84._org_ Australian Bankers' Association Inc

From: Australian Law Reform Commission [mailto:web@alrc.gov.au]

Name of organisation: Australian Bankers' Association Inc.

Proposal 4.1:

The Australian Bankers' Association (ABA) appreciates the opportunty to provide its response to DP 80 and the recognition that the ALRC has given to the ABA's earlier submission.

However, the ABA maintains its principal disagreement with the need for a statutory cause of action for serious invasion of privacy on the grounds stated in its submission to the Commission dated 13 November 2013.

There are elements of the proposed cause of action in DP 80 which the ABA considers give further reason for concern which are outlined later in this submission in answer to related proposals and questions.

In providing its responses to DP 80 in this submission, the ABA has, in instances, agreed with certain Commission proposals (or chosen not to provide responses) but which should not be taken as support for the proposed cause of action in part or as a whole.

There is nothing in the proposal that the proposed cause of action would be contained in a new Commmonwealth Act which the ABA considers would overcome these concerns.

Proposal 4–2 :

The Commission proposes that a statutory cause of action for serious invasion of privacy should be a tort. DP 80 states if the statutory cause of action were a tort, there would be increased certainty around various ancillary matters, such as vicarious liability. It is argued there would also be the benefit of more consistency, since the statutory cause of action would operate in concert with existing tort law.

The ABA is not confident with this conclusion about consistency simply by integrating the cause of action within existing tort law because there will be instances where existing tort law provides redress such as in the law of trespass and nuisance and in a broader body of law dealing with confidentiality and damage to reputation. In these circumstances, existing tort law would deal with the same issue in a different way to the proposed new cause of action.

Tort law itself is not necessarily free from uncertainty and there does not appear to be any guidance as to how a court or regulator should deal with any overlapping legal principles and provisions.

Proposal 5–1 :

DP 80 does not seek to define what is "seclusion" and "private affairs".

An individual may seclude himself/herself for a purpose of avoiding contact by a person who has a legitimate interest in making contact for example to recover a debt of to offer a product or service for sale.

The concern here is that the threat of action under the proposed tort is likely to be used (and abused) for purposes to frustrate and avoid legitimate contact.

DP 80 refers to *ABC v Lenah Game Meats* (2001) 185 ALR 1 and to the High Court's expressed view about the difficulty of defining the meaning of "private". It is unclear whether "private affairs" is intended to be covered in this type of approach.

The elements a. and b. are likely to overlap with exisitng Privacy Act's Australian Privacy Principles and appear able to be applied in the event of a breach of some of the APPs resulting in a double edged liability for a defendant.

Proposal 5–2 :

The ABA agrees with these limits on the elements of the cause of action.

Proposal 5–3 :

The ABA agrees with these protections for an alleged wrongdoer but should go further to prevent their disclosure either to the court or in any pre-action publicity of an intention to sue. An example where this type of conduct has occurred is in the period prior to commencement of a class action where these disclosures could be made for the purposes of recruiting class action participants.

Proposal 5–4 :

Please see the ABA's response in Proposal 5-3.

Proposal 6–1 :

Gleeson CJ in *ABC v Lenah Game Meats* considered the difficulty of attempting to define what is privacy. The words "private" or "privacy" are vague and therefore their use ought to be avoided particularly in legislation as to do so would create appreciable risk and uncertainy for business and the community.

Proposal 6–2 :

In addition to the ABA's comment under Proposal 6-1 above, the Commission has proposed a "shopping list" of criteria which a court may consider to determine whether an individual would have a reasonable expectation of privacy. A court would not be required to consider these criteria and would be free to consider other matters.

A shopping list of criteria which may be relevant to determining whether an individual has a reasonable expectation of privacy is of little use unless there is complete clarity about exactly what "privacy" is. Without a clear definition of the fundamental concept of "privacy", these factors only give a general indication of the circumstances in which an individual may reasonably expect that their circumstances, relationships or overall existence may attract a very uncertain type of "private" status.

The ABA considers that this approach increases the risk of uncertainty for business and the community.

Proposal 7–1 :

A general concept of limiting the cause of action to more serious invasions is helpful but the proposal lacks sufficient certainty without more gudiance about what invasions of privacy are "serious"? There does not seem to be a proposal that there will be a clear definition of this, just a few factors that a court may consider. This is not acceptable from the perspective of business certainty.

Proposal 7–2 :

The ABA considers that proof of damage should be the gist of the proposed cause of action rather than likening a claim to an action in trespass. The plaintiff should be required to prove actual damage.

Proposal 8–1 :

The ABA disagrees. The defence of freedom of expression and any broader public interest notions are vague concepts.

Business and the community should have greater certainty on where the balance lies rather than having this determined by a court or regulator on a case-by-case basis and employing vague concepts.

Business should be able to defend such an action based on the right of business to achieve its objectives efficiently which is a principle that is recognised in the Privacy Act.

Proposal 8–2 :

While this list is helpful, there are many other types of activity that may not fall clearly within the categories listed, for example, activities involved in the collection of debts.

The Privacy Act contains its own balancing principls which include *"the general desirability of a free flow of information (through the media or otherwise) and the right of business to achieve its objectives efficiently."*

Proposal 9–1 :

The ABA considers that a preferred model is for such claims to handled administratively in the similar way to complaints made under the Privacy Act with access by the regulator to the court as a last resort .

Question 9–1 :

Please see ABA's response to Proposal 9-1.

Proposal 9–2 :

The ABA agrees.

Proposal 9–3 :

The ABA agrees.

Proposal 9–4 :

The ABA agrees.

Proposal 9–5 :

The ABA refers to its response to Proposal 9-1 above

Proposal 10–1 :

The expression used in the Privacy Act of '*required or authorised by or under law'* should be considered and qualified as *'reasonably believed to be*' so for the reason given in ABA's response to Proposal 8-2.

Proposal 10–2 :

The ABA agrees.

Proposal 10–3 :

The ABA agrees.

Proposal 10–4 :

The ABA agrees provided the defence is based on a reasonable belief as to the existence of those specific matters.

Question 10–1 :

The ABA does not offer a response to this question.

Proposal 10–5 :

The ABA does not offer a response to this question.

Proposal 10–6 :

The ABA does not offer a response to this proposal.

Question 10–2:

The ABA does not offer a response to this question.

Proposal 10–7 :

The ABA does not offer a response to this proposal.

Question 10–3 :

The ABA does not offer a response to this question.

Proposal 11-1:

The ABA disagrees based on its response to Proposal 9-1

Proposal 11–2 :

The ABA does not offer a response to this proposal other than to suggest that a general defence that the defendant had acted honestly and reasonably and ought fairly to be excused could be included as a separate category. This form of defence is included in Commonwealth legislation such as in section 85 of the Australian Consumer Law.

Proposal 11–3 :

The ABA does not offer a response to this proposal.

Proposal 11–4 :

The ABA does not offer a response to this proposal.

Proposal 11–5 :

The ABA does not offer a response to this proposal.

Proposal 11–6 :

The ABA does not offer a response to this proposal.

Proposal 11–7 :

The ABA does not offer a response to this proposal.

Proposal 11–8 :

The ABA does not offer a response to this proposal.

Proposal 11–9 :

The ABA does not offer a response to this proposal.

Proposal 11–10 :

The ABA does not offer a response to this proposal.

Proposal 11–11:

The ABA does not offer a response to this proposal.

Proposal 11–12:

The ABA does not offer a response to this proposal.

Proposal 11–13 :

The ABA does not offer a response to this proposal.

Question 11–1 :

The ABA does not offer a response to this question.

Proposal 12–1 :

The ABA disagrees.

Proposal 12–2 :

The ABA does not offer a response to this proposal.

Proposal 13–1 :

The ABA agrees.

Banks and many other businesses operate on a national basis and are able to conduct their businesses more efficiently, with better convenience for their customers and in order to comply with consumer protection type laws if those laws are nationally uniform or consistent. National consistency contributes to national productivity and better outcomes for consumers.

Proposal 13–2 :

The ABA agrees provided that the definition of 'surveillance device' is sufficiently clear as a technologically neutral definition.

Proposal 13–3 :

The ABA does not offer a detailed response to this proposal as it requires a comprehensive understanding and anlaysis of all possible circumstances in which such activity may occur

However, a test should include the requirement of awareness of the recording (as per the Federal telecommunications legislation) rather than consent to the recording (as per the NSW listening devices legislation).

Proposal 13–4 :

The ABA does not offer a response to this proposal.

Question 13–1 :

The ABA does not offer a response to this proposal.

Proposal 13–5 :

The ABA does not offer a response to this proposal.

Question 13–2 :

The ABA does not offer a response to this proposal.

Proposal 14–1 :

The ABA does not offer a response to this proposal.

Proposal 15–1 :

The ABA does not offer a response to this proposal.

Proposal 15–2 :

The ABA disagrees and relies on the current APP dealing with the destruction or de-identification of personal information.

A simple mechanism for an individual to request destruction or de-identification of his/her personal information needs to be balanced against any legal and conduct of business requirements to hold information particularly where the relationship with the individual is on an ongoing basis. As stated, APP 11 already requires destruction or de-identificaiton of personal information that is no longer required which under APP 11 is overriden by other legal requirements to hold information. It is noted that DP 80 mentions that the new APP would be subject to suitable exceptions which the ABA submits the requirements of the law would but one.

However, the ABA does not agree with the proposed provision as it overlaps with APP 11 and had Parliament intended such a provision as is proposed to be necessary it could have included such a right in APP 11.

Question 15–1 :

The ABA refers to its response to Proposal 15-2.

Question 15–2 :

The ABA refers to its response to Proposal 15-2 and adds that requiring an organisation to take steps to remove private information introduces a circularity where the information is already available in the public domain and raises the whole question of establishing what is and is not "private information".

Further, the ABA disagrees if it is proposed that any such obligation should extend to the removal of information that the organisation may have passed on to third parties other than taking reasonable steps, and no more, to notify the third party to do so.

Proposal 15–3 :

The ABA does not offer a response to this proposal.

Other comments:

The ABA restates its concerns about introducing the proposed cause of action into Australia's statute law in this and its previous submissions to the Commission and to the former Government and that a satisfactory regulatory impact assessment of the proposals has not been undertaken.

The scope for unnecessary litigation and business dislocation and costs, including through the potential for class actions, and the uncertainty of the law for business are unacceptable risks associated with the proposals.

The ABA opposes the proposals.

File 1:

File 2: