



**National Farmers' Federation**

**Submission to the Australian Law Reform  
Commission**

***'Serious Invasion of Privacy in the Digital Era'***

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By

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CANEGROWERS



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WOOLPRODUCERS AUSTRALIA

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## 1. Executive Summary

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In 1937, the High Court was asked to decide whether Australians had a right to privacy. In finding that no such right existed under Australian common law, Chief Justice Latham stated:

“Any person is entitled to look over the plaintiff’s fence and to see what goes on in the plaintiff’s land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence.”<sup>1</sup>

Today, the privacy context is drastically different from that of 1937, and indeed the whole of the 20th century. Developments in technology have meant that it is more difficult for individuals to take steps to protect their own privacy by the mere erection of a higher fence.

Some of the key technological developments that have changed the context for the protection of privacy in Australian society include:

- Greater access to technology;
- Increased and faster connection to the internet;
- Growth in the level of online activity; and
- The expansion of online social networks.

In providing this submission to the Australian Law Reform Commission (ALRC), Issues Paper - ‘*Serious Invasion of Privacy in the Digital Era*’. The National Farmers’ Federation (NFF) outlines two applications of digital technology that have caused the privacy of farmers to be invaded, consequently making them the subject of harassment.

The first concerns recording video images without permission and then hosting these on a publicly available website which also makes inflammatory claims. The second concerns the use of unmanned aerial vehicles or drones. These issues have occurred in the last six months and highlight the current gaps in the legal framework concerning digital privacy.

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<sup>1</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 494 (Latham CJ).

There is currently no statutory action for invasion of privacy in any Australian jurisdiction, and there is scant common law, with no appellate court recognising a tort of invasion of privacy. To overcome these perceived deficiencies, the NFF recommends:-

- Legal remedies to trespass, nuisance, harassment, unauthorised surveillance and defamation that occur on line and via social media.
- Amend the Australian Consumer Law (ACL) to include activities campaigns designed to influence or impact the course of carrying on a business and automatically conduct a review of the deductible gift recipient (DRG) and charity status of any organisation found to be in breach of the ACL.
- The lawful use of unmanned aerial vehicles or drones to be clarified and appropriate legal remedies for unauthorised remote surveillance and digital trespass.

The NFF would welcome an opportunity to meet with the ALRC to expand on the issues raised in this submission.

## **2. Introduction**

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The National Farmers' Federation (NFF) welcomes the opportunity to make a submission on the Australian Law Reform Commission (ALRC), Issues Paper - '*Serious Invasion of Privacy in the Digital Era*'.<sup>2</sup>

The NFF was established in 1979 and is the peak national body representing farmers, and more broadly, agriculture across Australia. The NFF's membership comprises all Australia's major agricultural commodities. Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF. Following a restructure of the organisation in 2009 a broader cross section of the agricultural sector has been enabled to become members of the NFF, including the breadth and the length of the supply chain.

NFF has for almost 35 years consistently engaged in policy interaction with government regarding a range of issues of importance to the sector including trade, education, environment, innovation to name a few. The NFF seeks to represent the agriculture industry and provide high-level advice and guidance on issues of critical importance to the future of the Australian farm and agribusiness sector. The ALRC, Issues Paper presents a valuable opportunity to communicate the farm sectors views upon privacy in the digital era.

## **3. Present state of the Australian law**

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There is currently no statutory action for invasion of privacy in any Australian jurisdiction, and there is scant common law, with no appellate court recognising a tort of invasion of privacy.

The absence of the common law in this area can be traced back to 1937, where the High Court found in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>3</sup> that breach of privacy was not recognised in Australian law. This precedent was maintained by Australian courts for over 60 years. It was not until 2001 that the High Court, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,<sup>4</sup> departed from this decision, clearly indicating that the decision in Victoria Park does not stand

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<sup>2</sup> October 2013.

<sup>3</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

<sup>4</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

in the path of the development of a cause of action for invasion of privacy.<sup>5</sup> However, the High Court did not determine whether a cause of action exists, nor has it clearly articulated what the scope of such a cause of action might be.

Since the High Court considered the *Lenah Game Meats* case, the common law has remained undeveloped. Only two cases - *Grosse v Purvis*<sup>6</sup> and *Doe v Australian Broadcasting Corporation*<sup>7</sup> - have expressly recognised a common law right to an action for invasion of privacy.

In *Grosse v Purvis*, the Queensland District Court found a breach of privacy to have occurred as a result of the defendant stalking the plaintiff over a prolonged period. In this case, the court awarded aggravated compensatory damages and exemplary damages. After noting that the High Court in *Lenah Game Meats* had removed the barrier which the *Victoria Park* case posed, Skoien SDCJ took what he viewed as 'a logical and desirable step' and recognised 'a civil action for damages based on the actionable right of an individual person to privacy'.<sup>8</sup>

The Court in that case determined that the 'essential elements' of the action for invasion of privacy were:

- a) A willed act by the defendant;
- b) Which intrudes upon the privacy or seclusion of the plaintiff;
- c) In a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;
- d) And which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.<sup>9</sup>

Skoien SDCJ also considered that while a public interest defence was available, it was not relevant in the particular case. The facts in this case meant that it was not necessary to consider whether a privacy cause of action would include negligent acts.

In *Doe v Australian Broadcasting Corporation*, the defendant broadcaster published in its afternoon and evening radio news bulletins information that identified a victim of a sexual assault - the plaintiff. In doing so, the defendant breached section 4(1A) of the

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<sup>5</sup> Ibid at [107] (per Gummow and Hayne JJ, with whom Gaudron J agreed).

<sup>6</sup> *Grosse v Purvis* [2003] QDC 151.

<sup>7</sup> *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

<sup>8</sup> *Grosse v Purvis* [2003] QDC 151 at [442].

<sup>9</sup> Ibid at [444].

*Judicial Proceedings Reports Act 1958* (Vic), which makes it an offence in certain circumstances to publish information identifying the victim of a sexual offence. Hampel J in the County Court of Victoria held that, in addition to breaching a statutory duty owed to the plaintiff by virtue of the *Judicial Proceedings Reports Act*, the defendant broadcaster and two of its employees were liable to the plaintiff in equity for breach of confidence, and in tort for invasion of privacy. In this case, although Hampel J did not ‘attempt to formulate an exhaustive definition of privacy’<sup>10</sup> the ‘unjustified publication of personal information’<sup>11</sup> was considered to constitute a breach of the plaintiff’s privacy.

The Australian Capital Territory (ACT) and Victoria (Vic) have introduced bill of rights legislation. Section 12 of the *Human Rights Act 2004* (ACT) and section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognise a right to privacy and reputation, both stating that:

Everyone has the right-

- a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- b) Not to have his or her reputation unlawfully attacked.

Both the ACT and Victorian legislation also recognise a right to freedom of expression. While there are mechanisms to promote the application of the legislation, neither of these Acts provide individuals with privacy protections that are able to be enforced in the same way as a cause of action would operate.

#### **4. Digital images becoming a source of harassment and misleading claims**

A number of intensive farm businesses have been subjected to unauthorised farm visits. Often, these have occurred at night and for some farms it has become apparent there have been a number of repeat visits. NFF members became aware of an incident in May this year, where surveillance cameras and a hard drive were found installed inside a building used to house farm animals. Since that time the number of farms visited and filmed has been revealed via a website that has direct links (both hypertext and written words) to Animal Liberation’s NSW and ACT organisations.

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<sup>10</sup> *Doe v Australian Broadcasting Corporation* [2007] VCC 281 at [162].

<sup>11</sup> *Ibid* at [164].

NFF first became aware of the website footage and Facebook pages when a member was approached by a commercial television network in relation to an animal welfare story. In the months since, this website has added more farms to its pages. Each new update comes with inaccurate claims of breaches to animal welfare and statements that the intention is to shut the farms down.

In each case the name of the owners, their photographs, maps of the farms and business information are listed. Footage and pictures taken at night of the animals and their housing is also posted on the site. So too are inaccurate and slanderous statements about what was claimed to have been witnessed.

The website and Facebook pages encourage comments from viewers, there are many, often inciting further farm visits or harm to the farmers, staff and their families. As a consequence of the farmers' phone numbers being listed, a number of farmers have also been subject to abusive phone calls. In one situation a woman who had viewed the site felt personally motivated to ring one of the farmers at home one evening. She indicated she wanted to remonstrate him about his farm management although she indicated she lived in a metropolitan centre and was not involved in agriculture; the conversation lasted for some 30 minutes.

Due to the connectivity of social media, farmers with Facebook profiles have had their pages linked to the offending website or parallel Facebook page. This has caused further alarm to the farmer and their family, their staff also. For these people checking their Facebook status has taken on a whole new meaning in terms of cyber harassment.

The variations of the harassment are almost as many as there are social media applications. Another example concerns the platform Twitter with messages sent inciting others to view the website and share the outrage. Another version of the message that is periodically recirculated makes direct reference to the NSW Farmers personnel. Its wording: "The ones that profit from **CRUELTY** deserve **SHAME**. *Cruel, vile, disgusting*". [Emphasis as per original text] The text includes a picture of a pig and then a number of Twitter handles (user names) including that of a NSW Farmers staff member.

The third example demonstrates how easy it is to doctor video to suit the activist's claims but how difficult it is to stop it from being posted on the web. In response to the

night video taken in one member's piggery, Australian Pork Limited (APL) (NFF member) filmed the same location during the day. This video explained the animal husbandry practices, introduced a number of farm staff and discussed the high levels of biosecurity or farm quarantine measures required by law to keep the animals healthy and to respect food safety requirements.

The website in question some time later posted a response to this video. This started the same way, with the APL logo and the farmer's introduction but then followed selected images from the night footage edited in. This had the effect of making an alternative and again factually incorrect commentary on what was being filmed.

### **Farmer, family, staff and animal wellbeing has been impacted**

Given the farmers live on their farms near to where their animals are housed, they are quite rightly concerned about the safety of their families, staff and animals. They also have to deal with the cost of ensuring the farms are secure and remain disease and pest free. The NSW Department of Primary Industries biosecurity protocols require visitors to an intensive farm not to have visited another within the last 48 hours. Visitors are also required to cover their shoes and clothing to minimise what they bring into the facilities. Hence it is not just repeated unauthorised visits increasing the risk of quarantine and animal health status but also visits between farms.

Add to this farm animals themselves being stressed by being woken during the night and strong lights shone in their faces while being filmed or handled by the intruders. Another consequence has been the loss of young animals due to startled adults trampling young. One piggery lost 30 piglets the night an unauthorised night visit occurred. Such losses add further distress to the farmers and their staff.

**Legal remedies that are reasonable & respect legitimate freedom of speech are needed**

**In summary digital technology enables many users to impinge on the right of an individual to privacy. The NFF is calling for legal remedies to trespass, nuisance, harassment, unauthorised surveillance and defamation that occur on line and via social media.**

There are existing laws for trespass, nuisance and unauthorised surveillance, however these rely on the intruder being identified and prosecuted. Effected farmers have contacted the Police about the unauthorised visits but remedies to the internet and social media content has been difficult to address.

For example the Police's response has been stymied by the offending website not identifying a specific individual, rather the entity of Animal Liberation. The only recourse farmers have had is to lodge apprehended violence orders (AVO) against Mr Mark Pearson the Executive Director of *Animal Liberation NSW*. He has stated in newspaper and television interviews support for the unauthorised visits and filming.

In relation to the re-edited video, it was originally hosted on You Tube, who when contacted by APL removed the clip. However the video has been moved to another service provider that is off shore. This has increased the difficulty of contacting the service provider. Given the service is based in the United States of America (USA) it is also questionable that a complaint about a matter outside their legal jurisdiction would be promptly attended to.

Facebook does respond to inappropriate material being posted on its pages but does that also cover inaccurate footage of farm animals? It is quite an onerous task for the farmer to track down each and every Facebook post or user who is reiterating this material. If imagery and text can be quickly located to elsewhere in the world, the situation becomes more problematic.

Similarly Twitter enables user profiles to be locked for privacy, so too messages from known user accounts. However this has its own problems. A locked Twitter profile is contrary to the aim of a user profile designed to engage in conversation with the community about farming. Similarly blocking users is only possible retrospectively, i.e.

after the abusive messages have appeared. In response could existing harassment or slander laws consider social media platforms to be the same as print or electronic media reporting?

### **Legal remedies**

**NFF is calling for amendments the Australian Consumer Law (ACL) to include campaigns designed to influence or impact the course of carrying on a business and automatically conduct a review of the deductible gift recipient (DRG) and charity status of any organisation found to be in breach of the ACL.**

The NFF is of the view that Australian farmers are under attack from activists who use misinformation and incorrect statements to damage farmers and manipulate consumers. Freedom of speech is inviolate; however, there is no freedom to recklessly and negligently destroy the market through campaigns built on lies. Currently, activist organisations can engage in conduct that is ‘misleading or deceptive’ without being subject to the *Australian Consumer Law (ACL)*.<sup>12</sup>

To counteract the current exemptions within the ACL, the NFF recommends amending section 2 to ensure that conduct of anti-farm activists be considered “in trade and commerce” and subjecting activists who undertake ‘misleading and deceptive’ campaigns to remedy action under section 18 of the ACL. This would provide recourse (including damages and injunctions) for farms affected by fallacious comments made by campaigners.

A substantial source of income for farm activists is through tax deductible donations made by supporters. Organisations seeking to be deductible gift recipient (DGR) must either fall into one of the seven categories of types of institutions or establish a deductible gift fund.

A number of organisations operate a deductible gift fund and use it as a major source of income. The new law would review the DGR status of organisations if they (and their employees) are found to have breached the ACL. The review would be conducted by the relevant Minister.

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<sup>12</sup> See [http://www.austlii.edu.au/au/legis/cth/consol\\_act/caca2010265/sch2.html](http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/sch2.html).

An example of how this concept would operate can be found in the facts of the Greenpeace volunteers who destroyed a CSIRO trial GM wheat crop. In this case, following the guilty sentence of the activists and the payment of reparation by Greenpeace, the Minister would be required to review the DGR status of Greenpeace and consider removing the status. In New Zealand the government has stripped Greenpeace of its charity status due to its political activities because of its illegal activities such as trespass.<sup>13</sup>

As well as DGR status, organisations also seek to be granted charity status. A similar process should be in place for an organisations charity status to be reviewed, and possibly rescinded, as a result of their association with anti-consumer activity.

It is important for a government to not be seen to be supporting an organisation, in any form, which breaches the ACL.

## **5. The use of unmanned aerial vehicles or drones**

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The NFF is able to provide comment on the use of drone technology in agriculture as well as give a recent example where the technology was more of a nuisance than help in day-to-day farming.

Animal Liberation in late March this year announced it had acquired one drone for the use of monitoring on-farm animal welfare. Some farmers have had positive experiences with using the technology for sustainable agriculture such as for weed mapping, crop monitoring etc. However given Animal Liberation's history of adversarial behaviour, the majority of farmers are strongly sceptical.

Apart from concerns about the drone being perceived by livestock as an aerial predator, there was genuine concern about unauthorised filming being an invasion of privacy. It did not matter if the drone was in a back paddock or near the house; to the landowner all is their privately owned and enjoyed land.

In light of the adversarial nature of Animal Liberation's actions towards farmers discussed above, these reactions are not surprising. As demonstrated by the ABC Landline program of 2 September 2013,<sup>14</sup> the interpretation of the activities being

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<sup>13</sup> Refer to <http://www.businesscompass.co.nz/greenpeace-told-to-reapply-for-tax-exempt-status/>

<sup>14</sup> Refer to <http://www.abc.net.au/landline/content/2013/s3838274.htm>.

filmed on the farm may also be misleading. In the TV program Animal Liberation were concerned by hens at a free range egg farm not being outdoors.

However when the ABC spoke with the owner, the hens were being wormed and this veterinary practice required them to be kept inside for a number of hours. The ABC later showed footage of the hens outside and the farmer has confirmed to the NSW Farmers that the camera crew returned in the afternoon to film this.

The Landline program showed the farm owner talking to the Animal Liberation representatives asking them about what they were doing. NFF understands that approaching the drone operator to advise them they are trespassing is one aspect the Police would consider when investigating an invasion of privacy. However, if only the drone is visible how it is possible to warn an inanimate object it is trespassing?

Also of concern is the suggestion a landholder can only ask for the drone to be removed because any intervention or capture could in fact be unlawful. NFF members have spent considerable time communicating to farmers these legal limitations to ensure they conform to the law. This includes advising farmers to alert the Police when they observe a drone and to also note down details of the sighting to pass this onto the authorities. Farmers have also been encouraged to notify their state or commodity representative organisation of the sighting.

In recognition of the positive use of drones in agriculture state or commodity representative organisation has also advised farmers of known legitimate uses. To date these include: the Rice Research Institute, the Northern Inland Weeds Advisory Committee and the New England Weeds Authority. These activities will occur with the landholder's permission, on set days and times. In addition the mapping involved will make use of geographic information system (GIS) positioning.

## Legal remedies

**The NFF is calling for the lawful use of unmanned aerial vehicles or drones to be clarified and appropriate legal remedies for unauthorised remote surveillance and digital trespass.**

The NFF readily notes that drone technology is a useful tool. However, as is often the case, it is likely that a small number of users will bring the technology into disrepute. Given the ease at which video can be taken, modified and posted on the web from a mobile phone, these concerns are not unrealistic.

Noting that a drone is akin to a mobile camera and likely to be operating like an aircraft, the NFF would suggest that the current legal framework be amended to clarify the permitted operating space above the ground. Vertical trespass is quite well understood for aircraft but there is a gap in the vertical strata as far as privacy is concerned.

One possible remedy for this is requiring lodgement of a flight or operational plan for those using the technology in airspace above a property other than their own. This may not need to be as detailed as for human aircraft but contain as a minimum: area of operation, dates, duration and GIS information; and be centrally lodged. Also that landholders affected are to be notified in advance and have the ability to veto the activity.

An existing model that could be applied to drones is the restriction of power of entry under section 255A of the *Mining Act 1992* (NSW). For instance a permit to do so, reasonable notice to the landholder of the intention to exercise the permit, in reasonable time and has the permit on hand when on site. The section also enables payment by the permit holder in response to damages caused.

## **6. Conclusion**

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Community concern about the right to and protection of privacy is growing as new technologies change the way we interact with business, government, and each other. New technology provides new opportunities, but it also provides new challenges - one of which is whether the laws relating to privacy have kept pace with these changes.

The NFF acknowledges that it is timely to review the current regulatory framework to ascertain whether it is sufficient to deal with individual or private sector organisations who use misinformation and incorrect statements to damage farm businesses and manipulate customers. NFF recommends amending to ACL to counteract trespass and the making of misleading and deceptive statements by anti-farm activists.

There is growing interest in the community about the use and implications of aerial drone technology, particularly drones with video recording and streaming capabilities. While drone technology has clear benefits, such technology presents a number of risks through its potential to be privacy invasive.

NFF recommends that notice be given to affected individuals that the collection of their personal information, i.e. using and disclosing the personal information, is permitted by the *Privacy Act*.