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Social Media: An Update on the "Wild West of Publishing" In Less Than 140 characters *smiley face*

In a speech to CAMLA members and guests, Matthew Lewis provides an update on recent developments in defamation law in a social media context.

Social media has fundamentally changed the way we communicate with each other. Instantaneous status updates and tweets mean that there is a greater risk of someone defaming another person. It is a constantly developing area. Recently, one Judge remarked that social networking is to be considered "*the Wild West in modern broadcasting*" thereby inspiring the title to this seminar. I will do my best to give you a flavour of what is happening both here and overseas in that area.

Before we begin, some interesting information. Some of you may already be familiar with the fact that the Standing Council on Law and Justice (SCLJ, formerly SCAG) met on 5 October 2012 to discuss a coordinated national approach to issues surrounding social media and the law by referring it to the working group chaired by Victoria. I have recently received an email from the Federal Attorney General's Department that the working group will provide recommendations to the SCLJ following consultation with representatives of social media organisations, news media organisations, justice officials, law enforcement authorities and the courts.

For context and a bit of fun, I thought some statistics in relation to social media might be of interest:

- One out of eight couples married in the United States met on social media.
- If Facebook were a country it would be the third largest in the world.
- There are over 60 million status updates on Facebook every day.
- There are 200 million tweets per day and I even hazard a guess that in relation to the 60 million status updates and 200 million tweets per day they would not have the benefit of any pre-publication advice!
- If you are paid $1 for every article posted on Wikipedia you would earn $1.7 million per hour.[1]

These brief statistics emphasise that the way we interact with one another has fundamentally changed. That has, of course, thrown up some very interesting legal challenges.

I intend to focus primarily on five issues: first, recent authorities relating to search engines as publishers; second, defendants (both social media platforms and individuals) who have been sued in defamation for "tweets"; third, developments in respect of the anonymous putative defendant; fourth, some recent judicial comment on social media and damages considerations; and fifth, some procedural pointers in relation to issuing a subpoena on a social networking entity.

Search engines as publishers

We will all be familiar with the *Bunt v Tilley [2007] 1 WLR 1243* line of argument that search engines are a mere conduit and are not publishers for the purpose of defamation law at least

1 See generally Erik Qualman's book: *Socialnomics: How Social Media Transforms the Way We Live and Do Business* and YouTube video "Social Media Revolution" at http://www.youtube.com/watch?v=sIFYPQjYhv8.

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in common law. It would appear, in light of recent developments, that the courts have indicated a willingness to depart from that approach in certain circumstances.

In particular, both the Victorian Supreme Court (*Trkujla v Google [2012] VSC 533*) and the Court of Appeal in England and Wales (*Tamiz v Google Inc [2013] EWCA Civ 68*) considered that Google could be a publisher of defamatory information. The issue has not yet been definitively answered.

One out of eight couples married in the United States met on social media

Tamiz is the most recent authority of any substance and given it referred to Trkujla, I intend to focus on that authority.

Tamiz concerned the provision of a service called Blogger (also known as Blogger.com) by Google Inc. The service includes design tools to help users create layouts for their blogs and, if they do not have their own URL (web address), enables them to host their blogs on Blogger URLs. The service is free of charge but bloggers can sign up to a linked Google service that enables them to display advertisements on their blogs, the revenues from which are shared between the blogger and Google Inc. The claim was brought against Google Inc in respect of allegedly defamatory comments posted on a particular blog hosted on Blogger. At first instance, Eady J found that at common law Google Inc. was not a publisher and, in any event, Google took reasonable care in passing the complaint to the blogger after it was notified, thereby entitling it to a defence under the relevant legislation and, in addition, the defence of triviality was clearly engaged. An issue on appeal, amongst others, was whether there was an arguable case to say Google Inc. was a publisher of the defamatory comments.

Lord Justice Richards thought that after Google Inc. had been given notice of defamatory material being present on its site, and because it provided the service for designating a blog, Google *could* be a publisher and thereby departed from the *Bunt v Tilley* line of argument. The court was assisted by a giant noticeboard analogy. His Lordship said at [33]:

I have to say that I find the noticeboard analogy far more apposite and useful than the graffiti analogy. The provision of a platform for the blogs is equivalent to the provision of a noticeboard; and Google Inc. goes further than this by providing tools to help a blog and design the layout of his part of the noticeboard and by providing the service that enables the blogger to display advertisements alongside the notices on his part of the noticeboard. Most importantly, it makes the noticeboard available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms.

In *Trkulja,* the plaintiff was awarded $225,000 against Yahoo!7 by reason of searching the plaintiff's name on the search engine would result in, one hit, directing attention to a website called "Melbourne Crime" which contained the alleged defamatory matter. It was not in issue whether Yahoo!7 was a publisher for defamation law but, as in *Tamiz*, there was a live issue as to whether Google was a publisher. The jury found Google was a publisher by directing third parties to the relevant website by virtue of the results generated by a search of the plaintiff's name, distinguishing the first instance decision of *Tamiz* (above).

Most recently, the issue of whether Google is a publisher for defamation law was considered by the Federal Court of Australia in *Rana v Google Australia Pty Limited & Ors* [2013] FCA 60 per Mansfield J. However, this case would seem to have little utility given that the plaintiff alleged that Google *Australia* was a publisher despite a dearth of evidence to that effect (it will be noted that in the first instance decision of *Tamiz,* Eady J dismissed the plaintiff's allegation against Google UK on jurisdictional grounds. A point that was not pressed on appeal). Accordingly, his Honour found that the plaintiff's claim could not be sustained and therefore summarily dismissed the matter. However, his Honour gave the plaintiff leave to replead against Google Inc. noting that the law in this respect is unsettled. To date, there have been no further developments.

It would therefore appear at first blush that the courts have indicated an intention to move away from the *Bunt v Tilley* line of authority but that much still depends on the technology in question. For example, in *Tamiz,* the court was concerned with the particular blogging platform and how Google controlled that particular platform. How this more recent approach would effect social networking sites is yet to be determined. However, assuming the same arguments would apply, social media platforms could argue they are more passive facilitators.[2]

This area of the law requires urgent attention. There are ostensibly conflicting judgments between Eady J (*Bunt*) and Richards LJ (*Tamiz*) Beach on the one hand and J (*Trkulja*) on the other. Whilst, in a misleading and deceptive conduct context, the High Court of Australia have also recently held that Google are not publishers for the purposes of endorsing/adopting the representations of advertisers: *Google Inc v ACCC* [2013] HCA 1. It must surely be only a matter of time before the appropriate test case comes before the courts. The sooner the better.

2 See forthcoming article by Dr David Rolph, Sydney University.

Social networks as defendant

Instances in which a social networking site is a named defendant (in the defamation context) are comparatively few. This may be attributable to the likely cost involved as well as jurisdictional issues including the reluctance of the States to enforce any foreign judgment (particularly from the UK) where its citizens did not benefit from the same protection prescribed by the 1st Amendment.

In Australia there is only one recent example of any note, namely *Meggit v Twitter* (2012). However, this case came to nothing. I have recently spoken to the lawyers representing Mr Meggit and I am told that Mr Meggit has subsequently abandoned the litigation. I would apprehend that the whole process was too expensive a process and too hard a process generally for the reasons discussed below.

The facts are as follows. Joshua Meggit wanted to sue over a tweet by writer and TV identity Marieke Hardy. Ms Hardy wrongly outed Mr Meggit as an author of a "hate blog" dedicated to her. Eventually, Mr Meggit settled with Ms Hardy for purportedly $15,000.00. However, Mr Megitt maintained his action against Twitter Inc. for the re-tweets and the subsequent comments by other Twitter users.

The case did pose some very interesting issues that plaintiffs would face should they wish to proceed against Twitter or any other social network platform in Australia. In particular:

- Is Twitter present in the jurisdiction? *Adams v Cape [1990] Ch 433]* considerations arguably apply.
- Even if a plaintiff could establish a cause of action, the defendants are likely to avail themselves of defences such as clause 91: *Broadcasting Services Act (Cth)* 1992/Innocent dissemination

I interpolate, as foreshadowed, that another problem for Meggit may have been the *SPEECH Act 2010* (US) as well as the Communications Decency Act (US) 1996. The former Act came into force in the States on 10 August 2010. Shortly put, it is a retreat from judicial comity and is intended to protect US citizens from liable tourism stemming from the decisions of the England and Wales High Court. It therefore purports to protect its citizens from being sued in jurisdictions that provide less protection for free speech than the US (i.e. under the First Amendment). The Act is important because if a defendant (who is a US citizen) has no assets in Australia the plaintiffs may encounter problems in enforcing any Australian judgment in the States. The Act has been subject of some authority concerning the enforcement of Canadian judgments (which follows the English model of defamation law). Of interest to those practitioners present tonight would be the following recent cases: *Investorshub Com, Inc v Mina Mar Group, Inc*., 2011 US DIST Lexis 87566 (ND FLA. June 20, 2011) and *Pontigon v Lord*, 340 SW3D 315 (MO.CT.APP.2011). Interestingly, the American court in the *Mina Mar* refused to acknowledge even a consent order. In an Australian context, this Act has been considered comparatively recently in *Barach v UNSW* [2011] NSWSC 431.

Additionally, *AB Limited v Facebook Ireland & Ors* [2012] is interesting for various reasons and is worth noting (and I shall return to this case below in a different context). Tthe plaintiff complained that it was receiving abusive messages posted on its Facebook site by anonymous users. The plaintiffs brought their claim against Facebook as well as the anonymous defendants. The claim was eventually dismissed against Facebook in October 2012 by the High Court of Northern Ireland. However, there is no judgment available as to why the claim was dismissed against Facebook. I have of course looked at all the relevant sites on the Internet such as the *Gazette of Law and Journalism* and blog sites such as *Inforrm* and they, as I have discovered, could not find any judgment.[3]

Social media: Individuals as defendants

Typically, it is more common to see individuals named as a defendant in a matter involving social media. In a defamation context, there are currently a few interesting cases involving Twitter which should be noted.

1.1 Australia

Crosby v Kelly (Federal Court of Australia) concerns the Politician Mike Kelly who tweeted on 1 October 2011: "Always grate [sic] to hear moralising from Crosby, Texta, Steel and Gnash. The mob who introduced push polling to Aus." It is being argued that as principals of Crosby Textor Research Strategies Results, the named individuals introduced a polling technique that had the deceitful purpose of deliberately influencing voters with material slanted against the opposing candidate.

There was a jurisdictional challenge that was finally determined by the High Court of Australia in favour of the Federal Court retaining jurisdiction. On 5 May 2013, Foster J said, during an interlocutory hearing where it was apparent that the parties could reach settlement, the matter was heading to be "a famous defamation". The matter continues.

The Act is important because if a defendant (who is a US citizen) has no assets in Australia the plaintiffs may encounter problems in enforcing any Australian judgment in the States.

1.2 United States of America

In 2011, Courtney Love reportedly settled a defamation action commenced by fashion designer, John R Zimmerman over her tweets for $430,000.00 (Nevada Lawyer June 2011 at [50]). However, Ms Love must have been very dissatisfied with her lawyers because she tweeted directly after her settlement:

> I was fucking devestated when Rhonda J Holmes Esquire of San Diego was brought off. [sic]
>
> I've been hiring and firing lawyers to help me with this.

Whilst I tried to obtain some updated information from this particular case, I believe the case must either have settled or has not yet gone to trial. There is currently a dearth of information about it online.

1.3 United Kingdom

The most recent case is, of course, *Lord McAlpine of West Green v Sally Bercow* [2013] EHWH 1342 (QB). Briefly stated, on 2 November 2012 the BBC's Newsnight programme broadcasted a report relating to child abuse in North Wales and the involvement of a "leading conservative politician from the Thatcher years". Ms Bercow, who is high profile wife of the Speaker of the House of Commons, published to her 56,000 followers on 4 November 2012: "Why is Lord McAlpine trending? *innocent face*"

Lord McAlpine commenced proceedings against Ms Bercow and other high profile tweeters. For those tweeters with less than 500 followers they were invited to merely apologise to Lord McAlpine and a website was set up for that purpose.

Mr. Justice Tugendhat in the last few weeks considered the well known rules relating to natural ordinary meaning and innuendo, and held that: (1) a reasonable reader would have linked Lord McAlpine to the tweet because firstly Ms Bercow's followers were interested in politics and current affairs and (2) the use of the word "Lord" would have meant that a reasonable reader would know he was prominent even though he was otherwise not in the public eye at the time. There was much speculation as to who the unnamed "leading politician" was.

Tugendaht J had to further consider the use of "*innocent face*" and whilst there may be some element of a baby boomer explaining Gen Y lingo, his Lordship quite properly stated:

3 See "News: Northern Ireland judge orders Facebook to identify account holders" at http://inforrm.wordpress.com/2012/08/20/news-northern-ireland-judge-orders-facebook-to-identify-account-holders/.

> In my judgment the reasonable reader would understand the words innocent face as being insincere and ironical. There is no sensible reason for including those words in the tweet if they are to be taken as meaning that the defendant simply wants to know the answer to a factual question. (at [84])

His Lordship went on to say:

> There is no alternative explanation for why this particular peer was being used in the tweets which produced a trend, then it is reasonable to infer that he is trending because he fitted a description of the unnamed abuser. I find the reader would infer that. The reader would reasonably infer that the defendant had provided the last piece in the jigsaw. (at [85])

Things can be held to be seriously defamatory, even when you do not intend them to be defamatory and do not make any express accusation

In considering the repetition rule, his Lordship stated that Mrs Bercow was to be treated as if she had made the allegation herself, with the insertion of Lord McAlpine's name. It was an allegation of guilt which the Judge said the tweet meant in its naturally and ordinary defamatory meaning that the claimant was a paedophile who was guilty of sexually abusing boys living in care. Alternatively, it bore an innuendo meaning the same effect.

Defamation lawyers believe that this was the expected result. However, as has already been noted by Hugh Tomlinson QC, how would a reader of a tweet who had no idea of the Newsnight broadcast understand what the tweet concerned? It would surely be another Twitter 'in joke' that no one understands.[4] Some have said that this judgment may be a case of "twitter chill".[5] I doubt that. If it does give some pause for thought, that is arguably a good thing and might act as some sort of pre-publication veto before they publish. Such advice to the media does not necessarily have a chilling effect on free speech.

The Lord McAlpine case has now settled post judgment. Mrs Bercow issuing the following stern warning to other Twitter users:

> Today's ruling should be seen as a warning to all social media users. Things can be held to be seriously defamatory, even when you do not intend them to be defamatory and do not make any express accusation. On this, I have learned my own lesson the hard way".[6]

Trivial defamation

In the context of plaintiffs complaining of purported defamatory content published on social media platforms by individual defendants, it is also worth noting very briefly that defendants in the UK are increasingly seeking to strike out trivial claims as an abusive process, where the claimant cannot demonstrate that the allegations are sufficiently serious or there is insufficient publication. We are, to my knowledge, yet to see that in Australia: *Kordowski v Hudson* (2011) EWHC 2667 (QB); *Wallace v Meredith* [2011] WWHC 75 (QB); *McBride v Body Shop Int PLC* [2011] EWHC 1658.

Anonymous defendants: recent developments

We are all familiar of course with trying to trace anonymous users of blog sites and of social networking platforms by way of the use of IP addresses and identifiers. In August 2012, the High Court of Northern Ireland ordered Facebook to identify anonymous account holders responsible for abuse messages posted on the site. Facebook in that case had to provide email addressees within 24 hours and supply further information within 10 days. The basis of those orders was probably the equitable order called "Norwich Pharmacal Order".[7]

In February 2013, and after Facebook departed the litigation, McClosky J handed down judgment in *AB Limited*[8]. This may well be a symbolic judgment because it seems that the attempts to identify the anonymous defendants failed. Of particular note, Justice McClosky said at [13]:[9]

> It is indisputable that social networking sites can be a force for good in society, a truly positive and valuable mechanism. However, they are becoming increasingly misused as a medium through which to threaten, abuse, harass, intimidate and defame. They have been a source of fear and anxiety. So called "trolling" appears to be increasingly commonplace. There is much contemporary debate about evil such as the bullying of school children and its potentially appalling consequences. Social networking sites belong to the "Wild West" of modern broadcasting publication and communication. They did not feature in the Leveson enquiry and, in consequence, I am not addressed in the ensuing report (for a respectable recent commentary, see the UK Human Rights blog, a source of much viable material and analysis). The misuse of social networking sites and the abuse of the right to freedom of expression march together. Recent impending litigation in Northern Ireland confirms that, in this sphere, an increasingly grave mischief confronts society.
>
> [14] … The solution to this mischief is far from clear and lies well beyond the powers of this court. Self regulation and/or statutory regulation may well be necessary. In the meantime, this unmistakably pernicious evil is repeatedly manifest. Recourse to the courts for appropriate protection and remedies is an ever expanding phenomenon. The courts in Northern Ireland have demonstrated their availability and willingness to protect the interest of those whose legal rights are infringed by the cowardly and faceless perpetrators of this evil. As the present cases demonstrate, the law, through the courts, penetrates the shield and masks of anonymity and concealment. Effective remedies are available and will be granted in appropriate cases. The courts will continue to play their parts as the vehicle for the protection and vindication of legal rights and interests, and where violated, in a society governed by the rule of law and belonging to a super national legal order in which human rights have been placed at the centre, as a result of the Lisbon Charter of Fundamental Rights, a dynamic, revolutionary and directly effective measure of EU law.

Other cases considering Norwich Pharmacal Orders in the UK which may be of interest despite falling outside the scope of "recent developments", would be: *Sheffield Wednesday FC v Hargreaves* [2007] England Wales High Court 2375 (QB): anonymous website postings. Application partially unsuccessful; *Applause Store Productions Limited v Raphael* (2008) EWHC 1781 (QB): Norwich Pharmacal Order against Facebook to reveal, amongst other things, IP addresses; *An Author*

4 See Hugh Tomlinson, "Case Law: McAlpine v Bercow (No.2), Sally Bercow's tweet was defamatory" at http://inforrm.wordpress.com/2013/05/24/case-law-mcalpine-v-bercow-no-2-sally-bercows-tweet-was-defamatory-hugh-tomlinson-qc/.

5 See "McAlpine v. Bercow and a New Era of 'Twitter Chill'" at http://thetrialwarrior.com/2013/05/24/mcalpine-v-bercow-and-a-new-era-of-twitter-chill/.

6 Note 4.

7 Note 3. See also "Belfast judge orders Facebook to identify abusive account holders" at http://www.bbc.co.uk/news/uk-northern-ireland-19293161.

8 [2013] NIQB 14.

9 See "Case Law, Northern Ireland, AB Ltd v Facebook Ireland, Libel damages for anonymous posts" at http://inforrm.wordpress.com/2013/03/05/case-law-northern-ireland-ab-ltd-v-facebook-ireland-libel-damages-for-anonymous-posts/ and see also "News: Northern Ireland Judge awards £35,000 damages for anonymous Facebook libels" at http://inforrm.wordpress.com/2013/02/09/news-northern-ireland-judge-awards-35000-damages-for-anonymous-facebook-libels/.

of a Blog v Times Newspapers Limited [2009] EWHC 1358 (QB); no legally enforceable right for a blogger to remain anonymous (that is, privacy arguments).

Of course, in New South Wales, seeking to reveal the anonymous putative defendant would be done by way of a preliminary discovery application under UCPR r5.2. A preliminary discovery application has to be firstly necessary and secondly, has to follow reasonable enquiries having been made. It may therefore be arguably onerous for a plaintiff to establish such a test and be costly.

The most recent authority which practitioners should be aware of in respect of preliminary discovery under the UCPR in NSW is of course *The Age Company Limited & Ors v Liu* [2013] NSWCA 26, where Bathurst CJ confirmed that preliminary discovery was an objective test and the plaintiff must disclose the substance of the enquiries to the court - but not in every detail (at [52] – [53]). If a court is unable to conclude that reasonable enquiries have been made, the application will fail. Likewise, Bathurst CJ also said (at [53]): "Similarly if the court is unable to conclude that the applicant for preliminary discovery does not in fact know the identity or whereabouts of the putative defendant the application will also fail" (emphasis added).

In the Federal Court of Australia, note: *Costin v Duroline Products Pty Limited* [2013] FCA 501 per Yates J (to the same effect as Liu).

Damages considerations

As to damages considerations referable to social networking platforms, I do not consider that there has been, or will be, dramatic changes to 'regular' considerations. However, some of the recent authorities referred to above demonstrate that 'regular' considerations are brought sharply into focus when looking through the lens of social media.

For example, it is 'damages 101' to say that a defamatory statement to one person will cause infinitely less damage than publications to the world at large. Yet, as demonstrated by the *McAlpine* and *Cairns* litigation (above), social media provides a mechanism for the 'rapid fire' of defamatory matter. What may have been intended to be a communication from a putative defendant to one/a few other persons can, within the blink of an eye, go 'viral', that is be communicated to the world at large by way of the use of such mechanisms as 'liking' or 're tweets'. An amount of damages may well reflect such publication (albeit that a cap of course exists under the *Australian Uniform Defamation Acts*).

Likewise, damages may be aggravated by further 'tweets'/'likes'/other publications on social media. For example, in the McAlpine litigation, Mrs Bercow tweeted of Lord McAlpine's lawyers: "His lawyers ambulance chasers tbh #bigbullies". It is clearly arguable that such a tweet may go towards aggravating damages. Because Mrs Bercow has settled her claim against Lord McAlpine, the court does not have to deal with this issue. *Cf Cruddas v Adams* [2013] EWHC 145 (QB).[10]

By the same token, a defendant may use social media to reduce damages. For example, the relevant social networking platform may be used to publish, to the same readership as the original defamatory matter complained of, an equally rapid withdrawal of a defamatory statement, apology and an admission of falsity. That would arguably have the effect of diminishing the impact of the original publication complained of. In what may be an extreme case, the Guardian (UK) reported in 2011 on a Malaysian case where a defendant (politician's aid) agreed to apologise 100 times on Twitter over the course of three days.[11] Needless to say, it emphasises that defendants may use social media in creative ways to reduce their liability in damages.

It is abundantly clear then, as the court noted in *Cairns*, that: "…with the ready availability of the world wide web and of social networking sites, the scale of this problem has been immeasurably enhanced, especially for liable complaints who are already, for whatever reason, in the public eye. In our judgment, in agreement with the Judge, this percolation phenomenon is a legitimate factor to be taken into account in the assessment of damages." at [27].

Whilst there is nothing new in this approach, it perhaps lends credence to the view that the 'grapevine effect', an established principle in Australian defamation law (and was expressly referred to with approval by their Lordships in *Cairns*) is just as apposite (if not more so) to social media as it is to the more mainstream media.

From a practical perspective, practitioners may note that to establish 'readership' expert evidence may be required - as was done in Cairns where a median approach was taken: *Cairns v Moody* (No.2) at [26] and [27].

The final point I wish to quickly highlight in relation to damages in the context of social media, is that the courts appear to differentiate between celebrity use on social networking platforms and the general public. In particular, it has been said that: "Publications by celebrities via social media, a format designed to inculcate celebrity and influence, are quite different than ephemeral "saloon bar" banter in anonymous web forum": Cairns v Modi (No 2).

'regular' considerations are brought sharply into focus when looking through the lens of social media

Social networking entities: Subpoenas

To conclude, I wish to say something briefly about the appropriate procedure in serving a social media organisation with a subpoena.

Recently, some plaintiffs have tried to circumvent the procedure prescribed in NSW by the UCPR (Rule 11.5) and, in the Federal context, the Federal Court Rules (Rule 10.44). Rather than serve that subpoena on the (invariably) American corporation attempts are made to serve a subpoena on the Australian entity of the relevant social networking corporation (e.g. Facebook Australia Pty Ltd as opposed to Facebook Inc.). This is clearly the wrong approach. Unsurprisingly, the relevant Australian entity will, in this context, challenge any subpoena on, amongst other things, jurisdictional grounds. There is no mystery that social media platforms have advertising and/or marketing offices based in Sydney, and for that reason they are, ordinarily, the incorrect recipients of subpoenas. Any subpoena intended to be served upon a social networking entity should be addressed to the proper officer of the relevant social network corporation based in the States. International comity considerations dictate that it is imperative for plaintiffs to comply with the 'long arm' procedures prescribed in the rules.

For the same reasons, if a plaintiff attempts to serve a subpoena on a social networking entity by way of a substituted service order on the defendant's solicitors (who were protesting jurisdiction) that subpoena may well be set aside with costs. See for example *Styles v Clayton Utz*, 2010 NSWSC, Davies J, unreported, citing *Laurie v Carroll* (1958) and 98 CLR 310.

Matthew Lewis is a Barrister at 5th Floor Wentworth Chambers. ***This paper was presented to CAMLA members and guests on 28 May 2013 at Allens, Deutsche Bank Place, corner of Hunter Street and Phillip Street, as part of a seminar entitled: "Setting the Record Straight: Recent Developments in the Defence of Qualified Privilege and Other Current Issues in Defamation Law". The author would like to acknowledge and thank Dr. David Rolph for his insights on this presentation and for sharing his forthcoming (as yet untitled) paper on many of the issues discussed that evening. The seminar was conducted along with Bruce McClintock SC and Gabriella Rubagotti.***

10 Note 4.

11 See "Malaysian to tweet apology 100 times in Twitter defamation case" at http://www.guardian.co.uk/world/2011/jun/02/malaysian-tweet-apology-defamation.

Lost in the Landscape of Australian Privacy Regulation

Peter Leonard shines a light on the regulatory landscape in which privacy professionals and their lawyers have to operate.

Finding your bearings in the Australian privacy landscape has become increasingly difficult.

It has become even more challenging to explain the landmarks to people who are privacy professionals. The first challenge is to explain that the Australian Privacy Commissioner sits in the Office of the Australian Information Commissioner (**OAIC**) and applies laws that the Australian Parliament has misleadingly and deceptively elected to call 'principles'.

The second challenge is describing how to read principles as laws and how to fit them together with other provisions in the *Privacy Act 1988* (Cth) (the **Act**) that clearly are laws. Then try to apply them as fit for the purpose of dealing with exotica like cross-border cloud deployment, cross-border access to personal information held in another jurisdiction (or jurisdictions unknown), geo-tracking of devices, data warehouses, virtualised servers, big data and customer data analytics.

From 12 March 2014, Federal privacy law will require organisations to devise technical, operational and contractual safeguards to implement privacy and security by design.

Third is the challenge of explaining how, from 12 March 2014, privacy and security by design will become law (through principle drafted in very general terms that never refer to these concepts). If you cannot point to a clear statement of the law, how do you explain that privacy and security must be built into the architecture of information flows and the engineering of how organisations structure their processes and design their products? From 12 March 2014, Federal privacy law will require organisations to devise technical, operational and contractual safeguards to implement privacy and security by design. However, industry practice has not yet developed to the stage where we can reliably say what safeguards are appropriate, implemented how, or when.

Scepticism often sets in when management is told that this is not just a case of bolting on additional technical security to existing information and work flows. Incomprehension usually arrives when the information engineers and the privacy and compliance professionals gather together and the engineers hear that their best practice security risk management frameworks and methodologies do not really work for personal and sensitive information. And, by the way, all that information about customers that looks innocuous and 'everyone must know' really is regulated personal information about individuals.

Next is the challenge of explaining the legal status of the 'guidance' from the OAIC, particularly in an environment where the Australian Parliament dodges hard issues by placing increasing reliance on OAIC guidance as to principles (law) to give context and meaning to law (without giving this guidance any formal legal status).

A further challenge is that although the Privacy Commissioner has a central guidance and enforcement role, it has been allocated very limited staff and other resources, despite a major expansion in the Commissioner's responsibilities and the importance of privacy throughout the Australian economy. Given the importance of the Commissioner's guidance on key matters about the application of the new privacy laws from 12 March 2014, one really cannot expect the Commissioner, when allocating a meagre budget and limited staff, to have much to say about the gazillion privacy policy issues exercising privacy regulators and privacy professionals around the globe. On top of this, the Commissioner must also address major government privacy issues, such as data sharing between government agencies and cloud computing. And deal with PRISM. And just wait until the industry codes start arriving on the Commissioner's desk.

Privacy regulation also pops up in lots of different places in Australia nowadays. In addition to the OAIC interpreting and applying the Act, the Australian Communications and Media Authority (the **ACMA**) has become a very active privacy policy maker. First, by applying its Privacy Guidelines for Broadcasters in investigations about privacy related infractions of broadcasting codes, the ACMA has been the chief developer of the law as to serious invasions of personal privacy involving the electronic media. Although we do not yet have an accepted private right of action for invasion of privacy in Australia, the ACMA has developed and applied rules as to what is a serious invasion of personal privacy. Second, through the ACMA's application of the Telecommunications Consumer Protections Code C628:2012 (the **TCP Code**), the ACMA has become a principal regulator of the handling and use of telecommunications related personal information. The TCP Code has strong privacy provisions which require telecommunications service providers to, among other things, have robust procedures to keep customer personal information secure. These provisions have been applied against communications providers for failing to adequately secure stored customer information from third party hack-in intrusions.

The ACMA has also been a vigorous enforcer of spam and do not call legislation, two key planks in the regulation of electronic marketing. It has used its research and policy budget to good effect, actively blogging on its new website and recently releasing a series of detailed discussion papers on diverse privacy related topics, such as why 'coherent regulation is best for digital communications policy', cloud services, near field communications and apps. These papers include proposals for an active role for the ACMA in the further development of privacy regulation of all information passing through telecommunications links, over radiocommunications or derived from communications services. In an interconnected digital and cloud based world, that is most information.

But that is not all.

We also have the Australian Competition and Consumer Commission applying the Australian Consumer Law. In the United States the Federal Trade Commission has used comparable laws to become a de facto regulator as to the fairness and intelligibility – or in the trendy, new term, 'transparency' – of privacy statements and consumer contracts. These laws are also powerful tools for the regulator to argue that if a corporation does not comply with its own privacy statement, that corporation is guilty of misleading or deceptive conduct.

We have the Australian Attorney-General's Department applying the poorly understood *Telecommunications (Interception and Access) Act 1979* (Cth) and Federal Criminal Code provisions relating to unauthorised access to stored communications – such as email servers – and other unauthorised access to information technology systems. Arguably many cookie deployments today infringe these provisions.

We have State and Territory Governments and regulatory authorities applying State and Territory privacy laws relating to personal information collected by State and Territory agencies, use of workplace or video surveillance technologies, use of tracking devices and technologies and access to computer data. And a diverse range of health information privacy laws with purported reach to the private sector, including entirely standalone restrictions on cross-border transfers of health related information. There is plenty of little understood overlap of State and Federal law, and plenty of variation in the State and Territory laws.

And then, of course, there are many industry codes of practice, many of which include provisions dealing with privacy and provide remedies for non-compliance.

So privacy and data protection in Australia has become a confusing landscape, with forests of regulation to get lost in, unexplored corners and poorly signposted and potholed roads. At a time when privacy and information security is becoming a major area of concern for governments, businesses and citizens, it is unfortunate that Australia has created such a confusing thicket of regulation and quasi regulation.

although the Privacy Commissioner has a central guidance and enforcement role, it has been allocated very limited staff and other resources, despite a major expansion in the Commissioner's responsibilities and the importance of privacy throughout the Australian economy

So the next time that the CIO chairs a security and privacy compliance meeting with the CMO, the HR director, the information security experts and the privacy professionals, and that meeting disappears into a cloud of mutual incomprehension, you'll understand why.

Peter G Leonard is a Partner at Gilbert + Tobin Lawyers and iappANZ Director. An earlier version of this article has been published in the iappANZ Members Newsletter.

The ALRC Proposes Significant Changes to Australian Copyright Law

Michael Lagenheim provides an update on the status of the ALRC's reform of copyright law in the digital environment.

In June 2012, the Australian Law Reform Commission (**ALRC**) received its terms of reference for the current *Copyright and the Digital Economy* inquiry requiring the ALRC to report on whether the exceptions and statutory licences in the *Copyright Act 1968* (**Copyright Act**) are appropriate in today's digital environment. The terms of reference require the ALRC to have regard to providing incentives to create and disseminate original copyright material, the general interest of Australians to access and use content,

the retransmission of FTA and radio broadcasts no longer need to be facilitated in a converged media environment and the extent to which retransmission takes place should be left to the market to determine

the importance of the digital economy and Australia's international obligations.

The ALRC released an issues paper in August 2012[1] and a discussion paper in June 2013 in which a number of significant changes to the Copyright Act are proposed, including:

- the introduction of a fair use exception to copyright infringement (and a consequent repeal of existing more specific exceptions);
- the repeal of statutory licences for educational institutions and governments,
- options for amending the provisions relating to the retransmission of broadcasts; and
- the extension of the broadcast exceptions to include internet transmission.

The introduction of a fair use exception

The Copyright Act provides for copyright exceptions in a number of areas, including fair dealing for research or study,[2] criticism or review,[3] parody and satire,[4] and purposes of reporting news,[5] reproduction for the purpose of judicial proceedings or professional advice,[6] copying sound recordings for private and domestic use,[7] reproducing works in books, newspapers and periodicals for private use format shifting),[8] and recording broadcasts to replay at more convenient time (time shifting)[9].

This fragmented and restrictive approach and the technical nature of the provisions have led to the criticism that Australian copyright law is out of touch with modern technological developments. In contrast, a fair use approach has been enacted in a number of countries, most notably the US.[10] It involves a case by case assessment of whether a particular use is fair and therefore does not infringe copyright.

Arguments in favour of a fair use approach include that it provides greater flexibility (a principle based and technology neutral approach) and assists innovation (there is no automatic prohibition on a use). It also restores balance (to what would otherwise be an unreasonable broad grant of rights to content creators with an unduly narrow set of exceptions) and better aligns copyright law with the reasonable expectations of most users of copyright material.

Those opposed to the fair use approach argue that there is no case made out for its introduction and it would create uncertainty and expense (due to the need for increased legal advice and litigation).

The ALRC proposes that the Copyright Act should provide a fair use exception to copyright infringement[11] and that a

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1 The ALRC received 295 submissions in response, including submissions from collecting agencies, content creators, telecommunications companies, ISPs, broadcasters, Pay TV operators, the ACC and various industry associations.

2 ss40 and 103C, Copyright Act.

3 ss41 and 103A, Copyright Act.

4 ss41A and 103AA, Copyright Act.

5 ss42 and 103B,Copyright Act.

6 ss43 and 104, Copyright Act.

7 s109A, Copyright Act.

8 s43C (Books, newspapers and periodicals), s47J (photographs) and s110AA (films) Copyright Act.

9 s111, Copyright Act.

10 Other countries include South Korea, Israel and the Philippines

11 ALRC, *Discussion Paper: Copyright and the Digital Economy* 79, 2013, proposal 4-1 and 4-2 (**Discussion Paper**)

non-exhaustive list of ***fairness factors*** should be considered in determining if a use is a fair use. The fairness factors would include the purpose and character of the use, the nature of the copyright material, the amount and substantiality of any part of the copyright material used in relation to the whole and the effect of the use.[12]

In addition, the ALRC submits that the Copyright Act should specify a set of ***illustrative uses***, that is, uses that may qualify as fair uses, including research or study, criticism or review, parody or satire, reporting news, non-consumptive, private and domestic, quotation, education and public administration.[13]

The ALRC proposes that the fair use exception be applied (with the consequential repeal of the related specific exceptions) when determining whether the following infringe copyright:

- a use for the purpose of research or study, criticism or review, parody or satire, reporting news or professional advice;[14]
- a use for caching, indexing or data and text mining (non-consumptive use);[15]
- a private and domestic use;[16]
- back-up and data recovery;[17]
- a transformative use;[18]
- quotation;[19]
- use of copyright material not covered by specific libraries and archives;[20]
- use of an orphan work;[21]
- an educational use;[22] and
- a government use.[23]

The abolition of statutory licences for educational institutions and governments

A statutory licence allows for certain uses of copyright material without permission of the rights holder, subject to the payment of a reasonable remuneration.[24] There are two statutory licence schemes in the Copyright Act. The first scheme relates to educational institutions,[25] copying and communicating broadcasts,[26] and the reproduction and communication of works and periodical articles.[27] The second scheme relates to government use for the services of the Commonwealth or State.[28]

These schemes also require the payment of fees (equitable remuneration) to collecting societies.[29]

The ALRC proposes the abolition of these schemes on the basis that licences for such use of copyright material should be negotiated voluntarily.[30]

Reform to retransmission of FTA broadcasts

Under the *Broadcasting Services Act 1992* (Cth) (**Broadcasting Services Act**), the retransmission of a free to air (**FTA**) broadcast does not infringe copyright in the broadcast so long as it is from a national broadcasting service or a commercial broadcasting service (within the area of its licence).[31] In addition, the Copyright Act provides a statutory licence scheme for the underlying works if equitable remuneration is paid[32]. The retransmission scheme favours cable and satellite based pay TV providers as the arrangement does not apply to retransmission over the internet.[33]

Many stakeholders favour removal of the internet exception including the ACCC, Telstra, the Australian Copyright Council, the ABC and Optus while others, including rights holders

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12 Discussion Paper, proposal 4-3.

13 Ibid, proposal 4-4.

14 Ibid, proposal 7-1.

15 Ibid, proposal 8-1. There is no specific exception in the Copyright Act that permits copying or reproduction of copyright material for the purposes of caching or indexing.

16 Ibid, proposal 9-1. The current format shifting and time shifting provisions are considered too prescriptive and inflexible.

17 Ibid, proposal 9-3.

18 Ibid, proposal 10-1. A transformative use is one where a pre-existing work is used to create something new

19 Ibid proposal 10-2.

20 Ibid proposal 11-2.

21 Ibid proposal 12-1. An orphan work is copyright material where the owner cannot be identified or located by someone wishing to obtain rights to use the work.

22 Ibid proposal 13-1.

23 Ibid proposal 14-1.

24 It is argued that these licences are appropriate when there is market failure, ie where the costs of identifying and negotiating with copyright owners outweighs the value of the licence

25 These schemes also apply to institutions assisting persons with a print disability

26 Part VA, Copyright Act.

27 Part VB Copyright Act.

28 Part VII, Div 2, Copyright Act.

29 The collecting societies in turn distribute the fees to members.

30 Discussion Paper, Proposal 6-1.

31 s212, Broadcasting Services Act.

32 s135ZZK, Copyright Act.

33 s135ZZJA, Copyright Act.

such as the Australian Football League (**AFL**) and the National Rugby League (**NRL**), oppose it.

The retransmission scheme favours cable and satellite based pay TV providers as the arrangement does not apply to retransmission over the internet.

The ALRC noted that the potential reforms have an impact on communications and competition policy, and consequently proposed two alternative options in the discussion paper. The first option is that the broadcast copyright exception and the statutory licensing scheme be repealed so that the extent to which retransmission occurs will be entirely a matter of negotiation between the parties.[34] This option assumes the retransmission of FTA and radio broadcasts no longer need to be facilitated in a converged media environment and the extent to which retransmission takes place should be left to the market to determine.

The second option is that the broadcast copyright exception should be repealed and replaced with a statutory licence and that retransmission over the internet should no longer be excluded.[35] This option assumes a continuing need to facilitate the retransmission of FTA TV and radio broadcasts.

The broadcasting reforms

There are a number of broadcast exceptions in the Copyright Act. The Copyright Act defines 'broadcast' to mean a communication to the public by a 'broadcasting service' which is defined in the Broadcasting Service Act as a service that delivers TV and radio programs to persons having equipment to receive that service, whether using radiofrequency, cable, fibre, satellite or other means.

The ALRC proposals represent an important development in Australian copyright law. They involve a step towards the simplification of the law, greater flexibility and technology neutrality and bring Australian copyright law more in line with the approach adopted internationally

A ministerial determination in 2000 excluded a service that made TV and radio programs available over the internet from the definition of a 'broadcasting service'. The determination was intended to ensure that internet streaming services were not regulated by the Broadcasting Services Act, however, it has had the unintended consequence that while FTA and pay TV transmissions are covered by exceptions in the Copyright Act, transmission of TV services over the internet are not.

The ALRC proposes that the Copyright Act should be amended to ensure the following broadcast exceptions (to the extent they are retained) also apply to the transmission of TV or radio over the internet: broadcasts of extracts of works, reproduction for broadcasting, sound broadcasting by holders of a print disability radio licence, incidental broadcast of artistic works, broadcasting of sound recordings, broadcasts for persons with an intellectual disability, reception of broadcasts and use of broadcast for educational purposes.

Conclusion

It is clear that some new services have emerged in the digital economy which are placing strain on Australian copyright law. One important example is cloud computing, an internet based service where digital content is stored in remote servers and then delivered on demand to customers.

The Optus TV Now service was a cloud based service where Optus offered its customers a service which allowed them to record and view copies of FTA broadcasts of NRL and AFL games and then play them back at a later time. If those customers had used their own video recorders at home to record the programs there would not have been a breach of the Copyright Act. However, the Full Federal Court held that Optus had made the copies of the relevant games and was therefore in breach of the Copyright Act.[36]

The ALRC proposals represent an important development in Australian copyright law. They involve a step towards the simplification of the law, greater flexibility and technology neutrality and bring Australian copyright law more in line with the approach adopted internationally.

The proposals are likely to be well received by those in the technology industries such as ISPs and the educational sectors. Existing rights holders such as content creators, TV stations and collecting agencies will be concerned that the changes may allow some additional uses without requiring the payment of licensing fees.

Submissions in response to the ALRC's discussion paper closed on 31 July 2013 and a final report is due on 30 November 2013. Whether any of the recommendations are accepted and implemented will depend on the political will of the government of the day and where copyright reform sits in the scheme of legislative priorities.

Michael Lagenheim is a barrister specialising in communications and technology law at 4 Selborne Chambers.

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34 Discussion Paper, Proposal 15-1.

35 Discussion Paper, Proposal 15-1 and 15-2.

36 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

Privacy and Self-management Strategies in the Era of Domestic Big Data

Xavier Fijac considers the value of a rights-based approach to privacy in the digital age.

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the rooftops'.[1] *- Warren and Brandeis (1890).*

As Warren and Brandeis' 120 year old quote shows, privacy fears surrounding the introduction of new and invasive technologies often fail to be matched by reality. However, the issue for the contemporary period is that privacy concerns about private information being 'proclaimed from the rooftops', are being replaced by concerns about more permanent records such as the massive amounts of personal data being tracked and recorded via social media networks. Emerging technologies such as Facebook's 'Graph Search' point to the domestication of the kinds of powerful information analysis tools normally associated with 'big data', suggesting such fears may in fact be relatively well-founded. This article considers what the recent decision not to introduce a statutory right to privacy might mean for Australians hoping to protect their privacy from each other in an increasingly data-soaked world.

The Australian Government recently passed major reforms to the *Privacy Act 1988* (Cth), increasing the statutory requirements imposed on organisations dealing with personal information. However, the Government rejected the recommendations of the ALRC and decided against the introduction of a statutory cause of action for personal privacy invasion. Such a reform would have given individuals a right to privacy enforceable in the civil courts, and would bring individual privacy rights closer towards the existing rights-based protections in comparable jurisdictions around the world.[2]

The lack of a tort for privacy invasions has been described as a 'clear gap' in the privacy landscape, leaving individual Australians without legal redress for serious, and even more casual invasions of their privacy.[3] However, some 100 years after the introduction of privacy rights in the US, leading American privacy scholars have begun to question whether a rights-based approach to privacy protection is an effective way to address privacy issues between individuals.[4] It is therefore worth asking whether holding out for an Australian cause of action for privacy invasion is in fact the best way to address mounting privacy challenges in the age of domestic data surveillance.

Having never recognised a stand-alone right to privacy, the Australian approach to privacy management has traditionally been characterised by the 'self-management' approach articulated in *Victoria Park Racing*.[5] This puts almost complete emphasis on personal responsibility and pro-active protection of an individual's privacy rather than the exercise of specific privacy rights. As Latham CJ expressed it, an individual wanting to protect themselves from the prying eyes of their neighbours could simply 'erect a higher fence'.

Since the High Court's 2001 *Lenah Game*[6] decision, judicial attitudes appear to have shifted towards what has been described as a 'rapidly growing trend towards recognition of privacy as a right in itself deserving protection'. While this appears to reflect the current position of the courts, there is little doubt that both technology and public concerns about privacy are developing much faster than the common law. However, the logical conclusion to be drawn from the Government's recent refusal to recognise a statutory right is that the self-management or 'erect a higher fence' model remains ingrained in Australian legislative policy at some level.

Emerging technologies such as Facebook's 'Graph Search' point to the domestication of the kinds of powerful information analysis tools normally associated with 'big data'

In the US, self-management has a different meaning as it is supported by its long-standing, rights-based legal tradition of civil liberties, a fact evidenced by the more than 100 year

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1 Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 5.

2 *Human Rights Act 1998* (UK) , Restatement of the Law, 2nd, Torts 1977 (US) ss 652B-652D; European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8 – Privacy); *Hosking v Runting* [2005] 1 NZLR 1; Canada has 4 province based Privacy Acts.

3 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108) 2564; Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18* (2010) 147; New South Wales Law Reform Commission, Report 120: *Invasion of Privacy* (2009).

4 Daniel Solove 'Introduction: Privacy Self-management and the Consent Dilemma (2013) 126 *Harvard Law Review* 1880 ; see also Lior Strahilevitz 'A Social Networks Theory of Privacy' (2004) John M Olin Law and Economics Working Paper no 230.

5 *Victoria Park Racing and Recreational Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

6 *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199.

history of no less than four different privacy torts. Nonetheless, the changes wrought by modern communications networks have caused prominent US thinkers in the area of privacy law to question the effectiveness even of rights-based self-management in providing meaningful privacy protection.[7] Daniel Solove argues that even in the context of a rights-based model in the US, self-management approaches cannot be expected to address the challenges of informed consent for the disclosure of personal information by individual internet and social media users.[8] One compelling issue around consent identified by Solove is the privacy challenge posed by the 'aggregation effect'.[9]

The 'Aggregation Effect'

The average domestic internet user lays down thousands of small, separate and isolated parcels of personal information, whether wittingly or unwittingly, and consent or awareness of where it exists is most often in the form of an opt-out or opt-in checkbox or similar. In isolation, each piece of information disclosed is trivial, and so is the treatment of the consent and awareness issue surrounding it when, for example, commenting, tagging or entering a search term. However, the aggregation effect arises from the ability to piece together those disparate pieces of information into a meaningful whole. Data analysis allows patterns of behaviour or indeed inferences of fact to emerge from user data that is qualitatively very different from the individual bits of personal, but not quite private, information from which they have been composed. What may have appeared to be an unrelated, unconnected and innocuous mass of meaningless bits of information, in fact gives rise, through the process of data analysis, to a major revelation about a medical condition, financial stress, extra-marital affair, political affiliations or other information about which an individual may well have a reasonable expectation of privacy.

the aggregation effect arises from the ability to piece together those disparate pieces of information into a meaningful whole

'Graph Search' and the Domestication of Data Analysis

Powerful data analysis tools are more readily associated with the kind of exotic government surveillance technologies, such as 'XKeyScore', that have recently come to light in relation to the US PRISM scandal.[10] However, the recent announcement of Facebook's 'Graph Search' product suggests that increasingly powerful data analysis tools are quickly becoming available to the average social media user. Facebook openly advertises Graph Search as a powerful search tool allowing users to mine ever deeper and richer seams of data about their friends.[11] The data available goes back to the earliest personal details recorded by users of the social network well before such features existed. Unsurprisingly its announcement has already raised significant privacy concerns and reports about the potential of such tools to cause real harm to unwitting users of the platform.[12]

Networked Liability

The potential for a relatively major privacy breach occurring by stealth is further complicated by the fact that data analysis only reveals, rather than discloses, personal secrets by way of search algorithms or by recognition of emergent patterns of behaviour from information that is already available, albeit in a diffuse form, across a network. Quite aside from any legal or ethical questions about how a particular 'fact' or secret was revealed, the results of a search may then be separately disclosed or publicised by the searcher, thereby potentially further breaching established understandings of privacy and confidence rights.

In the case of aggregation, however, the revealing of secrets has not occurred as a result of the tool, but as a result of the user's input which draws together otherwise unrelated pieces of personal information, all of which have been in fact been disclosed with the individual's full consent and under the guise of pro-active 'self-management' of an individual's privacy settings, and in line with various standardised end-user privacy policies. Such circumstances would presumably raise some difficult legal questions for establishing a cause of action in terms of locating liability, if any, between the social media platform, search tool software developer, potential tortfeasor and injured party. At the same time, even for the diligent social media user set on pro-actively managing their privacy settings, it is clearly becoming more and more difficult to erect a fence high enough to anticipate the privacy challenges posed by rapid change.

Statutory Rights and a Climate of Restraint

This article has explored some of the challenges posed to personal privacy by rapidly advancing information technologies which may be too complex to be met by any one strategy in isolation. Alongside the Privacy Act and self-management strategies for ensuring the privacy of individuals, one advantage of Australian legislatures introducing a statutory cause of action would be the normative effects on the privacy relationship between individuals. Addressing what appear to be legitimate fears and concerns of the public, while at the same time fostering a general 'climate of restraint' in the wider community, may be the most important effect of introducing such a civil cause of action.[13]

The recommendations of the ALRC, NSW and Victorian law reform commissions to introduce a statutory right to privacy

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7 Solove, above n4.

8 Ibid, 1882.

9 Ibid 1889.

10 http://www.theguardian.com/world/interactive/2013/jul/31/nsa-xkeyscore-program-full-presentation.

11 'Facebook Graph Search' - https://www.facebook.com/about/graphsearch

12 Juliette Garside, 'Facebook Graph Search Privacy Concerns' (23 Jan 2013) *The Guardian UK,* http://www.theguardian.com/technology/2013/jan/23/facebook-graph-search-privacy-concerns?guni=Article:in%20body%20link.

13 John Burrows, 'Privacy and the Courts' (Address to the Privacy Forum, Wellington, New Zealand, 27 August 2008) <www.privacy.org.nz/assets/Files/PAW/10.-Speaker-Professor-John-Burrows.doc> at 10 November 2009, as quoted in VLRC Report at 147, quoted in http://www.dpmc.gov.au/privacy/causeofaction/docs/issues%20paper_cth_stat_cause_action_serious_invasion_privacy.pdf

in Australia should be understood in terms of a strategy to fill a gap left between self-management and regulation under the Privacy Act.[14] The Australian Government has recognised the importance of statutory recognition of privacy as a human right in Australia in view of its commitment to the ICCPR, a point particularly important given the absence of charter-based federal rights.[15] The fact that the courts have indicated their openness to recognition of a common law right does not mean that the issue should simply be abandoned by the Australian legislature. By all accounts it seems that the groundwork has been well and truly laid, yet Australian legislatures remain reluctant to plug the privacy gap and recognise an individually enforceable right to privacy. In the meantime it seems Australian internet users must continue to self-manage and erect ever higher fences to try and ensure their personal privacy.

Xavier Fijac is a law student at the University of New South Wales.

14 Australian Law Reform Commission 'For Your Information: Australian Privacy Law and Practice (ALRC Report 108);

15 *International Covenant on Civil and Political Rights* (ICCPR) Article 17; Department of the Prime Minister and Cabinet 'Issues Paper – A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy' 25.

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Valeska Bloch or Victoria Wark

C/- Allens
Deutsche Bank Place
Corner Hunter & Philip Streets
SYDNEY NSW 2000

Tel: +612 9230 4000
Fax: +612 9230 5333

CAMLA contact details:

Email: camla@tpg.com.au
Phone: 02 9399 5595
Mail: PO Box 237,
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