observed that the time was ripe for consideration as to "whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made".[1] In that period of ten years, the iPod and the iPhone were born, YouTube and Twitter began operating, Google was floated and wi-fi became a necessity, instead of a novelty.

The world is an infinitely more problematic place now for those who value privacy interests, yet the response of our courts and our parliaments continues to be unenthusiastic. Of course, commentators have been saying things like this for much longer than ten years: the same observation was made by Justice Rich in 1937 about the looming prospect of something called 'television'.[2]

Nevertheless, developments in the regulation of privacy interests in the last ten years can be counted on one hand.

In Queensland, a trial judge awarded a plaintiff substantial damages (including exemplary and aggravated damages) for breach of privacy interests.[3] That decision has either attracted guarded support,[4] cautious disapproval,[5] or has simply been ignored altogether in a consideration of the issues.[6]

In 2008, the Australian Law Reform Commission (ALRC) undertook the most extensive review of privacy laws in Australia and concluded (relevantly) that a statutory cause of action should be developed for serious invasions of privacy. So far, those recommendations have not been implemented.

In 2009, the New South Wales Law Reform Commission recommended that the *Civil Liability Act* 2002 be amended to provide a statutory cause of action for invasion of privacy. So far, those recommendations have not been implemented.

In 2010, the Victorian Law Reform Commission recommended that surveillance laws in that state be amended to expressly enable individual Victorians to take civil action in response to serious invasions of privacy by the use of surveillance in a public place. So far, those recommendations have not been implemented.

Charter of rights legislation introduced in Victoria[7] and the ACT[8] expressly acknowledge the right of individuals not to have their privacy, family, home or correspondence interfered with, or their reputation unlawfully attacked. However, neither Act confers a private right of action.

The argument could well be made that despite the passage of 10 years since the comments of Justice Callinan – or the passage of 75 years since those of Justice Rich – and notwithstanding the tremendous advances in technology during that period, the recognition and protection of privacy interests have remained largely unchanged. Some argue that protections, which may have existed, have in fact been irretrievably eroded;[9] a result which is perhaps exemplified by the comments in August 2007, of Microsoft's Chief Privacy Officer, who suggested that breach notification laws were pointless because "there will be so many notices that they will have little impact".[10]

For those whose interests fall within the jurisdiction of the Queensland courts, damages are available upon an unacceptable invasion of privacy, which consists of:

(a) a willed act by the defendant;
(b) which intrudes upon the privacy or seclusion of the plaintiff;
(c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;
(d) which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which they are wilfully entitled to do.[11]

Having said that, no Queensland decision has since followed *Grosse*, or awarded damages on this, or a similar basis. Far from being the watershed decision that practitioners had anticipated, the decision has been cited only once, in support of a claim for damages in trespass to land.[12]

At a Commonwealth level, private sector interests have been regulated by the *Privacy Act* 1988 since December 2001, although the High Court has indicated in the past that the protections contained in the Act do not give rise to an independent statutory cause of action.[13]

Privacy torts operate in the US,[14] and in Canada and the UK by reference to human rights legislation[15] or to more specific privacy Acts.[16] In an interesting corollary, our colleagues across the Tasman enjoy the protection of a limited tort for invasion of privacy, which involves:

1. the existence of facts in respect of which there is a reasonable expectation of privacy; and
2. publicity given to those private facts that would be considered highly offensive to an objective reasonable person.[17]

However, there is no recognition of a broader right to freedom from invasion of privacy and, in its report released in 2010, the New Zealand Law Commission suggested that development of privacy protections ought to occur through the common law.[18] In particular, the Commission noted that: >>

Privacy is particularly fact-specific, each case requiring an intense focus on individual circumstances. The common law is well-suited to that task and, being flexible, can also develop with the times.

'The common law has the great advantage that in a fast-moving area judges can make informed decisions on actual cases as they arise. Privacy is particularly fact-specific. As has been seen in the United Kingdom, each case requires an intense focus on the individual circumstances. The common law is well suited to that task. The common law is also flexible, and can thus develop with the times. Statute creates a risk that what is enacted today may be out of date tomorrow. To avoid this dilemma, any privacy statute would have to drafted in open-ended terms, and might end up being little advance on the common law.'

A STATUTORY TORT

In light of these sensible and accurate reflections on the benefits of common law reform, it is surprising that the Commonwealth government, by an Issues Paper released in September 2011, is seeking to progress the development of this area in Australia by reference to a statutory cause of action for privacy. In doing so, the Issues Paper commences, quite incorrectly it is submitted, with the observation that the High Court in *Victoria Park Racing*[19] found that Australians had no right to privacy under common law. While it is true that the decision in *Victoria Park Racing* had a dampening effect on the development of common law privacy rights for more than 60 years in Australia, the observations of those responsible for the Issues Paper[20] ignore the views subsequently expressed by Kirby J[21] and Skoien DCJ[22] that the decision in *Victoria Park* presented no bar to the existence of common law right to privacy in Australia. The facts of *Victoria Park* merely presented an inappropriate vehicle for the development of the tort: a curse that continues to plague the area.[23]

In stark contrast to the views expressed by the New Zealand Law Commission, the Report published by the ALRC concluded that:

'[A] statutory cause of action is the best way to ensure [adequate privacy] protection. It forecloses the possibility of Australian courts adopting an action in breach of confidence as the primary vehicle to protect an individual's private life from invasion, and alleviates the necessity of judges taking the 'bold step'[24] of formulating a new tort and a lengthy period of uncertainty and inconsistency as the courts refine the law in this area. Further, it does away with the distinction between equitable and tortious causes of action, and between the defences and remedies available under each.'[25]

These comments are likely to surprise a practising lawyer. Experience demonstrates that courts are adept at formulating relief by reference to the subjective facts of the parties and seem to operate remarkably well, despite the apparent hurdle presented by 'the distinction between equitable and tortious causes of action, and between the defences and remedies available under each'.

If this statement was intended to be a reference to the discretion afforded to a common law court when entertaining certain claims to relief, then the rationale that underlies the conclusion expressed by the ALRC is wrong. Privacy interests fall clearly within the realm of matters that ought to attract discretionary relief,[26] principally because it is well established that privacy rights, or interests, are not absolute. Competing interests, such as freedom of speech and general notions of public interest and market freedoms, need to be balanced. The weight to be given to those considerations, or whether they are considered relevant at all, are matters that are best left to the courts and the well-developed rules of evidence.

It is submitted that any attempt to codify the relevant issues would be madness. Consider, for example, clause 74(3)(a) of the draft Bill prepared by the New South Wales Law Reform Commission, which suggests the matters that a court must take into account in determining whether or not there has been an actionable invasion of an individual's privacy.

i. Is the subject matter of the complaint private or not?
ii. Is the nature of the invasion such as to justify an action?
iii. Does the relationship between the parties affect actionability?
iv. Does the claimant's public profile affect actionability?
v. Does the claimant's vulnerability affect actionability?
vi. Does any other conduct of the claimant and the defendant affect actionability?
vii. What effect has the conduct had on the claimant?
viii. Does the defendant's conduct contravene a statutory provision?

Note the absence of competing, fundamental interests such as those described above. Maybe these equally difficult issues are intended to be caught by clause 74(3)(b), which goes on to provide that the court may also take account of 'any other matter' that it considers relevant in the circumstances.[27]

The futility of the process is perhaps most evident in the identification of the first consideration. If only we knew what 'private' meant.[28]

CONCLUSION

Privacy law reform is occurring, but it is slow and, arguably, misplaced. The reforms identified by the ALRC as to the general operation of the *Privacy Act* 1988 should be embraced.[29] However, the move towards a statutory tort is a mistake.

As noted by Professor Butler,[30] although the decision of the High Court in *Lenah* did not produce the common law tort that many were hoping for, it did have the significant effect of removing the obstacle to reform which had previously resided within the conclusions of *Victoria Park Racing*. Fearless practitioners are needed, who are willing to advance the reform of privacy torts and pursue those interests. We should not sit idly by and wait for someone else to develop the app. ■

Notes: **1** *Lenah Game Meats Pty Ltd v Australia Broadcasting Corporation* (2001) 208 CLR 199 at [335]. **2** (1937) 58 CLR 479 at 505. **3** *Grosse v Purvis* [2003] QDC 151. **4** *Jane Doe v Australian Broadcasting Commission* [2007] VCC 281. **5** *Giller v Procopets* [2004] VSC 113. **6** *Kalaba v Commonwealth of Australia* [2004] FCAFC 326. **7** *Charter of Human Rights and Responsibilities Act* 2006 (Vic). **8** *Human Rights Act* 2004 (ACT). **9** Mark Thomson, 'Privacy: The Major Flaw – the Horse has already bolted!', *British Journalism Review*, September 2006. **10** The comment is recorded in an interview published by *ComputerWorld*. The article can be found at: http://www.computerworld.com.au/article/190727/microsoft_privacy_chief_says_disclosure_laws_reactive/#closeme. **11** This is the formulation by Senior Judge Skoien DCJ in *Grosse v Purvis* (supra) at [44]. **12** *Stereff v Rycen & Anor* [2010] QDC 117. **13** *Lenah Game Meats* (see note 1 above) per Gummow and Hayne JJ at [106]. **14** *Restatement of the Law, 2nd, Torts 1977* (US). **15** *Human Rights Act* 1998 (UK). **16** For example, those enacted in British Columbia, Manitoba and Saskatchewan. **17** *Hosking v Runting* [2005] 1 NZLR 1 (CA). **18** Chapter 7, New Zealand Law Commission Report, Stage 3, January 2010. **19** (1937) 58 CLR 479. **20** The Department of the Prime Minister and Cabinet. **21** (2002) 208 CLR 199 at [187]. **22** (supra), endnote 3. **23** Often plaintiffs seek discretionary injunctive relief, for example, *Lenah* (see note 1 above). **24** *Doe v Australian Broadcasting Corporation* [2007] VCC 281 at [157]. **25** ALRC Report at 2565, cited at p30 of the Commonwealth Government Issues Paper. **26** The notion that Australia's judges should take into account, when exercising discretionary power, the human rights to which Australia is bound under international law was examined by Dr Wendy Lacey in her text, 'Implementing Human Rights Norms: Judicial Discretion & use of Unincorporated Conventions,' *Presidian Legal Publications*, 2008. **27** Cited at p40 of the Commonwealth government Issues Paper. **28** See Kate Ford, 'Defining Privacy', Victorian Law Reform Commission, 2002. **29** See, generally, Dr Norman Witzleb, 'Exposure Draft of the New Australian Privacy Principles – The First Stage of Reforms to the Privacy Act' (2011) 39 *Australian Business Law Review* 58. **30** DA Butter, 'A Tort of Invasion of Privacy in Australia' [2005] *Melbourne University Law Review* 11.

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