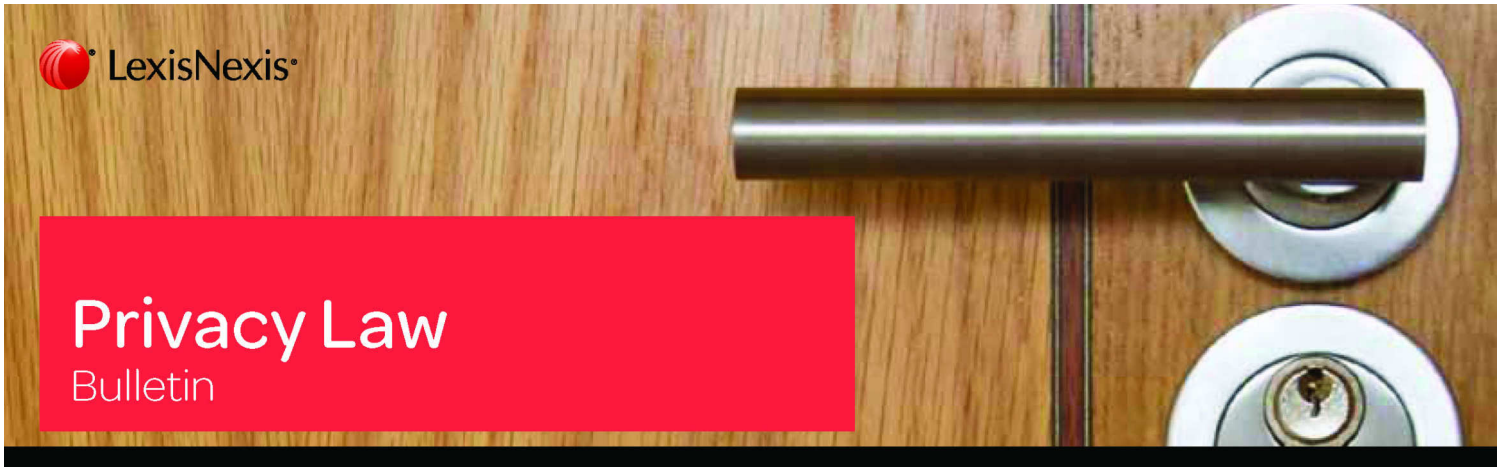

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Do you have a right to privacy?

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Key takeaways

The coming years will likely see:

- the development of a statutory cause of action for breach of personal privacy in Australia in response to society's growing focus on the need for such right;
- the subjective concept of what amounts to "private" information/actions will be developed by common law as against the circumstances of each claim; and
- the rise in class actions against businesses for breach of privacy by virtue of cyber-attacks/espionage.

Technology has significantly influenced the modern economy with businesses relying heavily on digital services for everyday operations. It is also one of modern economy's weakest links, evidenced in the increasing amount of incidents worldwide that have seen the personal data of customers, digitally held by businesses, being made public without their consent.[1] Often, such invasions of individuals' privacy stem from intentional or unintentional data breaches, including those resulting from cyber-attacks/espionage.

Cyber-attacks are considered the second biggest risk for Australasian cities, with the potential of costing the economy $14.26 billion.[2] Such attacks are commonly linked to the development of technology and the lack of sufficient security to complement the developments.

As technology increasingly becomes prevalent in society, regulators will need to constantly ensure that the use of technology is adequately regulated. This article considers the need for Australia to develop its privacy laws to allow for sufficient protection of individuals' right to privacy.

The current state of play

The law has not been fully developed to afford sufficient protection to the real "victims" of cyber-attacks on businesses — the individuals/customers whose information has been released without their authorisation.

While the High Court expressed in 2001 that the "time is ripe for consideration whether a tort of invasion of privacy should be recognised" in Australia,[3] 15 years later, Australia's protection of personal privacy remains inconsistent, comprising of a collection of statutes and common law causes of action.

Privacy as a human right

The right to privacy is enshrined in Art 17 of the International Covenant on Civil and Political Rights (ICCPR), which was ratified by Australia on 13 August 1980. Article 2(3) of the ICCPR provides that a person should have available an "effective remedy" in the event their right to privacy under the ICCPR is breached.

There has not been any uniformity in the application of Art 17 across Australian law, which also remains silent on the application and recognition of Art 2(3).

Victoria and the ACT have adopted the Art 17 principles into legislation by way of the introduction of the Human Rights Act 2004 (ACT)[4] and the Charter of Human Rights and Responsibilities Act 2006 (Vic).[5]

At a federal level, the legislation remains quiet on rights to personal privacy. While the preamble to the Privacy Act 1988 (Cth) indicates its intention to implement Art 17 of the ICCPR, the Act at large is only concerned with information privacy and does not consider personal privacy.

Recommendations to recognise the right

There have been four separate Law Reform Commission inquiries[6] calling for the introduction of a statutory cause of action to protect individual privacy. Further, the NSW Legislative Council Standing Committee on Law and Justice has recently recommended a statutory cause of action be introduced.[7] Despite the strong push to acknowledge personal privacy, the government is yet to clarify whether it will introduce such action.

However, there has been traction in the lower courts in developing such cause of action as part of Australia's common law, with the recognition of a tort for invasion of personal privacy[8] and a tort for the misuse of private information.[9]

Restrictions on the use of common law

The common law development of this action is a reflection of the right of personal privacy becoming more topical and prevalent in today's society. The fact that a court has not yet applied the developing jurisprudence to a particular case should not act as a bar to the common law developing new causes of action. However, the use of the common law to continue to develop

a standalone cause of action may be restrictive in that the courts may take a cautionary approach to such developments to avoid inconsistencies that may arise.

This was seen in *Giller v Procopets*[10] where the plaintiff made a claim against the defendant (an ex de facto partner) for intentional infliction of harm, invasion of privacy and breach of confidence caused by the defendant knowingly distributing videos of the pair engaging in consensual sexual activities to their family and friends. The plaintiff was distressed and upset from the incident, but did not suffer any psychiatric illness.

The court acknowledged the inconsistencies with the law of torts in that it provided compensation for claims for intentional infliction of pure mental distress (such as defamation and false imprisonment), yet failed to provide compensation for the tort of intentionally causing harm.[11] Neave JA elected not to expand the tort of intentional infliction of harm to also cover "distress", given such expansion could lead to further inconsistencies. Instead, her Honour took the view that such expansion of law was best dealt with by the legislature, which is in the best position to determine how a balance should be struck.[12]

By leaving the development of the cause of action to common law, such action may develop at a leisurely pace and may not be comprehensive enough to reflect the current and rapidly evolving needs of modern society. The Australian judiciary is yet to consider a case where an independent third party (with no relationship to the claimant) may be subject to an obligation to afford privacy to the claimant. That is, such claims will likely take form of a claim for breach of privacy made by a customer of a business directly against a hacker for the unauthorised distribution of personal information as a result of cyber espionage directed at that business. However, we envisage such claims to be infrequent, given the likely difficulties in locating and identifying the hacker and whether the hacker has the financial capacity to meet any award for damages made against him/her. Rather, we believe the development of such action would be instrumental in the increase in class actions brought by customers against businesses for breach of privacy.[13]

The regulation of businesses

Without the proper development of the cause of action, there will be a stark imbalance between the regulation afforded to businesses to ensure protection of the privacy of individuals/customers as against the remedies available to such customers for the breach of such privacy by businesses or third parties.

The government has heavily invested in regulating the impact of cyber-attacks/cyber espionage on businesses through various means including:

- the development of the Australian Cyber Security Centre to act as a central hub for collaboration between the private and public sector in "combating" the range of potential cyber threats;
- the implementation of various Australian Securities and Investments Commission (ASIC) reports[14] aimed at regulating ASIC's population when it comes to creating parameters to minimise and control cyber-attacks on businesses; and
- the potential introduction of mandatory data breach notification laws, which will aim to ensure businesses adequately notify the government of the types of threats/cyber-attacks they may face.

These initiatives aim to ensure businesses are regulated and adequately insured when dealing with such threats and also allow the government to collect data to inform itself of the trends of cyber-attacks and threats that have been faced.

Is Australia falling behind?

Australia is somewhat falling behind the development of a right to privacy in comparison to the United Kingdom, Canada and New Zealand.

The United Kingdom's position

In the UK, recommendations have been made against the introduction of a statutory cause of action as it is unlikely to rectify the uncertainties of the law of privacy including the scope of what constitutes "private".[15] Despite this, the UK has extensively developed common law on the right to privacy, which is likely aided/endorsed by the Human Rights Act 1988 (UK).[16] The equitable action for "breach of confidence" has been developed to encompass the misuse of private information in the absence of a standalone right to privacy in the UK.

Campbell v MGN Ltd[17] (*Campbell*) was instrumental in developing the tort, with the House of Lords identifying the test used when classifying information as private. The court must ask whether a reasonable person of ordinary sensibilities in the same position as the claimant (rather than the recipient of the disclosed information) would find the distribution of such information offensive.

The case involved supermodel Naomi Campbell who commenced proceeding against a newspaper, seeking damages for breach of confidentiality after the newspaper had printed photos of Ms Campbell exiting a Narcotics Anonymous meeting. Given confidentiality and anonymity were salient elements of the drug counselling provided by Narcotics Anonymous, the House of Lords held that a person in Ms Campbell's position would find such disclosure offensive.

The UK's robust common law has indicated that the following factors influence whether information can be considered private:[18]

- the nature of the information;
- how it is kept;
- whether the offender knew he/she did not have consent to use that information;
- the effect of that information on the claimant; and
- if it is intended for that information to become public.

New Zealand's position

New Zealand has developed two privacy torts aimed at publication of private facts and bare intrusions into private matters.

The test for breach of privacy/confidence in New Zealand contains a higher threshold than the test set out in *Campbell* — requiring an existence of facts where there is a reasonable expectation of privacy and the publication of such facts would be considered "highly offensive" to an objective, reasonable person.[19]

The requirements that the act be highly offensive creates a threshold of seriousness that requires the publication to be "truly humiliating and distressful or otherwise harmful".[20] However, the New Zealand Supreme Court has indicated that the jurisprudence is not yet settled and the court reserved its position as to whether the test should include a requirement that the act was highly offensive.[21]

The test for bare intrusions into privacy was developed in *C v Holland*,[22] where an individual commenced proceeding against her roommate for damages for invasion of privacy following the discovery of unauthorised video recordings of her naked in the bathroom. Given the defendant did not distribute the recordings, the test set out in *Hosking v Runting*[23] could not be satisfied and the court held that a breach of privacy did not occur. The jurisprudence in respect of this tort needs further development to recognise a breach had occurred in circumstances where no losses were suffered, akin to a claim for trespass.

New Zealand has otherwise identified a defence of "legitimate public concern", which aims to focus on matters of genuine public interest in an attempt to balance the values of privacy and freedom of expression and information.

What's next?

While common law has acted as a crutch in providing some protection of the right to privacy in Australia, the "genius" of the common law in resolving unchartered problems is likely to be challenged if it simply "limps along behind".[24]

Australia should look to implement a uniform right to privacy, which would be easily implemented by way of a statutory right to personal privacy. This will provide a starting point for Australia to consistently develop and maintain its privacy laws and would prevent claimants from having to sift through the fragmented common law. Such action should take into consideration developments in other jurisdictions, as well as recommendations regarding the scope of action and available defences (although in different terms) made by the various Law Reform Commissions.[25]

This will not resolve the difficulty in understanding what constitutes private information, which is subjective and ought to remain fluid so as to reflect contemporary societal values. Further, consideration needs to be given as to whether the threshold of highly offensive should be implemented. Privacy is a human right and is a dignity based interest. Other dignity based torts are actionable without the need to prove harm or hurt (such as trespass to the person) as they are designed to vindicate the "indignity inherent in unwanted touching".[26] As the tort of privacy is concerned with vindicating indignity, it should be aligned with these actions so to ensure there is no requirement to prove harm as otherwise suggested by "highly offensive" threshold.[27]

While it remains challenging to identify the scope of the proposed action, it is clear that the Australian legislature, with input from the judiciary, should develop such action in light of advances in technology and changing societal attitudes, including the growing focus on the right to individual privacy.

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Footnotes

1. See for example the Ashley Madison website hack that leaked personal details of the users of the website and the Department of Immigration's inadvertent publication of details of roughly 9000 asylum seekers online.
2. Cambridge Centre for Risk Studies, *Lloyd's City Risk Index 2015–2025*, www.lloyds.com/cityriskindex/.

3. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 54 IPR 161; [2001] HCA 63; BC200107043 at [335] per Callinan J.
4. See Human Rights Act 2004 (ACT), s 12(a).
5. See Charter of Human Rights and Responsibilities Act 2006 (Vic), s 13(a).
6. Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* Report No 108 (August 2008); Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* Report No 123 (September 2014); Victorian Law Reform Commission *Surveillance in Public Places* Report No 18 (June 2010); New South Wales Law Reform Commission *Invasion of Privacy* Report No 120 (August 2009).
7. Standing Committee on Law and Justice *Remedies for the Serious Invasion of Privacy in New South Wales* (March 2016).
8. *Grosse v Purvis* (2003) Aust Torts Reports 81–706; [2003] QDC 151.
9. *Doe v Australian Broadcasting Corp* [2007] VCC 281; *Wilson v Ferguson* [2015] WASC 15; BC201500064; *Giller v Procopets (Giller)* (2008) 24 VR 1; [2008] VSCA 236; BC200810874.
10. *Giller*, above n 9.
11. *Giller*, above n 9, at [473] per Neave JA.
12. *Giller*, above n 9, at [476] per Neave JA. As the plaintiff succeeded on the breach of confidence claim, the court did not go on to consider whether a separate action existed for breach of privacy.
13. Akin to *Condon v Canada* [2015] FCJ 803 where students commenced proceedings against a Canadian tertiary education provider for breach of confidence and intrusion upon seclusion following the loss of an unencrypted hard drive containing personal information of those students.
14. See for example, Australian Securities and Investments Commission *Cyber Resilience: Health Check* Report No 429 (March 2015).
15. Joint Committee on Privacy and Injunctions *Privacy and Injunctions* House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (March 2012) 37.
16. Which gives effect to Art 8 of the European Convention of Human Rights, regarding the right to privacy.
17. *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; (2004) 62 IPR 231.
18. See for example *OBG Ltd v Allan; Douglas v Hello! Ltd (No 3); Mainstream Properties Ltd v Young* [2007] UKHL 21; [2007] 4 All ER 545; [2007] 2 WLR 920, where the court held that the photographs surreptitiously taken by a Hello! Magazine contractor of the applicants' wedding was not considered a breach of their privacy.
19. *Hosking v Runting* [2005] 1 NZLR 1; [2004] BCL 395; BC200460235 at [117] per Gault P and Blanchard J.
20. Above n 19, at [126].
21. *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277; [2007] NZSC 91; BC200762862 at [25] per Elias CJ.
22. *C v Holland* [2012] 3 NZLR 672; [2012] NZHC 2155.
23. Above n 19.
24. N Wilson "Regulating the information age — how will we cope with technological change?" (2010) 33(2) *Australian Bar Review* 139; *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383; BC7000100 at [3] per Windeyer J.
25. Above n 6.
26. C Hunt "Breach of privacy as a tort" (2014) 8 *New Zealand Law Journal* 286 at 288.
27. Above n 26.