

Episode 153: Summary

Episode name: Mind Your Own Data: The Future of Privacy Law in Australia

Guest(s): Sophie Dawson & Hamish Lennon

What area(s) of law does this episode consider?

Privacy law.

Why is this topic relevant?

Privacy is, without a doubt, one of the defining legal issues of the 21st century. Our personal data is being collected, analysed, shared and, occasionally, unlawfully accessed and disseminated, in ways that we could scarcely imagine even a decade ago. In response, governments worldwide, including our own, are grappling with how to update laws that often lag behind the realities of modern technology.

In fact, the recent passing of the *Privacy and Other Legislation Amendment Act 2024* (Cth) marks the most significant reform to the *Privacy Act 1988* (Cth) since the private sector amendments back in 2001. These new amendments to the Act introduce some major changes, like a new cause of action for serious invasions of privacy, expanded powers for the privacy watchdog, and new transparency requirements for automated decision-making.

But what do these changes mean in practice? For individuals, they signal a greater ability to understand, manage and prosecute how their data is used, potentially curbing the overreach of large technology companies. For businesses, these reforms may be a wake-up call to invest in stronger compliance frameworks and rethink their data and privacy practices.

What legislation is considered in this episode?

[*Privacy and Other Legislation Amendment Act 2024* \(Cth\)](#) (**Amendment Act**)

[*Privacy Act 1988* \(Cth\)](#) (**Privacy Act**)

[*Defamation Act 2005* \(NSW\)](#) (**Defamation Act**)

[*Online Safety Act 2021* \(Cth\)](#) (**Online Safety Act**)

[Communications Decency Act, 47 U.S.C. § 230](#)

[European Convention of Human Rights](#)

[*Security of Critical Infrastructure Act 2018* \(Cth\)](#) (**SOCI Act**)

[*Spam Act 2003* \(Cth\)](#) (**Spam Act**)

[Cybersecurity Act 2024 \(Cth\) \(Cybersecurity Act\)](#)

What cases are considered in this episode?

[Victoria Park Racing and Recreation Grounds Co Ltd v Taylor \[1937\] HCA 45](#)

- This case primarily considered the limits of property rights, with privacy law considerations being a secondary issue. The plaintiff was a racetrack owner who charged admission for race attendees. A neighbour, Taylor, allowed a radio station to build a platform on his property overlooking the track, from which race details were broadcast to the public, which led to a drop in track attendance and betting revenue. The Supreme Court denied the plaintiff's application for an injunction on the grounds of nuisance, breach of copyright, and invasion of privacy. The High Court dismissed the appeal, and in its judgment, did not recognise a legal right to privacy.

[Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd \[2001\] HCA 63](#)

- The dispute in this case arose when the ABC broadcast covert footage of possum slaughter at Lenah Game Meats' abattoir, filmed through trespass, prompting questions about privacy as a legal basis for action, its application to corporations, and the balance with the constitutional freedom of political communication. The High Court found that privacy concerns must focus on the nature of the information, not how it was acquired or its value to the possessor, and introduced a test for privacy breaches based on whether the disclosure would be "highly offensive to a reasonable person."

[Jane Doe v Australian Broadcasting Corporation \[2007\] VCC 281](#)

- The Australian Broadcasting Corporation reported on a sexual assault conviction, revealing the names of both the perpetrator and the victim, the location of the offence, and referring to it as "rape within marriage." These disclosures breached legal restrictions against identifying sexual assault victims. The journalists involved admitted to the breach and issued a formal apology. The victim pursued legal action against the ABC, citing breaches of duty of care, statutory obligations, confidentiality, and privacy. The court found in favour of the plaintiff on all counts. The case renewed debate over whether Australian courts should formally recognise a common law tort of privacy.

[Kalaba v Commonwealth \[2004\] FCA 763](#)

- The plaintiff, Mr. Kalaba, alleged that the Commonwealth breached his privacy by requesting records about his wartime confinement without consent. He sought damages, claiming this and other acts of negligence led to his imprisonment following a protest. Justice Heerey in the Federal Court summarily dismissed the case, ruling that Australian law does not recognise a

tort of privacy. He noted precedent against such a tort, *Giller v Procopets*, criticised the contrary stance in *Grosse v Purvis*, and concluded that the Commonwealth's actions, even if erroneous, were at most a gratuitous effort to assist.

What are the main points?

- The first major reforms resulting from the digital platforms review process received royal assent on December 10, 2024, implementing proposals from the government's response to the privacy act review.
- Effective from December 11, the reforms include new powers for the OAIC, updated civil penalties, whitelisting powers for overseas jurisdictions, clarified information security obligations, and a new regime allowing the minister to make declarations about certain data breaches to reduce the harm to affected individuals.
- The process of obtaining injunctions in the media and intellectual property law spaces in Australia involves quick action by claimant lawyers, contacting duty judges, and arguing for interim injunctions to maintain the status quo while awaiting a court decision.
- In Australia, injunctions in defamation cases are rare due to the overarching concern for freedom of speech, unlike in intellectual property law where they are more common. Additionally, claimants face risks such as increased uncertainty in court approaches and potential costs if they decide to pursue litigation.
- The approach to addressing privacy issues is shifting towards a more proactive stance rather than being reactive, aiming to identify potential problems caused by new technologies or emerging risks before any actual harm occurs.
- This proactive approach to privacy allows for the commissioners to address privacy concerns before they escalate into serious incidents, offering an opportunity to prevent harm in the best-case scenario.
- The development of the Children's Online Privacy Code will involve consultation with the industry. The UK age appropriate online standards are expected to influence the code, focusing on principles like privacy by default settings and not tracking children's location, aligning with online safety efforts under the *Online Safety Act* to restrict exposure to inappropriate content and ensure age-appropriate online experiences for children.

What are the practical takeaways?

- Look and adhere to the OAIC's current guidance regarding consent requirements, especially in relation to cookies and personal information definitions outlined in the e-commerce directive. There is an emphasis on

ensuring clear upfront disclosures to clients, as the duration of consent for marketing emails under the *Spam Act* and *Privacy Act* is a critical consideration.

- When drafting privacy policies or disclosures, try to exercise common sense and provide easily accessible short form summaries in addition to long, complex privacy policies, to minimise the chance of misleading consumers.
- It's important to revise your consent forms to strike the right balance of detail while still remaining user friendly and accessible.
- Being curious, reading deeply, thinking critically, and asking questions are important for success in any field, according to the speaker. They believe that being curious and kind can lead to both learning and building relationships, which they consider essential for a successful practice.
- Exploring various areas of law as a law student or graduate can help you identify your passion and excitement for a particular field. It is important to choose an area of law that you are passionate about as your career is a long journey.
- Being curious, reading deeply, thinking critically, and asking questions are important for success in any field, as these skills will always lead to both learning and building relationships.

Show notes

[Australian Government Response to the Privacy Act Review Report, published 28 September, 2023.](#)

[OIAC, Overview of the Australian Privacy Principles.](#)

[Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy." *Harvard Law Review*, vol. 4, no. 5, 1890, pp. 193–220.](#)

[Serious Invasions of Privacy in the Digital Era \(ALRC Report 123\), tabled on 3 September, 2024.](#)