

Invasion of Privacy Tort?

Roger Walter | March 2016 | Insurance & Financial Services

Summary

No statutory or common law action for invasion of privacy has developed in Australia. In 2001, the High Court of Australia left the option open in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*. The issue of whether a statutory cause of action for serious invasion of privacy should be introduced in NSW will be addressed in a report to be released on 3 March 2016. In this article we briefly outline the context of this development, which may lead to the creation of new exposures to liability for businesses and their insurers.

Introduction

Since around 2000, the common law has developed a remedy or an action for invasion of privacy. Notably, this has not occurred at appellate level in Australia but it has in the United Kingdom and in New Zealand. A catalyst in the UK was the introduction there of the Human Rights Act in 1998. It required UK government bodies, including the courts, to give proper recognition to the European Convention on Human Rights, which requires protection of privacy and protection of freedom of speech in the public interest.

In Australia, the issue of whether there should be a cause of action for serious invasion of privacy was addressed in an Australian Law Reform Commission (ALRC) inquiry on privacy that concluded in 2008, with a recommendation for the creation of a statutory cause of action.

On 12 June 2013, the ALRC received terms of reference to undertake a review into serious invasions of privacy in the digital era. The ALRC final report 'Report 123: Serious Invasions Of Privacy In The Digital Era' was released on 30 June 2014 to the newly elected coalition government. As requested, the ALRC included in that 2014 report a template or design for the legislative creation of a tort

of serious invasion of privacy. At the federal level, there has been no significant response to the report, but there has been movement in New South Wales where a parliamentary inquiry was established on 24 June 2015 by the state's upper house, the Legislative Council. The Legislative Council's Standing Committee on Law and Justice has been conducting the inquiry and its report is due on 3 March 2016.

The legal framework

The protection of privacy in Australia to date has been largely dependent on the fairly recent and limited statutory regimes governing the gathering, retention and release of information and a range of other barriers and sanctions afforded by more traditional forms of relief, such as damages for breach of confidence, breach of contract or for harm caused by defamatory or other tortious conduct.

Defamation law was never designed as a protection of privacy and it was rendered a less stringent agent for privacy protection with the commencement in 2006 of the national uniform reforms in the area, which removed from the defence of justification the element of public interest or benefit. The result was that public interest or benefit no longer posed a hurdle for a defendant seeking to justify a publication, if truth could be established.

The current NSW committee was given the following terms of reference:

That the Standing Committee on Law and Justice inquire into and report on remedies for the serious invasion of privacy in New South Wales, and in particular:

- (a) the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence;
- (b) whether a statutory cause of action for serious invasions of privacy should be introduced; and
- (c) any other related matter.

We note in relation to the above terms that damages for emotional distress are not generally accepted as being available in the equitable action of breach of confidence and that, leaving aside trespass, malicious prosecution and defamation, tortious causes of action do not provide a remedy for the intentional infliction of emotional distress that does not amount to a psychiatric illness.

Invasion of privacy generally takes the form of misuse of personal information (facilitated greatly by internet usage) or the intrusion into seclusion, instances of which commonly involve the use of cameras (fixed or mobile), or a combination of the two. Embarrassment, hurt feelings and bullying or threatening behaviour commonly arise as a consequence.

Where mere emotional distress, rather than diagnosable psychiatric illness, is the subject of litigation there is a heightened risk of disproportionate expenditure on legal costs in comparison to the size of any award for damages in prospect, so access to justice considerations may feature in the forthcoming committee report, along with a discussion about whether the cause of action should require a fault element and if so, whether it should encompass negligence.

The workload of the cheaper and more accessible dispute resolution pathways may be another area of concern but the experience overseas (UK, New Zealand and Canada – where four provinces have a statutory cause of action) is that there has been no opening of the floodgates with privacy invasion disputes.

A perceived wide-ranging benefit of having a statutory action for serious invasion of privacy is that it would have a normative effect on behaviour across society. If something is made unlawful, people tend to stop and think before they act.

The elements of the statutory cause of action the ALRC designed in 2014 are:

1. The invasion of privacy must be either by intrusion into seclusion or misuse of private information.
2. The plaintiff must prove a reasonable expectation of privacy in all the circumstances.
3. The invasion must have been committed intentionally or recklessly—mere negligence is not sufficient.
4. The invasion must be serious.

5. The invasion need not cause actual damage and damages for emotional distress may be awarded.

6. The court must be satisfied that the public interest in privacy outweighs any countervailing public interests.

A range of defences and remedies were also recommended by the ALRC.

Implications

There is no expectation that the common law in Australia will rush towards recognition of a tort of invasion of privacy. The expectation is that legislatures will have to lead the way.

In relation to the prospect of a cause of action of serious invasion of privacy actually emerging, the options that appear to be available to the NSW government are:

- (a) to do nothing and see what develops through the common law or any legislative initiatives that might at some stage be taken up by the federal government (which many consider unlikely due to the prospect of intense media involvement and the perception that life for the media and other publishers could become a little more complicated with the introduction of the cause of action);
- (b) to promote among the other states the introduction of the cause of action by legislation at state level across the nation in a coordinated way; or
- (c) to lead by example and enact legislation establishing the cause of action in NSW.

If the law is to be changed in this area, there will be obvious implications for businesses and their insurers in terms of precautionary steps and the design of policy coverage. The issues will include data security measures and vicarious liability for certain behaviours of staff, including activity involving the distribution or publishing of digital images.

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