

15 November 2013

Ms Sabina Wynn
The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Via email: privacy@alrc.gov.au

Dear Ms Wynn

I write to provide Optus' input to the Australian Law Reform Commission's Issues Paper '*Serious Invasions of Privacy in the Digital Era*'. (Issues Paper)

Optus' submissions to past inquiries on the development of a statutory cause of action for serious invasions of privacy have argued that existing privacy and other laws already provide significant consumer protections.¹ Optus' view is unchanged.

Current privacy laws are technology neutral and Optus expects that ongoing reviews of privacy laws should maintain that principle. Optus does not consider that developments in technology necessarily create a need for change in privacy laws.

It is Optus' view that recent amendments to the *Privacy Act 1988* (Cth), specifically the new enforcement powers of the Privacy Commissioner, need time to be observed and assessed before any additional reforms are contemplated.

In addition, consideration must be given to the regulatory burden that will be imposed upon industry as a result of legislative change. This includes assessing whether the proposed changes are consistent with the Government's principles for best practice regulation, where a range of viable options for addressing the underlying problems are canvassed and overall benefits weighed against the costs imposed².

Optus notes that the focus of the Issues Paper is on what needs to be considered in the legal design of a statutory cause of action. The following comments are provided in response to selected questions raised in the Issues Paper in the context that Optus does not presently support the introduction of a statutory cause of action for serious invasions of privacy. Should such a cause of action be introduced, then Optus' response would be in the following terms.

¹ Submission to 'A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy Issues Paper', Department of Prime Minister and Cabinet, November 2011

² <http://www.finance.gov.au/obpr/about/>

QUESTION ONE: PRINCIPLES GUIDING REFORM

What guiding principles would inform the ALRC's approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?

Optus endorses the proposed principles that will guide the drafting process, specifically the principles that support:

- 'The balancing of privacy with other values and Interests' that includes:
 - 'the capacity of individuals to engage in digital communications and electronic financial and commercial transactions'; and
 - 'national economic development and participation in the global digital economy';
- 'Flexibility and adaptability' in the design of legislative protection of privacy where there should be sufficient flexibility to adapt to rapidly changing technologies, while also providing certainty; and
- 'Coherence and consistency' where any new remedy needs to be consistent with other laws and regulatory regimes and should promote uniformity and consistency across jurisdictions in Australia.

QUESTION THREE: THE IMPACT OF A STATUTORY CLAUSE OF ACTION

What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?

Optus recommends consideration be given to excluding online platforms, including social media and email as well as more traditional forms of communication, such as postal and telephone services, from the ambit of a statutory cause of action.

This view is based on the fact that a significant volume of communication that occurs over these platforms makes any prospect of retaining data for monitoring or editing impossible and/or impractical.

QUESTION FOUR AND FIVE: INVASION OF PRIVACY

Should an Act that provides for a cause of action for serious invasion of privacy include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list be?

Optus supports the proposal to clearly identify by way of examples, what may or may not fall within the statutory cause of action.

What, if any, benefit would there be in enacting separate causes of action for misuse of private information and intrusion upon seclusion?

Optus does not support a separate cause of action for misuse of private information and intrusion upon seclusion.

QUESTION SIX: PRIVACY AND THE THRESHOLD OF SERIOUSNESS

What should be the test for actionability for a serious invasion of privacy? For example should an invasion of privacy be actionable only where there exists a 'reasonable expectation of privacy'? What, if any additional test should there be to establish a serious invasion of privacy?

It remains Optus' view that a plaintiff should first be required to prove that there was a reasonable expectation to privacy, in line with the views set out by the New South Wales Law Reform Commission³ to determine whether the alleged invasion of privacy is actionable.

Therefore, Optus supports the proposal that an invasion of privacy should only be actionable where it is established that a reasonable expectation of privacy exists.

QUESTION SEVEN: PRIVACY AND THE PUBLIC INTEREST

How should competing public interests be taken into account in a statutory cause of action?

Optus' supports the proposal that the public interest should be informed by the guiding principles.

QUESTION NINE: FAULT

Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?

It is Optus' view that intention should be the primary fault element.

QUESTION TEN: DAMAGES

Should a statutory cause of action for serious invasion of privacy require proof or be actionable per se?

A statutory clause of action for a serious invasion of privacy should require proof and evidence of damage. Damages should be set with a prescribed maximum, and be proportional to the loss suffered.

QUESTION SIXTEEN: MONETARY REMEDIES

Should the Act provide for any or all of the following for a serious invasion of privacy: a maximum award of damages for non-economic loss; exemplary damages; assessment of damages based on a calculation of a notional licence fee; an account of profits?

For a serious invasion of privacy Optus supports the Act setting a maximum award for damages.

QUESTION EIGHTEEN: OTHER REMEDIES

Other than monetary remedies and injunctions, what remedies should be available for serious invasions of privacy under a statutory cause of action?

Optus encourages consideration of other remedies, for example a public hearing or public apology, and notes that a range of pecuniary penalties should not be viewed as the sole remedy if a serious invasion of privacy under a statutory cause of action is found.

QUESTION NINETEEN: WHO MAY BRING A CAUSE OF ACTION

Should a statutory cause of action for a serious invasion of privacy of a living person survive for the benefit of the estate? If so, should damages be limited to pecuniary losses suffered by the deceased person?

It remains Optus' view that a statutory cause of action for a serious invasion of privacy be limited to living natural persons and therefore not survive for the benefit of the estate.

QUESTION TWENTY ONE: LIMITATION PERIOD

What limitation period should apply to a statutory cause of action for a serious invasion of privacy?

It remains Optus' view that an action in relation to an alleged serious invasion of privacy be required to have commenced within 12 months of the alleged conduct.

QUESTIONS TWENTY TWO TO TWENTY FOUR: LOCATION AND FORUM

Should a statutory cause of action for serious invasion of privacy be located in Commonwealth legislation? If so, should it be located in the Privacy Act (Cth) or in separate legislation? Which forum would be appropriate to hear a statutory cause of action for a serious invasion of privacy? What provision, if any, should be made for voluntary or mandatory alternative resolution of complaints about serious invasion of privacy?

If a statutory cause of action for serious invasion of privacy progresses, Optus supports:

- an amendment to the *Privacy Act 1988* (Cth) rather than the drafting of separate legislation;
- the Federal Court having jurisdiction;
- alternative dispute resolution processes as a mandatory process step before any claim of a serious invasion of privacy is escalated further.

QUESTION TWENTY FIVE: INTERACTION WITH EXISTING COMPLAINTS PROCESSES

Should a person who has received a determination in response to a complaint relating to an invasion of privacy under existing legislation be permitted to bring or continue a claim based on the statutory cause of action?

It is Optus' view that if a person who has received a determination in response to a complaint relating to an invasion of privacy under existing legislation they should be excluded from making a claim based on the statutory cause of action.

COMMUNICATIONS ALLIANCE SUBMISSION

Optus also supports the submission made by Communications Alliance that details an industry view that questions the additional benefit the introduction of a cause of action for serious invasion of privacy may deliver.

Communications Alliance also notes that some of the perceived gaps highlighted in the Issues Paper will diminish from next year and highlights the need to consider the risk that the introduction of a cause of action will encourage litigation, including spurious claims, causing uncertainty and additional expense for business.



Optus notes that there will be a further opportunity to engage in the proposed design of a statutory cause of action in February 2014, specifically in relation to privacy issues of relevance to the telecommunications industry, when a further Discussion Paper is expected to be released.

Please contact me on (03) 9033 4239 or michelle.phillips@optus.com.au if you require any additional information regarding Optus' submission.

Yours sincerely

A handwritten signature in blue ink that reads "M. Phillips".

Michelle Phillips
Senior Regulatory Analyst
Optus