

12 May 2014

Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
Via email: privacy@alrc.gov.au

Dear Sir/Madam

Serious Invasions of Privacy in the Digital Era – Discussion Paper

Australian Pork Limited (APL) welcomes the opportunity to provide a submission to the above Inquiry. As an intensive agricultural industry subject to serious invasions of privacy on farms, the Australian pork industry is keenly interested in this Inquiry and its outcomes. To date, Animal Liberation ACT through its Aussie Pigs¹ and Aussie Farms² websites has undertaken undercover surveillance using highly sophisticated devices, and “exposed” 15 piggeries, with recent claims that a 16th piggery will be exposed on Sunday 11 May. In most cases, the videos made public have been “enhanced” to make the facility appear more horrendous. This includes such things as inserting overseas footage and claiming this to be of an Australian piggery, to adding screams and pig noises to imply distress where there is none, and depicting sick animals under veterinary supervision as the normal way all pigs are kept on farms. In several cases, the pigs filmed appear to be in serious distress at the presence of the intruders, with whom they are unfamiliar and probably afraid of, or alternatively who they thought were going to feed them and didn’t.

Apart from the distress these “exposés” cause to the owners, employees and the wider community, these covert operations are threatening the health and wellbeing of every pig on the properties targeted – these covert operations are an act of animal cruelty. This is because the activists, although claiming to do this for animal welfare and prevention of cruelty reasons, are contravening very strict biosecurity protocols in place on these quarantined farms. This is as much an issue for endemic diseases as it is for exotic diseases, which if introduced into Australia could cost the entire livestock industry significant welfare, trade, and financial outcomes. Moreover, it is a significant issue for Governments who will ultimately bear some financial burden for any disease incursion.

Therefore, APL supports, in principle, the endeavours of the Government, through this Inquiry, to explore options to close the regulatory gaps and inconsistencies across different jurisdictions in relation to privacy and surveillance devices, harassment and other measures.

That said APL remains concerned that the proposals, as outlined in the Discussion Paper, may not ultimately be of assistance to pork producers and their employees. The main reason for this concern is that workplaces remain a grey area in relation to privacy and surveillance devices in particular. For example, the proposed new privacy tort restricts the application to invasion and fault to “intrusion upon the plaintiff’s seclusion or private affairs; or misuse or disclosure of private information”.

At present, APL does not believe that the pig farm workplace (as opposed to the farmer’s family home on the workplace) meets the definition of privacy as intrusion into “seclusion or private affairs”, meaning personal activity, space or affairs. However, the pig farm workplace is

¹ <http://www.aussiepigs.com/>

² <http://www.aussiefarms.org.au/>

neither a “public space” nor a “private space” because of its unique situation with strict biosecurity protocols and quarantine facilities that underpin the health and welfare of every pig.

One issue raised by the ALRC was that of balancing privacy with public interest. Activists argue that they target piggeries because of the public interest in purported acts of cruelty, which activists appear to have confused with accepted, and legal, animal welfare practices. APL is of the view that in most jurisdictions existing legislation assigns a responsibility to organisations, e.g. RSPCA, with the powers to enter and investigate alleged acts of cruelty. Any proposed legislation ought to continue to respect these existing powers, and not allow an “out” for activists claiming to be acting in the public interest to “expose” acts of purported cruelty. APL suggests that the public interest defence is confined.

Furthermore APL is concerned about the proposed statute of limitations period. The nature of covert operations means that individuals who infringe through criminal acts (such as trespass) cannot be identified. Consequently, an individual may be aware through the publication of photos or footage, that their “privacy” rights have been infringed but can take no action. The ALRC statute of limitations proposal means that the affected individual may never be able to take action to have their privacy infringement addressed. The only alternative from the proposal is to take action against a third party who publishes the material and hope that discovery may identify those who actually took photos or footage.

Regarding the commencement of the limitation period, APL has concerns. For example, the situation may arise where the plaintiff might suspect (e.g. doors left open or claims made on social media sites) that their rights may have been infringed, but may not categorically know until the material is published. In the case of piggery break-ins, this period can be several months. APL has concerns that the limitation period may be waited out in order to avoid legal action.

These issues ought to be fairly considered by the ALRC in finalising its report to Government. APL suggests the capacity for plaintiffs to litigate, at least initially, against third parties publishing the material, or allow a limitations period to commence when the perpetrators have been identified.

APL does support the ALRC’s proposal that there be no defence of necessity. The current proposals provide options for defence. The inclusion of such a defence means that any person infringing the rights may do so on the basis of a value judgement rather than a legal or public good basis.

The ALRC proposes a defence for conduct incidental to the exercise of a lawful right of defence of persons and property, noting the example of where the third party is incapable of exercising self-defence. While this may work for real persons, APL is concerned that activists may see animals as the third party. While this is unlikely to be the ALRCs intent, APL suggests further confining third party definition to real people who are at risk of harm.

With regard to a safe harbour scheme for internet intermediaries, APL is concerned about the scope of this proposal to ensure coverage of internationally based internet intermediaries. Unless these are included, many of the internet service providers (e.g. Google, Vimeo, YouTube) will ignore the Australian based requests to comply with the safe harbour proposal. This has already occurred with footage and photos from pig facilities, where YouTube acted to remove the offending footage, Vimeo has ignored all requests as they only answer to United States law. APL recommends that ALRC consider the scope of the safe harbour scheme whereby coverage includes international third party service providers or intermediaries.

Similar to the privacy proposal, the proposed tort of breach of confidence relates to personal information and is unlikely to assist pig producers in their current situation.

APL supports the proposal that “surveillance devices” has a broad coverage and is not specific, e.g. drones, and that the surveillance laws are made uniform across all jurisdictions.

APL believes the proposal for a new Commonwealth Harassment Tort is perhaps a better option for pig producers in relation to activists. As noted by ALRC, “[h]arassment involves a pattern of behaviour or course of conduct by an individual designed to intimidate and distress another individual”. However, for pig producers, it may be helpful if this is expanded to include organisations, as it is organisations, their

office bearers and members that target the businesses of pig producers. It is driven by a shared philosophy amongst the organisational members of veganism, and anti-farming of animals for meat consumption rather than genuine animal health and welfare concerns.

There is definitely an ethos of harassment designed to intimidate and distress in order to stop pig production in Australia but also “horrifying” consumers so that they stop purchasing pork products. The behaviour tries to incite other members of the public (here and overseas) to further harassment; to such an extent that Facebook intervened to remove offensive comments. Therefore, APL suggests that social media ought to be considered by ALRC in its approach to harassment.

APL’s own assessment of the opportunities for other civil remedies such as trespass, are that these are only able to provide limited opportunities to take legal action against activist behaviour. The main reasons being difficulty in actually identifying perpetrators, and where this does occur and successful action is taken, the offenders wear this as a badge of honour. In other words, the remedy is not of sufficient deterrent to stop reoffending.

The ALRC has posed the question of what jurisdiction should implement the proposed new torts. APL is supportive of Commonwealth enacted legislation purely from the perspective of one jurisdiction and a consistent application, and the time taken to enact one Act. Should it be decided that torts are legislated at the state and territory level, APL would prefer that this be done in a way that delivers a consistent approach.

An issue not raised in the Inquiry, is the rights of employees in a workplace targeted for surveillance when this is not the employer. APL believes that this situation exposes employers to litigation by employees as innocent third parties. In some jurisdictions, employees have protection against employers, through state surveillance legislation but they are not protected by the actions of third parties that do not have the consent of either the employer or employee.

Conclusion

APL does not believe that the proposed privacy tort will deliver solutions to the unique situation currently facing pig producers. The proposed tort of harassment may assist but again, the workplace and business remains a grey area of concern. APL has suggested some changes to or confinement of some proposals, and identified some gaps.

Should you have any queries relating to this submission, please do not hesitate to contact me.

Yours sincerely



DEB KERR
GENERAL MANAGER, POLICY