ORMATION PRIVACY LAW IN AUSTRALIA

FOREWORD

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Information privacy law

The life of a working judge occasionally takes him or her into the realm of information privacy law. I suppose the most interesting example I have struck arose when the Attorney General for the United Kingdom appealed from an order of Justice Powell in the Supreme Court of New South Wales refusing an injunction to restrain the publication of Mr Peter Wright's book of memoirs *"Spycatcher"*. Mr Wright, it will be recalled, was a former member of the British Security Service. He set out to publish an amount of confidential and allegedly secret information derived by him during his former relationship with the Crown as an officer of that service. The issues raised by the case were numerous as the report of the decision shows. See *Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Limited.*[1]

By special leave, the case went to the High Court of Australia where the decision of the Court of Appeal was confirmed.[2] Eventually, in both Courts, the case was decided not on the basis of information privacy law but upon the basis that an Australian court would not enforce, directly or indirectly, the public law of secrecy in respect

government information imposed by the law of the United Kingdom on officers and former officers of its security service. Yet, on the way to that decision a number of interesting byways of the law of secrets and confidences were explored.

Obviously, it is not every day that a case of that character comes up for decision. Some lawyers will go through their lives without any substantial practical exposure to the issues of information privacy. Perhaps I might have escaped its thrall but for a few chance events.

In 1975 I was appointed to chair the Australian Law Reform Commission. This was a new statutory authority established by Federal Parliament to advise it on the reform, modernisation and simplification of Federal laws in Australia.

In 1976 the Commission was asked by the Attorney General to provide a comprehensive report on the status of privacy protection in Australia. This led to a major inquiry conducted over nearly seven years. The Commission was in the midst of the inquiry when the Organization for Economic Cooperation and Development (OECD) in Paris established a Special Expert Group to draw up guidelines on the basic rules to be observed for the protection of privacy in transborder data flows. I was sent by the Australian government to serve as the Australian expert on that group. The work already done by the Australian Law Reform Commission was considered (somewhat optimistically at the time) to be sufficient to qualify me as an "expert".

Multijurisdictional approaches

At the first meeting of the OECD Expert Group, I was elected its Chairman. The group set about preparing its guidelines. It did so between 1978 and 1980. Much preparatory work had already been done in the Nordic Council (comprising the countries of Scandinavia) and in the Council of Europe. As well, numerous high level reports had either been completed or were in the course of completion in Canada, the United Kingdom and the United States and other countries. On the brink of 1984, there was a common concern in many of the OECD countries (representing the developed world) about the erosion of privacy. That concern was exacerbated by the perceived capacity of new information technology to erode privacy and to undermine the practical safeguards for confidences and secrets.

Eventually the Expert Group presented its Guidelines. They were transmitted through the relevant OECD Committee to the Council of the OECD, representing the twenty-four member countries. On 23 September 1980 the Council of the OECD adopted a recommendation addressed to the twenty-four member countries that they bring their laws and practices into line with the Guidelines.

Somewhat belatedly, and after the most agonizing process of negotiation with the States, the Commonwealth, on behalf of Australia, announced in 1983, its acceptance of the Guidelines. Australia was one of the last countries in the OECD to agree in this way. All OECD countries have now signified their acceptance of the OECD principles. Those principles have influenced the development of legislation in a number of OECD countries, notably Australia, Japan and the

therlands. They have also led to modification of laws on formation privacy which had already been passed in other untries. Furthermore, they have been adopted by a number corporations, including multinational corporations, as inciples to be observed in corporate information actices. They have therefore proved quite influential.

Many things could be said about this law-making ocess. Information technology itself, being ultijurisdictional, imposes upon domestic law-makers an bligation to endeavour to achieve common or at least rmonious principles for their laws governing information rivacy. If commonality, or at least harmony, could not be chieved the risks are presented that a cacophony of laws, affecting inter-acting information systems, will present a ightmare for compliance. This, in turn, could result, in practice, either in the dominance of the laws of the information-rich countries or the drying up of information flows consequent upon a desperate effort to comply with a multitude of laws.

There are many problems nowadays, multijurisdictional in character, which require compatible or harmonious approaches to lawmaking. Laws on information technology present an obvious example. But laws relating to biotechnology or to international problems such as HIV/AIDS are other examples. Our world is more closely interconnected than it was in the past. An increasing number of issues of lawmaking must be dealt with on a multijurisdictional basis. The OECD exercise on information privacy taught me the simple truth that successful law reform in matters of interjurisdictional concern is unlikely to be achieved

without a high measure of interjurisdictional cooperation. If this is true on the international stage, it is equally true within a federation, like Australia, where the Federal Constitution may not afford the Federal Parliament the relevant head of constitutional power with which to deal rationally and conceptually, with a new problem presented by a changing society. The advent of technology (such as computers interlinked by telecommunications) may present what are truly national, indeed international, problems which were simply not conceived at the time the constitution was drawn at Federation.

New Australian legislation

It is against this background that this book should be read. The common law, and statute law applicable in Australia today developed over time to meet the social needs presented to succeeding generations. The primitive common law protected the privacy of the person, in the sense of the human body, just as the law of any primitive legal system does. It soon extended to protect the immediate territory occupied by the person. Later it developed an information penumbra, protecting various aspects of reputation about the person and the person's secrets and confidences. But a coherent common law protection of privacy, as such, did not develop in Australia,[3] anymore than in other common law jurisdictions outside the United States of America. It has thus been for statute to fill gaps left by the deficient common law. It is here that the work of bodies such as the OECD can play a vital part. Where new problems are presented by new technology an interjurisdictional organisation can

offer intellectual leadership. It can do so not so much by coercive treaties but by useful guidelines which represent the best thinking of informed experts. Such guidelines can help to ensure consistent interjurisdictional approaches to common legal problems.

In the field of information technology I believe that we will see more efforts such as are exampled in the OECD Guidelines on Privacy. Indeed, in 1991, the OECD has established a new Expert Group. It is working on guidelines to govern the security of information systems. Once again, I have been elected chairman of this Group. In the field of data security principles the OECD is endeavouring to mark out common rules of the road just as the OECD did earlier in the information privacy principles. Any sound projection of principles for the future must be based upon a solid understanding of where we are at present. This book is designed to provide that understanding. It does so by copious reference to the applicable common law decisions and relevant statutory provisions operating in Australia. Like a patchwork quilt, they cover part of the territory properly described as "information privacy law". That they do not provide a comprehensive or conceptual cover for privacy concerns is, in part, the result of the common law system itself and in part the product of the rapid advances in information technology. Those advances have far outstripped the capacity of law-making institutions to provide their solutions.

The OECD Guidelines on Privacy are referred to in the preamble to the *Privacy Act* 1988 (Cth). They obviously shaped the principles adopted by that Act. But the Act had

scarcely come into force when the *Privacy Amendment Act* 1991 was passed, designed to apply basic privacy protection to individual consumers in respect of information held about them by credit reference organisations and by creditor providers in Australia. These recent legislative developments are described in this book. They are put into proper historical perspective. The need for further extensions of the principles and the likely developments in transborder data flows are also described.

The dynamic world of informatics

The lesson of the new OECD Expert Group is that future laws on the subject matter of this book can be expected. So dynamic is the technology of informatics that it is impossible to write the last word on its legal regulation. So pervasive is the new information technology that a society which ignores its social implications marches with eyes open towards technological autocracy. As Jacques Ellul once said: "The fact that it is a dictatorship of dossiers and not of hobnail boots does not make it any less a dictatorship". That is why this is an important book. Information privacy is a vital attribute of individual liberty. It therefore deserves legal protection. It merits the concern of lawyers, information technologists and all citizens.

FOOTNOTES

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Committee to the International Commission of Jurists.

(1987) 10 NSWLR 86 (CA).

(1988) 165 CLR 30.

Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479, 496.