

The New Australian Statutory Tort for Serious Invasions of Privacy – What Does It Currently Look Like?

Background

- On 12 September 2024, the long-awaited statutory tort for serious invasions of privacy has been revealed in Schedule 1 to the *Privacy and Other Legislation Amendment Bill 2024* (Cth) (the Privacy Bill).
- The proposed statutory tort represents a significant development in the law in respect of a general right to privacy and will undoubtedly lead to litigation involving individuals, corporations and the media sector.
- The statutory tort will become law on “a date fixed by Proclamation” or within six months and one day from the day the Privacy Bill receives the Royal Assent.

Elements of the Tort (s. 7)

- ✓ The defendant invaded the plaintiff’s privacy by: (1) “intruding upon the plaintiff’s seclusion”; or (2) misusing information relating to the plaintiff.
- ✓ A person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances.
- ✓ The invasion of privacy was intentional or reckless.
- ✓ The invasion of privacy must be “serious”.
- ✓ The public interest in protecting a plaintiff’s privacy must outweigh any competing public interest(s) in the invasion of privacy identified by the defendant (e.g., freedom of expression).

Defences (s. 8)

- The invasion was required (or authorised) by law or court (or tribunal) order.
- The plaintiff consented to the invasion.
- The defendant reasonably believed the invasion was necessary to prevent or lessen a serious threat to the life, health or safety of a person.
- The invasion was incidental to the lawful defence of persons or property and was proportionate, necessary and reasonable.
- Defamation defences, including absolute privilege, publication of public documents, fair report of proceedings of public concern, or exemption for journalism.

Remedies (ss. 9, 11, 12)

- Interim injunctions or injunctions.
- Damages (excluding aggravated damages), capped at the greater of (a) AU\$478,550 or (b) the maximum award for general damages in defamation proceedings.
- Account of profits.
- Order requiring an apology.
- Correction order.
- Destruction or delivery up of material order.
- Declaration.
- Any other remedy the court considers appropriate.

Exemptions (ss. 15, 16, 17, 18)

- The invasion of privacy by “journalists” in respect of the collection, preparation for publication and publication of “journalistic material”.
- Enforcement bodies.
- Intelligence agencies.
- Persons under 18 years of age.

Standard Limitation Periods (s. 14)

- One year after the day that the plaintiff becomes aware of the invasion of privacy.
- If the plaintiff is unaware of the invasion of privacy, three years after the day the invasion of privacy occurred.
- If the plaintiff was under 18 years of age when the invasion of privacy occurred, before the plaintiff’s 21st birthday.

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