

# Australian Class Actions in the Privacy Arena

**Paul Forbes, Partner, Baker McKenzie and Ann-Maree Hartnett, Associate, Baker McKenzie discuss class actions in the privacy arena.**

## Introduction

The introduction of the mandatory data breach notification laws under the *Privacy Act 1988* (Cth) (the **Privacy Act**) in February 2018 has assisted with the ready identification of a plaintiff class.

It has also created new privacy related rights and obligations and speculation is now mounting that we will see a rise in class actions alleging interference with privacy in the short to medium term. This article considers the issues in play and the likelihood of this occurring.

## Mechanisms for seeking relief

### Under the Privacy Act

Representative complaints are made to the Information Commissioner of the Office of the Australian Information Commissioner (**OAIC**) under sections 36 and 38 under the Privacy Act and can be made against certain Australian Government agencies or private sector organisations when there has been an interference with privacy.

Compensation can be sought under the Privacy Act on a representative basis if the following criteria are satisfied:

- the class members have complaints against the same person or entity;

- all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
- all the complaints give rise to a substantial common issue of law or fact.<sup>1</sup>

An “interference with privacy” includes a breach of:<sup>2</sup>

- an Australian Privacy Principle or a registered APP privacy code;
- rules under s 17 in relation to tax file number information;
- a provision of Part IIIA or the registered CR code;
- prescribed mandatory data breach requirements;<sup>3</sup> and
- other legislation that provide specific provisions for the Information Commissioner to investigate a matter.<sup>4</sup>

The OAIC has wide investigation powers for investigating representative and other complaints, including attempts to conciliate the complaint and/or holding a hearing prior to making any determinations.<sup>5</sup>

The Privacy Act does not set out any specific timeframes or process in which a complaint (including a representative complaint) should be determined. The closest one gets is in section 43(2) which provides that “*An investigation under this*

*Division shall be conducted in such manner as the Commissioner thinks fit*”.

### Representative Proceedings in Court

A claimant may prefer to bring an action directly to Court rather than complain to the Information Commissioner under the Privacy Act. This is sometimes preferred as:

- the Privacy Act has been criticised for being too limited in terms of the compensation afforded;<sup>6</sup> and
- the Privacy Act does not apply in all circumstances. In particular, there are exceptions for:
  - individuals not operating a business;
  - businesses with an annual turnover of less than \$3 million (with some exceptions such as Health and Credit Providers);
  - members of a parliament, contractors for political representatives, and volunteers for registered political parties; and
  - media organisations.<sup>7</sup>

Potential causes of action for interference with privacy include claims in tort (including by way of a claim for breach of statutory duty), breach of confidence, misleading or

<sup>1</sup> Section 38 of the *Privacy Act 1988* (Cth)

<sup>2</sup> Section 13 of the *Privacy Act 1988* (Cth)

<sup>3</sup> See sections 26WH(2), 26WK(2), 26WL(3), and 26WR(10)

<sup>4</sup> For example, s 35L of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); section 73 of the *My Health Records Act 2012* (Cth); Part VIIC of the *Crimes Act 1914* (Cth)

<sup>5</sup> See, for example, sections 33E, 36(4), 40-50, 52, 55A, and 68 of the *Privacy Act 1988* (Cth)

<sup>6</sup> See, for example, the ALRC’s Report on ‘Serious Invasions of Privacy in the Digital Era’ (ALRC Report 123); <https://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123>

<sup>7</sup> Sections 6C-6D and 7B of the *Privacy Act 1988* (Cth); <https://www.oaic.gov.au/privacy-law/rights-and-responsibilities>

deceptive conduct and/or breach of contract.

The decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 left open the possibility for the right to bring claims for breach of privacy in Australia. Further decisions in the District Court of Queensland<sup>8</sup> and in the County Court of Victoria<sup>9</sup> have recognised this right, and others have subsequently questioned its existence.<sup>10</sup> These cases and others involving a common law tort for invasion of privacy have demonstrated that the Courts are hesitant to strike out a cause of action involving breaches of privacy in circumstances where:

- there is an arguable case,<sup>11</sup> including for claims for both breach of confidence and invasion of privacy;<sup>12</sup>
- the law is continuing to develop in this area;<sup>13</sup> and/or
- the law is currently unclear and has not been fully addressed by the High Court of Australia.<sup>14</sup>

Ultimately, the likely direction of the future development of the common law tort of privacy remains uncertain. However, the Courts have not barred the bringing of a class action involving such claims and it is reasonable to expect that it will develop further in future.

Class actions may be commenced in Australia through the Courts by one (or more) of the persons representing the class under the

same conditions identified for representative complaints under the Privacy Act - except that a class action brought before the Courts must have at least seven or more persons which have claims against the same person.<sup>15</sup>

A representative proceeding brought before the Courts and a representative complaint under the Privacy Act otherwise have similar requirements when bringing a claim. For example, both representative proceedings and representative complaints:<sup>16</sup>

- must specify the name of the respondent, the nature of the complaint made, and the relief sought on behalf of the class;
- do not normally need to identify the class members by name or specify how many class members there are (other than to confirm that it is seven or more for Court representative proceedings); and
- can be lodged without the consent of the class members.

### How to quantify compensation claims for interference with privacy?

While it is largely untested, compensation is expected to be lower for representative complaints made under the Privacy Act. For example, in *PB' and United Super Pty Ltd as Trustee for Cbus*,<sup>17</sup> \$2.97 million was sought on behalf of 328 employees of a building sub-contractor. The superannuation details for the 328 sub-contractors was wrongfully sent to Cbus, the head contractor. The OAIC ultimately

held that Cbus must undertake a review of its procedures and issue a public apology. No award for financial compensation was provided. The OAIC determined in this case that:

- the payment of compensation is discretionary and the Privacy Act also contemplates other forms of redress in the ordinary course;
- the OAIC is not authorised under the Privacy Act to award compensation simply because an organisation has breached the Privacy Act. Unless an individual member of the class supplies evidence of actual loss or damage (not potential or future loss or damage), they are not entitled to a remedy;<sup>18</sup> and
- even where a complainant establishes loss or damage, a declaration for an award of compensation is not automatically provided.

Further, even in circumstances where a misuse of personal information has occurred, any compensation from a Court or the OAIC may be limited in situations where:

- the wrongful recipient of the personal information offers to delete the relevant data and provide undertakings not to provide it to any third parties;
- as is common, the party losing control of the information offers to pay for credit monitoring for a specified period (e.g. to ensure that identity theft does/has not occurred);

8 *Grosse v Purvis* [2003] QDC 151

9 *Doe v Australian Broadcasting Corporation* [2007] VCC 281

10 See, for example, *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183; *Dye v Commonwealth* [2010] FCA 720; *Maynes v Casey* [2011] NSWCA 156; *Gee v Burger* [2009] NSWSC 149

11 *Gee v Burger* [2009] NSWSC 149

12 *Maynes v Casey* [2011] NSWCA 156

13 *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181

14 *Sands v State of South Australia* [2013] SASC 44; *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181; *Chan v Sellwood*; *Chan v Calvert* [2009] NSWSC 1335

15 Section 33C of the *Federal Court of Australia Act 1976* (Cth) and section 157 of the *Civil Procedure Act 2005* (NSW)

16 Section 36 and 38 of the *Privacy Act 1988* (Cth); Part IVA Division 2 of the *Federal Court of Australia Act 1976* (Cth); Part 10 Division 2 of the *Civil Procedure Act 2005* (NSW)

17 *PB' and United Super Pty Ltd as Trustee for Cbus (Privacy)* [2018] AICmr 51

18 Although the complaint against Cbus was substantiated, the Information Commissioner found that class members failed to establish actual loss or damage to warrant the payment of compensation.

- individuals have consented for relevant government agencies or organisations to provide their personal information to third parties under relevant terms and conditions;
- information is already public so that there may be no causal link to claims for economic loss or humiliation;
- it is difficult to establish substantiated loss or damage that goes beyond individuals feeling 'unhappy', 'angry', 'upset', 'disappointed' or 'uncomfortable';<sup>19</sup> and
- substantiated loss or damage will likely vary between the complainants to a class action. As such, loss or damage would need to be investigated on an individual basis based on the circumstances of each person.

### Current and proposed class action claims

Since 2017, at least three data breach class action claims have either commenced or are being investigated. These cases seek compensation either via the Court process or through the representative complaints mechanism provided for under the Privacy Act.

- On 20 November 2017, a class action against NSW Ambulance Service and Waqar Malik was filed in the Supreme Court of NSW on behalf of 130 ambulance employees for alleged breach of confidence, invasion of privacy, breach of contract, and misleading and deceptive conduct. The statement of claim alleges that Waqar Malik, a NSW Ambulance contractor, accessed and sold medical records without authorisation between 14 January 2013 and 1 February 2013. The loss or damage is said to be pain and suffering,

humiliation, psychological injuries and economic loss on the part of the ambulance employees.

- In June 2018, PageUp, a multinational software provider, notified affected individuals that their software had been hacked and that the security of the personal information (including potentially sensitive personal information) of thousands of job applicants may have been compromised. Investigations are underway to determine whether or not class action could be brought on behalf of interested participants who were affected by that data breach. It is not clear at this time if compensation is to be sought via the Court process or through the representative complaints mechanism under the Privacy Act.
- Finally, in July 2018, litigation funder IMF Bentham announced that it had commenced a representative complaint against Facebook seeking compensation on behalf of more than 300,000 Australian individuals whose data was allegedly obtained without authorisation by Cambridge Analytica.<sup>20</sup>

### Conclusion

Following previous positions taken by the Courts in Australia and the OAIC, there remains doubt as to the extent of compensation that might be awarded in the absence of properly substantiated claims for actual loss or damage.

So, while the avenues for complaint are clear and are likely to be developed in future, a real question remains as to whether or not class actions for interference with privacy brought either through the Courts or under the Privacy Act will yield much in the way of compensation. It seems unlikely that the pursuit of

such claims formally through Court processes will be economical in most cases.

However, with the advent of mandatory reporting, a greater opportunity now arises for plaintiff lawyers and potential claimants to identify cases involving a large number of group members which might be able to be brought economically by way of representative proceedings. It seems inevitable that such actions will, therefore, be brought with increasing regularity in future.



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<sup>19</sup> *PB' and United Super Pty Ltd as Trustee for Cbus (Privacy)* [2018] AICmr 51

<sup>20</sup> <https://www.imf.com.au/newsroom/press-releases/press-releases-full-post/press-releases/2018/07/10/imf-bentham-launches-representative-action-against-facebook-for-privacy-breaches>