

# Should a tort of privacy exist in australia?

[Law](#), [Common Law](#)



The law has had great difficulty in classifying and protecting each individual's apparent rights to privacy. The courts have been faced with the difficult tasks of defining what privacy encompasses for each individual and then balancing this against the values of society. The common law has recently begun to develop through judgements handed down in such countries as the United States, United Kingdom and New Zealand, placing pressure upon Australian courts to follow their lead. Cases such as *Lenah Game Meats v Australian Broadcasting Corporation* and more recently *Grosse v Purvis* have expressed the Australian legal systems apparent desire to move forward in acknowledging an action for invasion of privacy. By legislating at a federal level, most suitably within the Privacy Act, a more consistent and structured cause of action can be put in place. By acknowledging the need to protect privacy rights, Australia will be coming into line with not only the rest of the common law countries, but also with its international obligations under the International Covenant on Civil and Political Rights.

**Defining Privacy:** The term 'privacy' has been difficult to obtain a universally accepted definition between legal scholars. In ALRC 22 it was noted that 'the very term "privacy" is one fraught with difficulty. The concept is an elusive one'. As Professor J Thomas McCarthy noted, 'Like the emotive word 'freedom', 'privacy' means so many different things to so many different people that it has lost any precise legal connotation that it might once have had. In coming to terms with the concept of 'privacy', it is important to first recognise that it has been acknowledged by the international community as a human right through such key documents as the Universal Declaration of Human Rights and the International Covenant on

Civil and Political Rights. Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980. Although such rights and obligations under the ICCPR will not be recognised in Australian law until specific legislation is passed implementing the provisions, the recognition of privacy as a human right under Article 17 of the ICCPR lends support to the argument that such recognition in domestic law is warranted. The recent enactment of domestic human rights legislation such as the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT) further demonstrate the desire for privacy to be recognised. The Development of the tort of Privacy: A tort of invasion of privacy has, since the 1970's, been recognised through legislature in some jurisdictions of the United States and Canada. Within the United Kingdom such a tort is yet to be specifically recognised, however the equitable action for breach of confidence has been used to address the misuse of private information. In Australia, no state or territory has yet to recognise a cause of action for invasion of privacy legislatively; however the door to such a cause of action being developed through the common law has been left ajar by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah Game Meats*'). The Major obstacle at common law to the recognition of a right to privacy in Australia has been the 1937 High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* ('*Victoria Park*'). However in the decision handed down in *Lenah Game Meats*, it was expressed that the decision in *Victoria Park* will no longer 'stand in the path of the development of ... a cause of action 'for invasion of privacy]'. A common law right of action for invasion of privacy has been recognised in two Australian cases. In

Grosse v Purvis, Skoien SDCJ awarded aggravated compensatory damages and exemplary damages to the plaintiff for the defendant's breach of the plaintiff's privacy. After pointing out that the High Court had removed the barrier to any party attempting to rely on a tort of invasion of privacy through the decision handed down in Lenah Game Meats, he went on to describe the next 'logical and desirable step' as recognising 'a civil action for damages based on the actionable right of an individual person to privacy'. In Doe v Australian Broadcasting Corporation the invitation held out by Lenah Game Meats was also used in justifying the recognition of an invasion of privacy to the plaintiff. In response to any suggestion that recognition of a tort of invasion of privacy would be a 'bold step', the words of Judge Hampel emphasise the need for the common law to adapt to more current social values: If the mere fact that a court has not yet applied the developing jurisprudence to the facts of a particular case operates as a bar to its recognition, the capacity of the common law to develop new causes of action, or to adapt existing ones to contemporary values or circumstances is stultified. Lenah Game Meats and the UK cases ... in particular those decided since Lenah Game Meats, demonstrate a rapidly growing trend towards recognition of privacy as a right in itself deserving of protection.

Developments of other countries: The fact that other common law countries have taken steps in recognising privacy will have a strong influence upon the Australian courts in their development of a cause of action. 'Naturally, however the impetus for change cannot be the same as in the United Kingdom, which operates under the HRA and the ECHR'. Also as Callinan J pointed out, Australia should not merely adopt United States jurisprudence,

since the political and constitutional history of Australia is unlike that of the United States, where the relevant jurisprudence is complicated by the First Amendment.’ He then went on to suggest that ‘ any principles for an Australian tort of privacy would need to be worked out on a case by case basis in a distinctly Australian context.’ United States In the United States, the Restatement of the Law, 2nd, Torts provides for invasion of privacy under four categories, namely, intrusion on solitude or seclusion, appropriation of identity, public disclosure of private facts and display in a false light. It must be recognised that the privacy tort has proved to be of limited effect due essentially to the constitutionally entrenched right to a free press under the First Amendment. New Zealand It was held by the majority of the New Zealand Court of Appeal in *Hosking v Runting* that the tort of invasion of privacy should be recognised as part of the common law of New Zealand. The court also recognised the incremental approach of the courts in formulating new causes of action where it went on to state that, ‘ the cause of action will evolve through future decisions as courts assess the nature and impact of particular circumstances’. United Kingdom The United Kingdom is yet to recognise a specific tort for invasion of privacy, with the courts repeatedly stating that ‘ English law knows no common law tort of invasion of privacy’. Instead, courts have extended the cause of action for breach of confidence to include misuse or wrongful dissemination of private information. With the European Convention on Human Rights coming into force in the United Kingdom in 2000, any developments of an action for breach of privacy must now be discussed with reference to the human rights legislation, in particular Article 8(1) which states that ‘ everyone has the

right to respect for his private and family life, his home and his correspondence'. Should a Statutory Cause of Action be Introduced? Recent judgements in Australian courts such as the decision in *Lenah Game Meats*, and that of *Grosse v Purvis* have expressed the desire to recognise an individual's right to privacy. It appears however that the courts are hesitant to establish a new cause of action for invasion of privacy until a suitable case comes before them. Through recognising a statutory cause of action, parliament can fill such a gap without having to wait for the 'perfect' case. The submission of the centre for Law and Genetics is representative of such an argument: It may well be that the courts would be amenable to such a development, should the right case come before them. In the absence of common law or equitable protection, there is good justification for the development of legislation to fill the void. It should be recognised that if the courts are left to develop a cause of action for invasion of privacy through the common law, they will be limited by the rules of equity and tort. This will limit the circumstances that would give rise to such a cause of action, and the remedies available to address the wrong. As the words of Sir Roger Toulson express in reference to the United Kingdom's incremental development of the common law breach of confidence: A consequence of the development of privacy within the action for breach of confidentiality is that it is presently confined to cases involving the use of information of a private nature, whether in word or pictorial form. If a statutory cause of action for invasion of privacy is enacted, it will allow for such constraints to be overcome. It will also avoid 'the problems inherent in attempting to fit all the circumstances that may give rise to an invasion of privacy into a pre-

existing cause of action... it also allows for a more flexible approach to defences and remedies'. Should the statutory cause of action be in federal legislation? In deciding that a statutory cause of action for invasion of privacy should be enacted, the question arises as to where the cause of action should be located, either in state and territory legislation or in federal legislation such as the Privacy Act . A major concern with current legislation governing the use of private information such as medical records is the inconsistency between states and territories and the difficulties that this creates for the courts. In looking to avoid a similar problem when dealing with the enactment of a statutory cause of action for breach of privacy, it would be desirable to ensure national consistency from the beginning. The Office of the Privacy Commissioner has stated that, ' It would be preferable to introduce a tort of privacy in a uniform manner throughout Australia, particularly to avoid inconsistencies and ' forum shopping' The desire for uniformity amongst states and territories was made clear in the establishment of the ((defamation Act))??, which brought the rules governing defamation, in particular the defences of justification and the ' public interest' into line. By legislating at a federal level the problems of uniformity which arose within the area of defamation law can be avoided at the outset. In amending the Privacy Act to include provisions relating to the cause of action for invasion of privacy, its scope will be made broader than simply data protection, and will therefore reflect more accurately the title of the act and will also essentially fulfil Australia's international obligations arising under article 17 of the ICCPR . What would be protected? The only Australian Case to date which has recognised a right to privacy is the 2003

Queensland District Court Case, *Grosse v Purvis*, which relied upon the United States framework, endorsing an action for breach of privacy in the form of an 'unreasonable intrusion on another's solitude'. Skoein SJDC also referred to the decision of the majority in *Lenah Game Meats* for guidance where he saw their implicit support for protecting interests for public disclosure of private facts and unreasonable intrusion upon seclusion. In looking at what an action for invasion of privacy would protect, it would appear at the outset through examining the reasoning of the courts and the current legal avenues for defamation law that the United States concept of 'appropriation' would not be recognised in Australian courts. The use of another's name and portraying them in a false light would appear to fall within the already established defamation principles under the (Defamation Act) and as the High Court has previously indicated in the case of *Sullivan v Moody*, it is unwilling to expand the law where it would lead to one tort encroaching upon the established domain of another. In regards to the recognition for an action of invasion of privacy in the form of unreasonable intrusion and also disclosure of private facts there is however, a strong basis for support, which has been expressed through the Australian Law Reform Commissions' papers and also the majority judgement handed down in *Lenah Game Meats*. In gaining support from the ALRC in recognising the need for private information of an individual to be protected, the judgements handed down by the majority in *Lenah Game Meats* also gave their support for the need to protect the disclosure of private facts. With Gummow and Hayne JJ both referring to the United States Second Restatement, while Gleeson CJ followed a United Kingdom style breach of



confidence approach. The introduction of such a cause of action would fit alongside the current Information Privacy Principles and National Privacy Principles currently protecting some aspects of private information. An obvious shortcoming of the recognition of the disclosure of private facts tort alone is that it will be unable to provide a remedy for situations when an intrusion has occurred but no information has been obtained or disclosed. In order to fill the gap, the introduction of a tort based on unreasonable intrusion should be made. The need for such a cause of action has been expressed in cases such as *Kaye v Robertson* where the court recognised the inadequacies of the existing laws in dealing with such intrusions upon a plaintiff, and in particular the case of *Grosse v Purvis* where the recognition of a right to privacy was based upon unreasonable intrusions towards the plaintiff. In the establishment of an action for unreasonable intrusion, Australian courts should adopt legislature which will encompass both physical and other forms of invasions of privacy in order to embrace the technological advances in surveillance techniques that are now available. Therefore, in cases where photos have been taken through long range lenses, but not published, plaintiffs will still have a cause of action. Accordingly, Australia should adopt a tort of unreasonable intrusion upon privacy, a second tort protecting privacy should be recognised in the form of a disclosure of private facts tort. Bibliography Books: - J McCarthy, *The Rights of Publicity and Privacy* (2nd ed, 2005), [5. 59]. - B Mason, 'Privacy without Principle: The use and abuse of Privacy in Australian Law and Public Policy' (2006). Cases: Journals: - D Butler, 'Tort of Invasion of Privacy in Australia' (2005) 29(2) MULR 339.?? Legislature: - Privacy Act 1988 (Cth) - Human

Rights Act (1998). Speeches: - R Toulson, 'Freedom of Expression and Privacy' (Paper presented at Association of Law Teachers Lord Upjohn Lecture, London, 9 February 2007), 7. Commission Papers: - Australian Law Reform Commission Paper - New South Wales Law Reform Commission Paper Websites: - I Ryan, 'Doe v ABC — A Case Note' (2007) 19(2) Australian Press Council News [www.presscouncil.org.au](http://www.presscouncil.org.au), 7.