# The private international law implications of a privacy tort under state or territory legislation

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## Introduction

In 2014, the Australian Law Reform Commission ('ALRC') recommended the introduction of a privacy tort through federal legislation to give victims of serious invasions of privacy a civil action for redress.[1] This proposal re-affirmed the ALRC's earlier proposal for a statutory cause of action,[2] as well as similar calls for law reform made by the New South Wales Law Reform Commission[3] and the Victorian Law Reform Commission.[4] Unfortunately, the Commonwealth Government has repeatedly stated its opposition to a statutory privacy tort, making it unlikely that a federal privacy tort will be created in the foreseeable future.

As a result, attention has been re-directed towards legislative action at state or territory level. In 2013, the Law Reform Committee of the Parliament of Victoria recommended that Victoria give further consideration to introducing a statutory cause of action for invasion of privacy by the misuse of private information.[5] In March 2016, the Legislative Council of the New South Wales Parliament reported on its inquiry into the remedies for a serious invasion of privacy. The Legislative Council's Standing Committee on Law and Justice recommended the introduction of a statutory tort by the NSW Parliament.[6] It recommended that the statutory tort be based on the model proposed in the 2014 ALRC report.[7] Shortly afterwards, the South Australian Law Reform Committee also proposed a statutory tort for serious invasions of personal privacy.[8]

It is universally accepted that nationally uniform laws would be a more effective and less complex approach to protecting personal privacy in Australia and therefore preferable to state-based regulation. Legislative action

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[1] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report 123 (2014).

[2] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

[3] New South Wales Law Reform Commission, *Invasion of Privacy*, Report 120 (2009).

[4] Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18 (2010).

[5] Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting, Report of the Law Reform Committee for the Inquiry into Sexting*, Parl Paper No 230 (2013) Recommendation 12, 187–8. This recommendation was not accepted by the former Victorian government.

[6] Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, *Remedies for the Serious Invasion of Privacy in New South Wales*, Report No 57 (2016) Recommendation 3.

[7] Ibid Recommendation 4. However, in variation of the ALRC model, it was proposed that a different fault standard should apply to governments and corporations, as opposed to natural persons. In relation to the former, the fault element of intent, recklessness and negligence was proposed. The latter should only be liable if they acted with intent and recklessness: ibid Recommendation 5. The ALRC proposed a uniform fault standard of intent and recklessness: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 1, Recommendation 7-1.

[8] See South Australian Law Reform Institute, *A Statutory Tort for Invasion of Privacy*, Final Report 4 (2016) Recommendations 1 and 2.

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to create a statutory privacy tort by some states, but not others, would create divergent laws on privacy claims within Australia. These divergences raise questions of jurisdictional reach and the applicable law whenever a privacy invasion crosses state or national borders, such as publications in Australia-wide media or on the internet. This article explores how a state (or territory) legislator should deal with these issues, if a state-based approach was considered desirable in light of the lack of political will to enact a statutory cause of action at federal level (and as a potential precursor to nationally uniform privacy legislation).[9] These interstate and international issues were raised in the NSW inquiry but not considered in the Report.[10] They also received little to no attention in the other reports that recommended a statutory privacy tort in Australia. This is understandable to the extent that the ALRC proposed the enactment of a privacy tort in federal legislation, which by definition would exclude a conflict of laws within Australia.

The ALRC proposed to confine the tort to the following types of invasion: (a) intrusion upon seclusion; and (b) misuse of private information.[11] This article will focus on these two forms of privacy invasion, which were also central to the tort recommended by the NSW Legislative Council and the South Australian Law Reform Institute.[12] The term 'intrusion upon seclusion' denotes any conduct by which the defendant directly violates the plaintiff's physical private sphere. The term 'misuse of private information' chiefly includes any invasion of privacy by way of unauthorised disclosure of private information to third parties, although the ALRC suggested that unauthorised obtaining of private information can also amount to 'misuse'.[13] The ALRC recommended not to include two other privacy wrongs recognised under the influential US Restatement of Torts, namely, the privacy torts of 'publicity which places the plaintiff in a false light in the public eye' and 'appropriation, for the defendant's advantage, of the plaintiff's name or likeness'.[14] As will be considered below, we propose the introduction of a single choice-of-law rule that applies to all forms of privacy invasion. This proposal would also apply if a state legislature chose to adopt a broadly formulated cause of action, as was recommended by the New South Wales Law Reform Commission.[15]

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[9] In its response to the Report by the Legislative Council's Standing Committee on Law and Justice (see above n 6), the NSW Government acknowledged the community concerns over adequate privacy protection but rejected the Committee's recommendation for introducing a cause of action through NSW legislation: NSW Government response to the Legislative Council's Standing Committee on Law and Justice's report into Remedies for the Serious Invasion of Privacy in New South Wales, received by the NSW Parliament on 5 September 2016, <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/GovernmentResponse/6043/160905%20Government%20response.pdf>. Referring to inconsistency and complexity, increased cost of doing business in NSW and the risk of forum shopping as likely consequences, it preferred to further explore the potential of nationally uniform legislation.

[10] Parliament of New South Wales, above n 6. The discussion in this article formed part of a submission by the authors to the inquiry.

[11] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 1, Recommendation 5-1.

[12] Parliament of New South Wales, above n 6; South Australian Law Reform Institute, above n 8.

[13] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 1, [5.37].

[14] See American Law Institute, *Restatement (Second) of Torts* (1997) §§ 652A-E.

[15] New South Wales Law Reform Commission, above n 3, Draft Bill, cl 74(1).

In the next Part, we consider the rules that a court in NSW[16] would apply in determining the jurisdiction whose law governs the merits of a privacy claim (choice of law). After evaluating the various reform options, we recommend the introduction of a specific choice-of-law rule to deal with interstate and international cases. This choice-of-law rule should be based on a test of closest connection, similar to the test adopted in the Australian uniform defamation legislation. In the following Part, we consider issues of jurisdiction, that is, when a NSW court could or would hear a privacy law suit. We evaluate the likely operation of the current jurisdictional rules in cases of the proposed NSW privacy tort and conclude that there is no need for specific regulation to address potential issues of 'privacy claim tourism' to NSW courts. This article does not

## Choice of law

### *Substance vs. procedure*

While the law of a jurisdiction other than the forum[17] may govern the substance of the claim, the law of the forum always governs matters of procedure. In John Pfeiffer Pty Ltd v Rogerson,[18] which involved an intra-Australian tort, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in the High Court of Australia said that, for this purpose, matters affecting the existence, extent or enforceability of remedies, rights and obligations are matters of substance, and that rules governing the mode or conduct of proceedings are procedural.[19] They further said that matters of substance included the application of any limitation period and 'all questions about the kinds of damage, or amount of damages that may be recovered'.[20] Subsequently, in Regie Nationale des Usines Renault SA v Zhang,[21] which involved a tort occurring in a foreign country, the same judges said that they would reserve for further consideration, as the occasion arises, whether the proposition quoted should be applied to foreign torts.[22] For the purposes of this article, it is clear that matters of substance include the questions of whether a particular form of invasion of privacy is actionable and, if so, whether particular remedies such as damages or an injunction are available. The proposed statutory cause of action for invasion of privacy thus raises choice-of-law questions.

### *The effect of s 118 of the Australian Constitution*

The Australian Constitution binds a court devising a common law rule and the legislature of the Commonwealth, a state or a territory. Section 118 of the

[16] The discussion in this article would be equally relevant to statutory privacy torts enacted in other states and territories. The reference to New South Wales should be understood as a shorthand that has been adopted because the Parliament of New South Wales was the first to recommend such a tort.
[17] This article follows the convention of using the term 'forum' to denote the jurisdiction in which litigation takes place.
[18] (2000) 203 CLR 503.
[19] Ibid [99], [102].
[20] Ibid [100]. It was held that a statutory cap on damages is a matter of substance.
[21] (2002) 210 CLR 491.
[22] Ibid [76]. For a discussion, see Anthony Gray, 'Remedy Issues in Multinational Tort Claims: Substance and Procedure and Choice of Law' (2007) 26 *University of Queensland Law Journal* 1.

Constitution provides: 'Full faith and credit should be given, throughout the Commonwealth to the laws, the public Acts and records and the judicial proceedings of every State.' What parameters s 118 sets in respect of possible choice-of-law rules for tort is not entirely settled. In John Pfeiffer Pty Ltd v Rogerson,[23] where the High Court laid down the applicability of the law of the place of the tort (lex loci delicti) for intra-Australian torts, the Court said:

> In its terms, s 118 does not state any rule which dictates what choice is to be made if there is some relevant intersection between legislation enacted by different states. Nor does it, in terms, state a rule which would dictate what common law choice of law rule should be adopted.[24]

In short, s 118 does not prescribe any particular choice-of-law rules for intra-Australian torts. It does not follow, however, that every possible choice-of-law rule is compatible with s 118. It seems to be accepted that s 118 prohibits the courts of one state from denying the application of another state's legislation on the mere ground that such application would be against the public policy of the forum state.[25] Furthermore, in John Pfeiffer Pty Ltd v Rogerson,[26] the High Court rejected the double actionability rule (which, in simplified terms, required liability under both the law of the place of the tort and the law of the forum) on the ground that a state applying this rule would fail to give full faith and credit to the laws of the state in which the tort occurred. But the High Court in that case expressly refrained from giving a comprehensive account of the effects of s 118 for choice-of-law rules.[27] The High Court was content to raise the possibility that —

> [Section] 118 suggests that the constitutional balance which should be struck in cases of intranational tort claims is one which is focused more on the need for each State to acknowledge the predominantly territorial interest of each in what occurs within its territory than it is on a plaintiff's desire to achieve maximum compensation for an alleged wrong.[28]

The uniform defamation legislation in Australia prescribes a test of closest connection where allegedly defamatory matter has been published in two or more Australian jurisdictional areas.[29] The Australian legislatures thus took the view (which has not been challenged) that a test of closest connection is compatible with s 118 of the Australian Constitution. Section 118 does also not seem to stand in the way of a statutory provision under which privacy claims are governed by the law of the place where the plaintiff ordinarily resided at the time the invasion of privacy took place. Other choice-of-law regimes for privacy claims may also be permitted.

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[23] (2000) 203 CLR 503.
[24] Ibid [63] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
[25] *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 577 (Rich and Dixon JJ), 587–8 (Evatt J); *Breavington v Godleman* (1988) 169 CLR 41, 81 (Mason CJ), 96–7 (Wilson and Gaudron JJ), 116 (Brennan J), 136–7 (Deane J); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 [63]–[64].
[26] (2000) 203 CLR 503.
[27] Ibid [65].
[28] Ibid [64] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
[29] Eg, *Defamation Act 2005* (NSW) s 11(2).

*Options for the NSW Parliament*

If the NSW Parliament were to enact a statutory cause of action for invasion of privacy, it would have three broad options as to the issue of choice of law. The three options are:

(a) no legislative intervention in the area of choice of law;
(b) enactment of a provision that merely defines the territorial application of the new statute;
(c) enactment of a general choice-of-law rule for privacy claims.

We will now scrutinise these options in turn.

**No legislative intervention in the area of choice of law**

The first option is that the NSW Parliament, when enacting a statutory cause of action for invasion of privacy, does not enact any specific choice-of-law rule. In that case, a court in NSW or elsewhere (within or outside Australia) would apply the proposed statute if, and only if, the forum's choice-of-law rules refer to the law of NSW as the law governing the claim. Assuming that legislation on choice of law for privacy claims remains absent throughout Australia, an Australian court would apply the proposed statute if, and only if, the choice-of-law rules of the Australian common law refer to the law of NSW as the law governing the claim. The relevant choice-of-law rules are the ones for torts. The choice-of-law rules that apply to 'torts' in the strict sense of the word also apply to 'acts or omissions which by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby'.[30] For that reason, it would not matter in relation to choice of law whether or not the proposed statute described the statutory cause of action for privacy invasion as a 'tort'.[31]

*The current choice-of-law rules for privacy claims*

Under the Australian common law, the law of the place of the tort (lex loci delicti) governs liability for an alleged tort occurring in Australia[32] or in another country.[33] There is no flexible exception in favour of the law of a jurisdiction that has a closer connection to the alleged tort than the place of the tort.[34] The

[30] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 [21] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), citing in support *Koop v Bebb* (1951) 84 CLR 629, 642. *Koop v Bebb* involved statutes of NSW and Victoria, both of which substantially mirrored Lord Campbell's Act in giving an action in respect of wrongful death; the High Court applied the double actionability rule laid down in *Phillips v Eyre* (1870) LR 6 QB 1.
[31] Cf Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 1, [4.42], which suggests that referring to the cause of action as a 'tort' would provide greater certainty in the application of the choice-of-law rule for torts.
[32] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.
[33] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. The choice-of-law rule for alleged torts committed on the sea or in the air is not entirely settled; see Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 9th ed, 2014) [20.71]–[20.77]. This has little relevance to privacy claims.
[34] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 [78]–[80]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 [75]. The inflexibility is criticised by Robert Pietriche, 'The Ascendancy

doctrine of renvoi applies.[35] This means that the reference by the choice-of-law rule of the Australian common law to the law of the place of the tort is a reference to the choice-of-law rules, rather than the dispositive rules (here: tort law), of that place.[36] Renvoi is relevant only where the choice-of-law rules of the jurisdiction to which the forum's choice-of-law rules refer differ from the latter rules. Since the common law is uniform throughout Australia, renvoi is irrelevant for intra-Australian torts except where state or territory legislation has created a divergence of choice-of-law rules. Renvoi is relevant where the alleged tort occurred in a country other than Australia and that country's choice-of-law rules for tort differ from the choice-of-law rules of the Australian forum. Consider the following example: An action in the Supreme Court of NSW involves an invasion of privacy that occurred in country X. Under the choice-of-law rules of country X, liability in tort is governed by the law of the jurisdiction that has the closest connection to the tort. The invasion of privacy that has occurred is most closely connected to country Y, which has the same choice-of-law rule as country X. In these circumstances, the Supreme Court of NSW will apply country Y's law on invasion of privacy.[37]

*The place of an invasion of privacy*

The choice-of-law rule for torts under the Australian common law requires the court to determine the place of the tort. This is not always easy, as the place of the tort could be the place where the tortfeasor acted or should have acted, or the place where the protected interest (for example, bodily integrity) was first violated, or the place where the victim has suffered loss. In cases in which the place of a tort had to be determined for the purposes of jurisdiction, it has been held that it is the place where 'the act on the part of the defendant, which gives the plaintiff his cause of complaint' occurred.[38] The same rule has been applied to the determination of the place of a tort for the purposes of determining the applicable law.[39]

The test used to determine the place where an alleged tort occurred often points to the place where the defendant acted or should have acted.[40] This is the case, for example, where an allegedly negligent act or omission of the

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of the *Lex Loci Delicti*: The Problematic Role of Theory in Australian Choice of Tort Law Rules' (2015) 16 *Melbourne Journal of International Law* 86.

[35] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331.

[36] There are differences between single *renvoi* and total (or double) *renvoi*, which will not be discussed here. The majority in *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 refrained from choosing between the two forms of *renvoi*.

[37] It is not settled which country's dispositive rules should apply where the choice-of-law rules of country Y refer back to the law of country X, or where the choice-of-law rules of country X refer back to the law of the Australian forum. These matters will not be discussed in this article.

[38] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC) 468 (Lord Pearson); approvingly quoted in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 568; *Agar v Hyde* (2000) 201 CLR 552 [111] (Callinan J).

[39] *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 [10], [14]. This view was also expressed in *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [43] (Gleeson CJ, McHugh, Gummow and Hayne JJ). The question was left open by Kirby J in *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [145]–[150].

[40] Where the alleged wrong is an omission, the place of the tort is the place of the acts of the defendant that render the omission significant: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 567; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539, 547–8.

defendant caused personal injury or property damage to the plaintiff.[41] Identifying the defendant's 'act […] which gives the plaintiff his cause of complaint' can cause difficulty in more complex scenarios. Suppose, for example, that a defective product is manufactured in one jurisdiction but the plaintiff suffers injury in another jurisdiction to which the defendant has supplied the product.[42] Each case will depend on its own facts. The court must then 'look back over the series of events constituting [the alleged tort] and ask the question, where in substance did this cause of action arise?'[43] In some cases, the NSW Court of Appeal regarded the place of the injury as the place of the tort, essentially on the ground that the defendant's conduct had been directed at that place.[44]

Applying these principles to an invasion of privacy by way of intrusion into seclusion, the place of the invasion would normally be the place where the defendant acted. Things may be different where the physical intrusion occurred across borders and the most significant aspect of it was located in a place other than the one in which the defendant acted. For example, where the defendant, standing in Albury in NSW, operated a drone that flew over, and took intrusive photos of, the plaintiff's property in Wodonga, Victoria, it is arguable that the invasion of privacy occurred in Victoria since the most significant aspect of it (the taking of photos) occurred there. This result is reinforced by the consideration that the plaintiff's physical sphere of privacy, into which the intrusion occurred, was located in Victoria. The same considerations apply where an intrusion into seclusion occurs through electronic means, for example where a computer is hacked remotely to obtain private information.

Special rules on the determination of the place of a tort exist where some form of communication is essential to the occurrence of the tort. Even though the place where the defendant acted is the place from which the communication was sent, the courts have often said that the place of the tort is the place where the communication was received. Thus, it has been said that if an allegedly negligent misstatement is transmitted from one place to another where it is anticipated that it will be received by the plaintiff, the statement was in substance made at the place to which it was directed, whether or not it is there acted upon.[45] The same rule has been applied to statutorily proscribed misleading or deceptive conduct in trade or commerce.[46]

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[41] Eg, *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [43] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *ICI Australia Operations Pty Ltd v Kidde-Graviner Ltd* [1999] WASCA 65 (23 June 1999); *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70 [17]–[21], [97]–[99], revd on other grounds *Puttick v Tenon Ltd* (2008) 238 CLR 265.

[42] More than two jurisdictions may be involved: A product may be manufactured in one jurisdiction, be purchased by the plaintiff in a second jurisdiction and cause injury to the plaintiff in a third jurisdiction; see, eg, *McGowan v Hills Ltd (Ruling No 1)* [2015] VSC 674 (27 November 2015).

[43] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 468 (Lord Pearson); approvingly quoted in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 568; *Agar v Hyde* (2000) 201 CLR 552 [111] (Callinan J).

[44] *Hyde v Agar* (1998) 45 NSWLR 487, 515 (noting Mason P's disagreement), revd on other grounds *Agar v Hyde* (2000) 201 CLR 552; *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 [44]; but see also *McGowan v Hills Ltd (Ruling No 1)* [2015] VSC 674 (27 November 2015).

[45] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 569 (Mason CJ, Deane, Dawson and Gaudron JJ) (emphasising that the place where the statement was made always depends upon the facts of the individual case); *Delco Australia Pty Ltd v Equipment Enterprises Inc* (2000) 100 FCR 385 [27], [30] (misleading or deceptive representations and negligent misstatement are made where they are received); *Telesto Investments Ltd v UBS AG* (2012) 262 FLR 119 [197]–[206].

[46] *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539.

Similarly, it has been said that the place of an alleged defamation is ordinarily the place where the damage to reputation occurs. This is ordinarily the place where the allegedly defamatory material is available in comprehensible form, assuming that the person defamed has in that place a reputation which is thereby damaged.[47] Thus, in the case of an online publication, the place of the alleged defamation is ordinarily the place where the material was downloaded by a third party (provided that the plaintiff had a reputation there), not where it was uploaded by the publisher.[48] Where a defamatory publication occurs simultaneously in multiple jurisdictions (as is generally the case for online publications), the common law choice-of-law rules recognise a separate wrong occurring in each jurisdiction. As a result, the law of a particular jurisdiction governs liability in respect of the damage to reputation that has occurred in that jurisdiction as a result of the plaintiff being lowered in the estimation of residents of that jurisdiction.[49] But the plaintiff may still obtain compensation in respect of all publications in one proceeding.[50] Indeed, the bringing of separate actions in each jurisdiction in which publication occurred would be regarded as an abuse of process.[51] The plaintiff can, of course, confine her claim to the damage suffered in one jurisdiction (usually the forum). An application of the laws of multiple jurisdictions is a difficult task for the court. In the context of defamation claims, the Australian legislatures perceived the problems as being so great as to require legislative intervention. The uniform Defamation Acts have abrogated the common law choice-of-law rules for defamation in respect of publications within Australia.[52]

There seems to be no Australian case in which it was necessary to determine the law governing an alleged invasion of privacy by way of misuse of private information. It is possible that the courts would adopt the common law position in respect of defamation, and regard the place of publication (which is the place of downloading in the case of an online publication) as the place of the invasion of privacy.[53] Under that approach, where publication has occurred in NSW, the law of NSW (including the proposed statutory cause of action) would govern liability for invasion of privacy. Where the publication has occurred simultaneously in multiple jurisdictions, this approach would lead to

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[47] *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[48] Ibid. A stronger emphasis on the place where the injury to reputation was experienced, rather than the place of downloading, is called for by Megan Richardson and Richard Garnett, 'Perils of Publishing on the Internet: Broader Implications of *Dow Jones v Gutnick*' (2004) 13 *Griffiths Law Review* 74, 80.

[49] *Arrowcrest Group Pty Ltd v Advertiser News Weekend Publishing Co Pty Ltd* (1993) 113 FLR 57; *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181; *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519 (where, however, an application of the law of the plaintiff's residence to all publications was considered preferable). This approach was effectively affirmed in *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575. With regard to intra-Australian defamations, the application of the *lex fori* to the publications in all Australian jurisdictions (coupled with a transfer of proceedings to the most appropriate forum under the cross-vesting scheme) was suggested in *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1, 36–7.

[50] *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519, 537.

[51] *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519, 537.

[52] Eg, *Defamation Act 2005* (NSW) s 11 (see annex). The choice-of-law rules for defamation in the uniform *Defamation Acts* will be referred to on several occasions throughout this article.

[53] Karin Clark and Maree Norton, 'The *Gutnick* Decision: Possible Implications for Privacy Law' (2004) 1 *Privacy Law Bulletin* 107.

the application of the law of a particular jurisdiction to liability in respect of the damage suffered in that jurisdiction as a result of the misuse.

If the analogy of misuse of private information with defamation is accepted, there would be two distinct choice-of-law rules for invasions of privacy. In respect of intrusion into seclusion, it would usually be the place at which the defendant invaded the plaintiff's physical privacy. In respect of privacy invasion through misuse of personal information, it would be each place at which the private material was wrongfully disclosed. This is likely to create considerable complexity in cases in which both forms of privacy invasion coincide.

Moreover, the analogy of a misuse of personal information with defamation is not inevitable. While both torts involve a wrongful publication, there is a significant difference in relation to the interests each tort protects. In Dow Jones & Company Inc v Gutnick, the High Court of Australia stressed the importance of paying close 'regard to the different kinds of tortious claims that may be made' in identifying the place of a tort.[54] The place-of-publication rule for defamation was based on the consideration that 'it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct'.[55] This rationale does not apply with equal force to misuse of personal information. A privacy tort is not primarily concerned with the effect a publication had on third parties but with the effect it had on the plaintiff.[56] An invasion of privacy is a wrong against the plaintiff's personality. It aims to protect the plaintiff's dignity and autonomy from wrongful interference. On that basis, it could be argued that the place of the wrong is the place at which the plaintiff feels the effects of their loss of privacy. This could be the place at which they would reasonably expect to enjoy privacy, which may in many cases be the place of their ordinary residence at the time of the invasion. This conceptualisation would align the misuse of personal information more closely with intrusion into seclusion rather than with defamation.

The preceding discussion has shown that it is by no means certain how the place of an invasion of privacy is to be determined under the current law. Just as in defamation, problems are particularly likely to arise in cases of privacy invasion through online publication or remotely operated invasions into a person's private sphere. We therefore recommend that the common law choice-of-law rules be modified by statute in respect of privacy claims.

### Provision only for territorial application of proposed statute

The second option is that the NSW Parliament, when enacting a statutory cause of action for invasion of privacy, adopts a provision that merely defines the circumstances in which the proposed statute applies, but does not lay down a general choice-of-law rule for privacy claims.[57] This approach would be unproblematic if the statute's localising rules mirrored the common law choice-of-law rules (lex loci delicti, etc) discussed above. But a provision that

[54] *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [43] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[55] Ibid [44].
[56] This was already pointed out by Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 197.
[57] The following discussion assumes that a statutory cause of action for invasion of privacy would lie in addition to, not in substitution of, already existing causes of action.

simply mirrors the common law is superfluous. Thus, the second option is relevant only if the statute's localising rules differ from the common law choice-of-law rules. The statute's localising rules may give the statute a wider or narrower scope of application than the law of NSW has under the choice-of-law rules of the Australian common law. It may also be wider in some respects and narrower in others. The three possibilities will now be examined.

*The statute's localising rules 'catch' more cases than the common law choice-of-law rules*

The first category of case is where the statute's localising rules 'catch' more cases than the choice-of-law rules of the Australian common law. What is meant by this is that, under the statute's localising rules, the statute applies to every privacy claim that would be governed by the law of NSW under the common law choice-of-law rules, and the statute also applies to some privacy claims that would not be governed by the law of NSW under the common law choice-of-law rules. For example, the statute may provide that it applies whenever the alleged invasion of privacy occurred in NSW or, at the time of the invasion, the plaintiff was ordinarily resident in NSW or the defendant's principal place of business or residence was in NSW.[58]

A NSW court would apply the proposed statute whenever it applies under its own localising rules. The same is not necessarily true for a court in another Australian jurisdiction. There are two certain grounds and one uncertain ground on which a court in another Australian jurisdiction would apply the proposed statute. The three grounds are:[59]

(1) A court in another Australian jurisdiction would apply the proposed statute where the forum's choice-of-law rules specify the law of NSW as the law governing the claim. Unless legislation in the forum provides otherwise (and none currently exists), these are the common law choice-of-law rules, and the court would apply the proposed NSW statute if, according to those rules, the invasion of privacy occurred in NSW.
(2) A court in another Australian jurisdiction would apply the proposed statute (if it applies under its own localising rules) where that court is, or is likely to be, exercising cross-vested jurisdiction: s 11(1)(b) of the Jurisdiction of Courts (Cross-Vesting) Acts.
(3) In cases not covered by (1) or (2), s 118 of the Australian Constitution might require a court in another Australian jurisdiction to apply the proposed statute if it applies under its own localising rules.[60] However, the law is not certain in this regard.

A court in a foreign country would not apply the proposed statute simply because it applies under its own localising rules. For a foreign court to apply the proposed statute it is necessary that the forum's choice-of-law rules

[58] It is doubtful whether such a wide application of the statute would be compatible with s 118 of the *Australian Constitution*.
[59] It is clear that s 118 of the *Australian Constitution* would prohibit a court in another Australian jurisdiction from refusing to apply the proposed statute on the ground that such application would violate the forum's public policy, if the court would otherwise apply the statute.
[60] See *Borg Warner (Australia) Ltd v Zupan* [1982] VR 437.

specify the law of NSW as the law governing the claim and that the application of the statute would not violate the forum's public policy (ordre public). Where the forum's choice-of-law rules specify the law of NSW as the law governing the claim but the proposed statute does not apply under its own localising rules, the foreign court is unlikely to apply the statute and may apply the law of NSW apart from the statute.[61]

*The statute's localising rules 'catch' fewer cases than the common law choice-of-law rules*

The second category of case to be discussed is where the statute's localising rules 'catch' fewer cases than the common law choice-of-law rules. What is meant by this is that, under the statute's localising rules, the statute does not apply to any privacy claim that would not be governed by the law of NSW under the common law choice-of law rules, and the statute does not even apply to every privacy claim that would be governed by the law of NSW under the common law choice-of law rules. For example, the statute may provide that it applies only where the alleged invasion of privacy occurred in NSW and the plaintiff was ordinarily resident in NSW when the invasion occurred.

A court in NSW would apply the proposed statute if, and only if, it applies under its own localising rules. A court in another Australian jurisdiction would apply the statute if the statute applies under its own localising rules and the forum's choice-of-law rules specify the law of NSW as the law governing the claim. Under the assumption made here (the common law choice-of-law rule catches all cases caught by the statute's localising rules), the second condition is satisfied whenever the first condition is satisfied, provided that the forum has no legislation modifying the common law choice-of-law rules for privacy claims. The application of the proposed statute by a court in a foreign country would be governed by the same principles as outlined under the first category, discussed above.

In the category of case now under discussion (the statute's localising rules 'catch' fewer cases than the common law choice-of-law rules), an Australian court could be required to apply the law of NSW apart from the proposed statute.[62] This would occur where the forum's choice-of-law rules specify the law of NSW as the law governing the claim but the proposed statute does not apply under its own localising rules. Consider the following example: The proposed statute provides that it applies only where the alleged invasion of privacy occurred in NSW and the plaintiff was ordinarily resident in NSW when the invasion occurred. A publication in NSW violates the privacy of P, who does not reside in NSW. P brings an action in a court in NSW or elsewhere in Australia.[63] Under the common law choice-of-law rules, the court must apply the law of NSW to the claim, since the invasion of privacy

[61] See F A Mann, 'Statutes and the Conflict of Laws' (1972/73) 46 *British Yearbook of International Law* 117, 129–32. For criticisms, see K Lipstein, 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 *International and Comparative Law Quarterly* 884, 893; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 2nd ed, 2011) [12.25].

[62] The possibility that a court in a country other than Australia applies the law of NSW apart from the proposed statute exists in both the category discussed before and the category discussed now.

[63] The courts of NSW have jurisdiction because the tort occurred in NSW. The courts of another Australian jurisdiction may have jurisdiction because the defendant is present there. Jurisdiction in privacy cases is discussed further below.

occurred in NSW. But the court cannot apply the proposed statute since it applies only to claims by NSW residents and P does not reside in NSW.[64] Thus, the court must apply the law of NSW apart from the proposed statute. Such laws would include other statutory or common law rules applying to the alleged invasion of privacy, for example the Surveillance Devices Act 2007 (NSW), the tort of trespass or the tort of intentional infliction of mental harm.

*The statute's localising rules are partially wider and partially narrower than the common law choice-of-law rules*

The third and final category of case is where the scope of the statute according to its own localising rules is partially wider and partially narrower than the common law choice-of-law rules. For example, the statute may provide that it applies whenever NSW is either the plaintiff's place of ordinary residence or the defendant's principal place of business or residence. This would be wider than the common law choice-of-law rules in so far as the statute may apply even where the invasion of privacy did not occur in NSW. But it would also be narrower than the common law choice-of-law rules in so far as the statute would not apply, even though the invasion of privacy occurred in NSW, where neither of the conditions is satisfied. In these circumstances, a combination of the rules discussed for the first two categories of cases would apply. It would be extremely complex, and we will not set out the possible scenarios.

*Recommendation*

We do not recommend the enactment of a provision that merely defines the circumstances in which the proposed statute applies, but does not lay down a general choice-of-law rule for privacy claims. Such a provision would not completely supersede the common law choice-of-law rules for privacy claims and would need to interact with those rules. This would be unnecessarily complex and lead in some cases to the application of the law of NSW apart from the proposed statute. We therefore recommend the enactment of a general choice-of-law rule for privacy claims.

**Enactment of general choice-of-law rule for privacy claims**

The third option, which we recommend, is that the NSW Parliament, when enacting a statutory cause of action for invasion of privacy, enacts a general choice-of-law rule for privacy claims. This would avoid the complexities of the second option (enacting only rules for the application of the proposed statute) by ensuring that a court (in NSW, elsewhere in Australia or in a foreign country) would apply the statute if, and only if, the forum's choice-of-law rules

[64] It goes without saying that a NSW court would be bound by the statute's localising rules. A court in another Australian jurisdiction is also very likely to have regard to the statute's localising rules. This may follow from general principles (see Mann, above n 61, 129–32), or the common law rule that an Australian court should apply the law that would be applied by a court in the jurisdiction to which the forum's choice-of-law rules refer (*Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331), or the 'full faith and credit' obligation under s 118 of the *Australian Constitution*. The issue did not need to be decided, and was not decided, in *Augustus v Permanent Trustee Company (Canberra) Ltd* (1971) 124 CLR 245, 259.

specify the law of NSW as the law governing the claim.[65] There are a number of possibilities as to the choice-of-law rules to be adopted. Before these will be discussed, it is necessary to address four preliminary matters.

*Uniform rules for physical intrusion and misuse of personal information*

We discussed above whether the choice-of-law rule should differentiate between the various forms of privacy invasion, in particular between intrusion into seclusion and misuse of personal information. We take the view that a single choice-of-law regime should apply to all forms of invasion of privacy. Even though it is true that intrusion into seclusion is more likely to occur in a single jurisdiction whereas the misuse of personal information very often occurs in multiple jurisdictions, we still regard it as desirable to have a single choice-of-law regime for all forms of invasion of privacy. The examples considered above of remotely operated drones or online hacking show that intrusion into seclusion, too, may cross borders. More importantly, a plaintiff may bring an action in respect of intrusion into seclusion as well as the misuse of personal information. For example, the defendant may have taken intrusive photos of the plaintiff's private sphere by using a drone or a telescopic camera, and may then have published those photos. While a single choice-of-law regime for all forms of invasion of privacy does not make it impossible that intrusion into seclusion and the misuse of personal information by the same defendant are subject to different laws, it makes it less likely than under a set of separate choice-of-law rules.

*Uniform rules for interstate and international cases*

It needs to be considered whether the choice-of-law rule to be enacted should apply to all invasions of privacy wherever occurring, or only to invasions within Australia, leaving the common law intact for privacy invasions overseas. We recommend that the rule to be enacted should apply to all privacy invasions wherever occurring. Lessons can be learnt from the choice-of-law rule in the uniform Defamation Acts (place of closest connection),[66] which is confined to publications in Australia and thus leaves the common law intact for publications overseas.[67] Where the defamatory publication occurred both in Australia and in foreign countries (which tends to be the case for publications on the internet), the choice-of-law rule in the uniform Defamation Acts works well where the plaintiff has no significant reputation outside Australia, or where the parties agree to confine their litigation to the publication in Australia or a particular jurisdiction within Australia. Otherwise, the claim must be split, with the statutory rule applying to the publication in Australia and the common law rule applying to the publication overseas.[68] This is unnecessarily complex.[69]

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[65] A court in a foreign country could refuse to apply the law of NSW (including the proposed statute) on the ground that such an application would violate the form's public policy (*ordre public*).
[66] Eg, *Defamation Act 2005* (NSW) s 11.
[67] Mortensen, Garnett and Keyes, above n 61, [18.22].
[68] Ibid [18.23].
[69] An extension of the statutory rule to defamation cases involving foreign publications has been proposed by Matt Collins, 'Approaches Towards Jurisdiction and Choice of Law in Cases of Multi-Jurisdictional Defamation' (2006) 11 *Media and Arts Law Review* 379, 392.

*Exclusion of renvoi*

It needs to be considered whether the reference of the statutory choice-of-law rule to the law of another jurisdiction should be designed as a reference to that jurisdiction's choice-of-law rules or to that jurisdiction's dispositive rules (that is, the rules on liability for invasion of privacy). In other words, it needs to be considered whether the doctrine of renvoi should apply under the statutory choice-of-law rule. If the statute were to be silent on this matter, simply referring to 'the law' of a jurisdiction, the doctrine of renvoi would be likely to be applied, on the ground that the statute does not expressly change the common law in this respect. The doctrine of renvoi is very complex,[70] and is often excluded by statutory choice-of-law regimes, for example by the choice-of-law provision in the uniform Defamation Acts.[71] We recommend that renvoi also be excluded by a statutory choice-of-law regime for invasions of privacy. The relevant subsection could be phrased in this way: 'The application of the law of any jurisdiction specified by this section means the application of the rules of law in force in that jurisdiction other than its rules for choice of law.'[72]

*Public policy*

It is a commonly accepted principle that a court should generally not be obliged to apply the law of another jurisdiction where such application would violate the forum's public policy (ordre public). As an exception, the 'full faith and credit' clause in s 118 of the Australian Constitution prohibits the courts of one state from denying the application of another state's legislation on the mere ground that such application would be against the public policy of the forum state.[73] The same respect should be afforded to territory legislation. With regard to the application of the law of another country, the statutory choice-of-law regime for invasions of privacy should include the public policy rule. The relevant provision could be phrased like this: 'The application of the law of a foreign country may be refused if such application would be incompatible with the public policy (ordre public) of New South Wales.'

*Possible choice-of-law rules*

We will now consider the merits of various choice-of-law rules that the NSW Parliament could enact in respect of privacy claims.

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[70] Particular complexities arise where the law of the forum and the law of the jurisdiction referred to by the forum's choice-of-law rule differ as to what matters are characterised as procedural and what as substantive; see, eg, Sirko Harder, 'Statutes of Limitation Between Classification and *Renvoi* — Australian and South African Approaches Compared' (2011) 60 *International and Comparative Law Quarterly* 659.

[71] Eg, *Defamation Act 2005* (NSW) s 11(4).

[72] The wording is modelled on art 20 of the *Rome I Regulation* and art 24 of the *Rome II Regulation*. See *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations* [2008] OJ L 177/6 ('*Rome I Regulation*'), art 20; *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations* [2007] OJ L 199/40 ('*Rome II Regulation*'), art 24.

[73] *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 577 (Rich and Dixon JJ), 587–8 (Evatt J); *Breavington v Godleman* (1988) 169 CLR 41, 81 (Mason CJ), 96–7 (Wilson and Gaudron JJ), 116 (Brennan J), 136–7 (Deane J); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 [63]–[64].

An option that can be rejected swiftly is to enact a provision that, without more, specifies the law of the place of the invasion as the applicable law. Such a provision would merely restate the common law, and the courts would apply the common law rules in localising an invasion of privacy. As explained above, the common law rules are unclear and unsatisfactory. They should not be cemented through legislation.

It needs to be considered which country's law should govern liability for an alleged invasion of privacy. In the case of intrusion upon seclusion, this should prima facie be the country in which the physical sphere into which the defendant intruded was located at the time of the intrusion. For example, liability for the taking of intrusive photos of the plaintiff would then be governed by the law of the place where the plaintiff was when the photos were taken; liability for the taking of intrusive photos of the plaintiff's property would then be governed by the law of the place where that property is situated; and liability for the retrieval of private information through the hacking of the plaintiff's computer would then be governed by the law of the place where the computer was located when it was hacked. As we explain below, it should be provided that these rules may be displaced where an invasion of privacy has a closer connection to another jurisdiction.

Where an invasion of privacy occurs by way of publication (a form of misuse of personal information), the question of which country's law should govern a privacy claim is much more difficult because the plaintiff's interest in keeping the information private conflicts with the defendant's interest in free speech, considering in particular that privacy claims in respect of publications usually involve the publication of facts that are true. A legal system needs to decide which of the two conflicting interests is to prevail in what circumstances. Different legal systems resolve this conflict in different ways, and a country should be slow to impose its view upon others.[74]

It is therefore problematic to choose as the sole factor determining the applicable law a territorial connection to only one of the parties.[75] If privacy claims were always governed by the law of the place of the defendant's principal place of business or residence at the time of the invasion, potential defendants such as media organisations and other publishers could set up their places of business or residences in a country that has a strong protection of free speech, and could there publish private material about people living in countries that have a strong protection of privacy. Such a publisher would be protected from liability even if the material ends up in the country in which the plaintiff lives (which is almost inevitable for publications on the internet) and, crucially, even if the publisher intended the material to end up in that country. Conversely, if privacy claims were always governed by the law of the place of the plaintiff's ordinary residence at the time of the invasion, a defendant might not always be able to determine in advance which law will apply and, more importantly, might have to comply with laws that restrict freedom of speech to an unacceptable extent. For example, Australian media organisations might find it impossible to publish certain information about a foreign dictator

[74] Trevor Hartley, '"Libel Tourism" and Conflict of Laws' (2010) 59 *International and Comparative Law Quarterly* 25, 33.

[75] See Jan-Jaap Kuipers, 'Towards a European Approach in the Cross-Border Infringement of Personality Rights' (2011) 12 *German Law Journal* 1681, 1698–1700 (discussing possible choice-of-law rules for defamation in European law).

because the law of the foreign country prohibits such publication.[76] In such circumstances, an Australian court should refuse to apply the foreign law on the ground that such application would violate Australian public policy (see above), but media organisations may find that protection too uncertain.

The difficulty of choosing an appropriate choice-of-law rule for privacy (as well as defamation) claims is demonstrated by developments in the European Union. The European Union has created a largely uniform regime for its choice-of-law rules for torts and other fields of private law. The choice-of-law rules for torts are contained in the Rome II Regulation.[77] However, defamation and privacy claims are presently excluded from the scope of the Regulation. During the drafting of the Regulation, no agreement could be reached over the approach to be adopted.[78] While the Regulation adopts the lex-loci-damni principle (law of the place where the damage arises) as its general rule, an application of this rule to defamation and privacy claims met fierce resistance from media organisations, in particular those of the United Kingdom. In the case of internet publications, the place-of-publication rule has the potential to subject the same material to a multiplicity of highly diverse laws, increasing legal costs and possibly stifling freedom of expression. As an alternative, the media organisations put forward the 'country-of-origin' principle, which leads to the application of the law of the place at which editorial control is exercised. While the application of this rule is more predictable, it has the consequence that the level of protection enjoyed by a plaintiff whose reputation is harmed or whose privacy is invaded, depends on the origin of the defendant. A plaintiff enjoys fewer protections if the media defendant operates from a place with media friendly laws even when most or all of the damage occurs in the place of the plaintiff's ordinary residence.

This stalemate between seemingly irreconcilable positions was resolved through carving out defamation and personality infringements from the scope of the Rome II Regulation, with the effect that the determination of the law governing such claims remains subject to national laws, which are hugely divergent.[79] In 2012, the European Parliament asked the European Commission to amend the Rome II Regulation so as to bring defamation and privacy claims within its scope.[80] It proposed the addition of the following new Recital and new Article in the Regulation, aimed at creating a compromise between the opposing interests:

> Recital 32a
>
> This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the effect of

[76] See, in the context of defamation, Hartley, above n 74, 35.
[77] *Rome II Regulation* [2007] OJ L 199/40.
[78] On the law in EU Member States, see MainStrat, *Comparative Study on the Situation in the 27 Member States as Regards the Law Applicable to Non-contractual Obligations Arising out of Violations of Privacy and Rights Relating to Personality*, JLS/2007/C4/028 (February 2009) (Final Report) <http://ec.europa.eu/justice/civil/files/study_privacy_en.pdf >.
[79] See ibid.
[80] *European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)*, Document P7_TA(2012)0200 (10 May 2012).

significantly restricting the scope of those constitutional rules may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.

Article 5a Privacy and rights relating to personality

(1) The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.
(2) However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.
(3) Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.
(4) The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

This proposal, which has not been implemented and is unlikely to be implemented in the foreseeable future, adopts a general test based on the place at which the most significant element or elements of the damage occurred. However, the scope of the general rule is heavily restricted through three exceptions. First, the law of the place of the defendant's habitual residence applies where the defendant could not have reasonably foreseen substantial consequences of his or her act in the country where the damage occurred. Secondly, where the violation occurred through the publication of 'printed matter' or a broadcast (which probably includes publications on the internet), the applicable law is the law of the country to which the publication or broadcast was principally directed or, if this is not apparent, the country in which editorial control was exercised. Thirdly, in cases of publication or broadcast, the law of the defendant's habitual residence governs the availability of a right of reply and preventative measures including injunctions.

The proposal of the European Parliament strikes the balance between the right to privacy and freedom of expression at an abstract level through a complex hierarchy of hard-and-fast rules, reflecting the preference of most

European legal systems for certainty and predictability over flexibility. By contrast, common law countries such as Australia have a tradition of flexible choice-of-law rules, which permit the court to consider the particular circumstances of the individual case.

*Recommendation*

We take the view that a test of closest connection would be the preferable choice-of-law rule for privacy claims brought in the courts of NSW. Privacy claims should be governed by the law of the jurisdiction with which the harm occasioned by the invasion of privacy is most closely connected. The provision enacting this rule should contain a non-exhaustive list of factors which the court may take into account in determining the closest connection, in particular:

- the place where the plaintiff was ordinarily resident at the time of the invasion;
- where the invasion occurred by way of publication of private information, the place of the defendant's principal place of business or residence, and whether the publication was directed at a certain jurisdiction or certain jurisdictions;
- where the invasion occurred by way of publication in multiple jurisdictions, the extent of publication and the extent of harm in each jurisdiction.

In cases of intrusion upon seclusion, we anticipate that the closest connection would usually be found with the jurisdiction in which the physical sphere into which the defendant intruded was located at the time of the intrusion. Where an invasion of privacy has occurred by way of publication of private information, a test of closest connection provides sufficient flexibility to consider the particular circumstances of the individual case, similar to the choice-of-law regime prescribed by the uniform Defamation Acts for intra-Australian publications.[81] The reference to the defendant's place of business and the jurisdiction(s) to which the publication was directed signals that these factors may in some cases outweigh the connection to the jurisdiction in which the harm was suffered by the plaintiff, in particular when harm in that location was unintended or unexpected. A flexible rule based on the closest connection is also likely to provide a basis for subjecting complex scenarios to a single law — for example, where photographs obtained through an intrusion upon seclusion in country X are then published in country Y or a multitude of countries.

The test might be criticised for failing to provide sufficient certainty and predictability. However, in an area where two important interests conflict, we take the view that a flexible choice-of-law rule fits better with the Australian legal tradition than a set of hard-and-fast rules. Furthermore, a test of closest connection for privacy claims in NSW courts would align the choice-of-law rules for such claims with the rules for defamation claims in respect of

[81] Eg, *Defamation Act 2005* (NSW) s 11.

publications in Australia, where the test of closest connection has attracted no claims of undue uncertainty and unpredictability.[82]

## Jurisdiction

In addition to choice of law, it also needs to be considered when the NSW courts should have jurisdiction to decide actions for invasion of privacy. In light of NSW's current rules on jurisdiction in civil matters, two questions will be considered. First, do the NSW courts under the current rules have jurisdiction in all privacy cases in which they should have jurisdiction? Secondly, do the NSW courts under the current rules have jurisdiction in privacy cases in which they should not have jurisdiction? It is necessary to begin with the current NSW law on jurisdiction in privacy cases.

### *Transfer of proceedings to NSW under cross-vesting scheme*

Where an action for invasion of privacy has commenced in another Australian jurisdiction in a court that participates in the cross-vesting scheme (in particular the Supreme Court of another state or territory), that court may transfer proceedings to the Supreme Court of NSW on one of several grounds — for example, on the ground that the transfer is 'in the interests of justice',[83] in other words, that NSW is a more appropriate forum.[84] This may occur in particular where the Supreme Court of NSW would apply the proposed statute.

### *Proceedings commenced in NSW*

With regard to actions for privacy commenced in the Supreme Court of NSW, it is necessary to distinguish between prima facie jurisdiction (it is open to the court to exercise jurisdiction) and forum non conveniens (discretionary refusal to exercise jurisdiction).

### Prima facie jurisdiction

The Supreme Court of NSW has prima facie jurisdiction if the defendant appears before the court without contesting jurisdiction, or if the plaintiff can serve originating process on the defendant. Service of originating process is permitted without conditions where the defendant is present in NSW,[85] elsewhere in Australia,[86] or in New Zealand.[87] Where the defendant is a corporation that has a registered office in Australia, originating process may be served at that office.[88] Thus, for example, the NSW courts have prima facie

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[82] In the context of defamation, a test of closest connection is favoured by Kuipers, above n 75 (for European law); Hartley, above n 74, 35–6 (for English law).
[83] *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) s 5.
[84] It is not required that the transferor court is a 'clearly inappropriate' forum: *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.
[85] *Laurie v Carroll* (1958) 98 CLR 310.
[86] *Service and Execution of Process Act 1992* (Cth) s 15; *Uniform Civil Procedure Rules 2005* (NSW) reg 10.3.
[87] *Trans-Tasman Proceedings Act 2010* (Cth) s 9.
[88] *Corporations Act 2001* (Cth) ss 109X, 601CX; *Service and Execution of Process Act 1992* (Cth) s 9.

jurisdiction to decide on a privacy action against an Australian media organisation.

Where the defendant is not present in Australia or New Zealand, originating process may be served on the defendant only in certain circumstances. The grounds of such extraterritorial or 'long-arm'[89] jurisdiction are set out in the relevant rules of court. In NSW, these are the Uniform Civil Procedure Rules 2005 (NSW). Those rules permit service of originating process in a country other than Australia or New Zealand if a certain ground of service is satisfied according to the plaintiff's allegations.[90] Five grounds of long-arm jurisdiction are particularly relevant to privacy claims.[91]

The first two grounds are that 'the proceedings are founded on a cause of action arising in New South Wales',[92] or that 'the proceedings are founded on a tort committed in New South Wales'.[93] The two grounds can be discussed together. In order to determine whether a cause of action arose, or a tort was committed, in NSW, the courts ask where in substance the cause of action arose, considering the act of the defendant that gives the plaintiff his or her cause of complaint.[94] The same test is used to determine the place of a tort for choice-of-law purposes and has been discussed above. In cases of intrusion into seclusion, the Supreme Court of NSW has long-arm jurisdiction if the intrusion occurred in NSW (for example, the defendant arranged for a surveillance drone to fly over the plaintiff's property in NSW). Where the invasion of privacy occurred by way of publication, the courts may decide to apply the common law principles established in respect of defamation claims,[95] and the Supreme Court of NSW would then have long-arm jurisdiction if (in addition to the plaintiff being known in NSW) the publication took place in NSW, which in instances of a publication on the internet is the case if the material was downloaded in NSW. For example, where a US corporation uploaded on the internet private information about a person known in NSW and someone downloaded the information from the internet in NSW, originating process issued by the Supreme Court of NSW may be served on the US corporation even if it has no registered office, and is not otherwise present, in Australia.

The third ground of long-arm jurisdiction relevant to privacy claims is that 'the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in New South Wales caused by a tortious act or omission wherever occurring'.[96] It is likely that the phrase

[89] Historically, the term 'long-arm jurisdiction' was used whenever originating process was served outside the forum (here NSW). Since originating process issued by the Supreme Court of NSW can now be served without conditions anywhere in Australia or New Zealand, this article uses the term 'long-arm jurisdiction' only for service in a country other than Australia or New Zealand.

[90] The strength of the plaintiff's case will only be considered if the defendant applies for the service to be set aside: *Agar v Hyde* (2000) 201 CLR 552 [50]–[55]; *Sigma Coachair Group Pty Ltd v Bock Australia Pty Ltd* [2009] NSWSC 684 (23 July 2009) [38]; *Benson v Rational Entertainment Enterprises Ltd* [2015] NSWSC 906 (10 July 2015) [94]–[125] (test of 'good arguable case').

[91] Other grounds that may be satisfied in some cases are that the defendant is domiciled or ordinarily resident in NSW or has submitted or agreed to submit to the jurisdiction of the court in respect of the proceedings: *Uniform Civil Procedure Rules 2005* (NSW) sch 6 paras (g) and (h).

[92] Ibid sch 6 para (a).

[93] Ibid sch 6 para (d).

[94] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 468; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 568; *Agar v Hyde* (2000) 201 CLR 552 [111] (Callinan J).

[95] See *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 [44], discussed in text accompanying fn. 37–55 above.

[96] *Uniform Civil Procedure Rules 2005* (NSW) sch 6 para (e).

'tortious act or omission' includes not only conduct that constitutes a tort under the Australian common law, but also conduct that by virtue of legislation is wrongful and triggers liability to pay compensation.[97] The phrase 'wholly or partly' indicates that only part of the damage caused by the alleged wrong needs to have been suffered in NSW for the ground to be satisfied.[98] Thus, the ground has been held to be satisfied where a NSW resident has suffered personal injury overseas and received medical treatment (or further medical treatment) in NSW.[99] The ground is even satisfied where the plaintiff, after suffering the initial damage overseas, moved to NSW and suffered further loss there.[100] In a case where an email sent by a resident of California to a resident of Florida contained allegedly defamatory statements about a NSW resident (the plaintiff), it was held that damage (in the form of hurt to feelings) had been suffered in NSW as the place where the plaintiff happened to be when he first learnt of the publication.[101] Thus, the Supreme Court of NSW may have long-arm jurisdiction in respect of the publication of private material occurring anywhere in the world if the plaintiff happened to be in NSW when he or she first learnt of the publication.[102]

The fourth ground of long-arm jurisdiction relevant to privacy claims is that 'the proceedings are for an injunction as to anything to be done in New South Wales or against the doing of any act in New South Wales, whether damages are also sought or not'.[103] This ground is satisfied, for example, where the plaintiff seeks an injunction restraining the defendant from continuing intrusive surveillance in NSW or from distributing in NSW physical material containing private information. In those circumstances, however, the defendant is likely to be present in Australia and long-arm jurisdiction is not needed. Where the plaintiff seeks an injunction that orders a foreign defendant to remove, or cause to remove, certain material from the internet, it might be argued that this ground of long-arm jurisdiction is satisfied because the defendant would be ordered to make the material unavailable in NSW. However, while it is possible through technical measures (eg, blocking of IP addresses by country) to limit the availability of internet material to certain jurisdictions, material cannot be blocked solely in NSW and an injunction would therefore have extraterritorial effect. It may be doubted whether the Supreme Court of NSW should have such a wide prima facie jurisdiction over foreign

[97] See *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909 (20 August 2010) (claim under *Fatal Accidents Act 1976* (UK) c 30). See also *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 [21] (for choice of law); *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320 (8 August 2014) [159]–[197] (misleading or deceptive conduct prohibited by statute constitutes 'tort' for purposes of long-arm jurisdiction). This view was doubted in *Re Mustang Marine Australia Services Pty Ltd (in liq)* [2013] NSWSC 360 (13 March 2013) [19].

[98] Eg, *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (The 'Katowice II')* (1990) 25 NSWLR 568, 577; *Barach v University of New South Wales* [2011] NSWSC 431 (24 May 2011) [41]. Where a company that has been incorporated in NSW and has its principal place of business in NSW claims compensation for economic loss resulting from a tort, it automatically follows (and need not be expressly pleaded) that economic loss has been suffered in NSW: *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Services Pty Ltd* [2005] NSWSC 803 (10 August 2005) [49].

[99] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 [9]. See also *Flaherty v Girgis* (1985) 4 NSWLR 248 (injury in Queensland prior to *Service and Execution of Process Act 1992* (Cth)).

[100] *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909 (20 August 2010).

[101] *Barach v University of New South Wales* [2011] NSWSC 431 (24 May 2011) [51].

[102] In the case of intrusion into seclusion, it is probably required that the intrusion occurred in NSW, and the third ground of long-arm jurisdiction discussed here may not catch any case not already caught by the first two grounds discussed here.

[103] *Uniform Civil Procedure Rules 2005* (NSW) sch 6 para (n).

defendants. If it does, the court will need to consider carefully whether NSW is a clearly inappropriate forum (see next section, below) and whether the court should exercise its equitable discretion to grant an injunction.[104]

The final ground of long-arm jurisdiction relevant to privacy claims is that 'the proceedings concern the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act'.[105] This ground would be satisfied whenever a plaintiff asserts to have a claim under the proposed statute. Because of its simplicity, this would in practice be the ground on which long-arm jurisdiction in respect of a statutory privacy claim could most easily be based. The other grounds would remain relevant, however, if the plaintiff decided to proceed also under existing common law and equitable actions that incidentally protect privacy.[106]

### Forum non conveniens

Even if the Supreme Court of NSW has prima facie jurisdiction, it may decide not to exercise that jurisdiction. Under the cross-vesting scheme, it 'shall' transfer proceedings to another participating court in Australia (in particular the Supreme Court of another state or territory) where this is 'in the interests of justice',[107] in other words, where the other court is a more appropriate forum.[108] Furthermore, the Supreme Court of NSW may stay proceedings where it is satisfied that a New Zealand court is the more appropriate court to determine the matters in issue.[109]

Where the alternative forum is a country other than Australia or New Zealand, the Supreme Court of NSW will stay proceedings only if it is satisfied that NSW is a clearly inappropriate forum.[110] This test is not easily satisfied, and stays of proceedings on that ground are rare.[111] Even where the defendant's allegedly wrongful act and the initial damage suffered by the plaintiff occurred in the foreign country and the Supreme Court of NSW has prima facie jurisdiction only because some consequential loss was suffered in NSW, applications for a stay of proceedings on the ground of forum non conveniens have usually been rejected.[112]

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[104] Australian cases in which the plaintiff applied for an injunction against defamatory statements on the internet include: *Macquarie Bank Ltd v Berg* [1999] NSWSC 526 (2 June 1999) (interlocutory injunction against US resident denied on discretionary grounds); *Woolcott v Seeger* [2010] WASC 19 (17 February 2010) (permanent injunction against NSW resident granted). In both cases, originating process was served on the defendant in Australia. See also Dan Jerker B Svantesson, 'Jurisdiction in 3D – "Scope of (Remedial) Jurisdiction" as a Third Dimension of Jurisdiction' (2016) 12 *Journal of Private International Law* 60.

[105] *Uniform Civil Procedure Rules 2005* (NSW) sch 6 para (r).

[106] Ibid sch 6 para (w).

[107] *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) s 5.

[108] It is not required that the transferor court is a 'clearly inappropriate' forum: *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.

[109] *Trans-Tasman Proceedings Act 2010* (Cth) ss 17–19. Section 20 of that Act deals with the effect of an exclusive choice-of-court agreement in favour of an Australian or New Zealand court.

[110] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

[111] A stay is more likely, however, where proceedings involving the same subject matter have already commenced in the foreign country and a resulting judgment would be entitled to recognition in Australia: *Henry v Henry* (1996) 185 CLR 571; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

[112] Eg, *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909 (20 August 2010); *Barach v University of New South Wales* [2011] NSWSC 431 (24 May 2011). An exception is *Scrivener v Raffles Medical Group Ltd* [2015] NSWSC 874 (3 July 2015) [48]–[53].

*Evaluation*

The current rules on jurisdiction give the Supreme Court of NSW prima facie jurisdiction in a wide range of circumstances involving an invasion of privacy. Where the connection of the dispute with NSW is tenuous, the court may transfer the case to another Australian jurisdiction or stay proceedings in favour of a New Zealand court, but is unlikely to stay proceedings in favour of a court in a country other than Australia or New Zealand. We cannot identify any circumstances of an invasion of privacy in which the Supreme Court of NSW should have jurisdiction but does not have it under the current rules.

Some consideration needs to be given to the converse question: Do the current rules lead the Supreme Court of NSW to be able and likely to exercise jurisdiction in circumstances of an invasion of privacy in which it should not exercise jurisdiction? It is necessary to distinguish two questions. The first is whether the grounds of long-arm jurisdiction in NSW and other Australian jurisdictions (in particular the ground that damage was suffered in the forum) are too wide in general, not just in privacy cases. This question is beyond the scope of this article, and if legislative reform is considered necessary in that respect,[113] it should be done on a separate occasion.[114] The second question is whether the wide grounds of long-arm jurisdiction create problems, and require legislative intervention, specifically in respect of privacy cases. It is worth considering developments in England.

For some time, there were complaints that English courts were a destination for 'libel tourism', in which foreigners brought defamation actions in England in order to make use of the plaintiff-friendly English libel law,[115] even though the publication in question had only marginal connection with the United Kingdom,[116] so that the matter would have more appropriately been tried elsewhere. Similar concerns were expressed about libel tourism to Australia.[117] While the issue received much attention, in particular in the media, the scale of libel tourism was unclear.[118] Section 9 of the Defamation Act 2013 (UK) c 26 now excludes the jurisdiction of the English courts for defamation claims unless the defendant is geographically based in the UK or another country of the European Economic Area, or England is the most appropriate forum for the action.[119]

It might be thought that a similar provision would be required to prevent 'privacy claim tourism' in the courts of NSW. The decision by a plaintiff in

[113] See, eg, Andrew Dickinson, 'The Future of Private International Law in Australia' (2012) 19 *Australian International Law Journal* 1, 6–10.

[114] Preferably through uniform legislation throughout Australia: ibid.

[115] On the risk of a world-wide restriction on free speech as a result of English libel law, see, eg, UN Human Rights Committee, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR//CO/6 (30 July 2008) [25].

[116] This will often be the case where the publication, and its effect, were minimal in the United Kingdom or where the plaintiff had no significant reputation in the United Kingdom.

[117] See Nathan W Garnett, '*Dow Jones & Co v Gutnick*: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?' (2004) 13 *Pacific Rim Law and Policy Journal* 61, 69–70.

[118] Ministry of Justice, Libel Working Group, *Report of the Libel Working Group* (2010) Annex B; European Parliament, Committee on Legal Affairs, *Working Document on the Amendment of Regulation (EC) No 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II)* (23 June 2010) 4–6 <www.europarl.europa.eu/document/activities/cont/201009/20100922ATT83328/20100922ATT83328EN.pdf>.

[119] An international convention is proposed by Ali G R Auda, 'A Proposed Solution to the Problem of Libel Tourism' (2016) 12 *Journal of Private International Law* 106.

which jurisdiction to sue will usually be shaped by a host of considerations, including comparisons of the cost, inconvenience and expected duration of proceedings, the likelihood of success, and the ability to enforce a judgment against the defendant. Apart from procedural and evidential matters, the likelihood of success also depends on the substantive law that would be applied by each court. 'Libel tourism' in England was partly driven by the expectation that it was easier for a plaintiff to succeed under English defamation law than under the law in other jurisdictions, in particular the US (where the First Amendment protection of free speech erects substantial hurdles to defamation plaintiffs[120]). Disregarding other matters, the degree to which NSW could become a destination of choice for privacy proceedings would depend significantly on how much more favourable the provisions of the proposed statutory privacy tort would be for plaintiffs compared to the relevant law in other jurisdictions.

Assuming that the proposed NSW statutes would, for the most part, implement the recommendations of ALRC Report 123,[121] the differences between the NSW privacy tort and equivalent protections in comparable foreign jurisdictions, with the possible exception of the US, would be small. The reason for this is that the ALRC took careful account of the legislative and case law developments in other common law jurisdictions and rarely (if ever) chose to extend the protection available under the proposed tort from that available elsewhere.[122] As a result, it is unlikely that NSW would become an unduly attractive forum for international privacy claims that would be more appropriately tried in a foreign jurisdiction. The situation may be different in cases where a court in a foreign jurisdiction, pursuant to its own choice-of-law rules, would apply the law of a jurisdiction which is less favourable to a privacy plaintiff than the (reformed) law of NSW. As discussed in the preceding section, the Supreme Court of NSW would decline to exercise its jurisdiction only if it was satisfied that NSW was a clearly inappropriate forum. Although this high threshold will rarely be met, there has been no flood of international defamation cases in the courts of NSW. This suggests that the current regime, which is based on the court exercising its discretion to stay proceedings on forum non conveniens grounds would also work satisfactorily in privacy cases. This is especially so in light of the fact that the proposed NSW privacy tort cannot be regarded as tilted towards plaintiffs when compared to the equivalent laws in important foreign jurisdictions.

The possibility of 'privacy claim tourism' must also be considered in respect of interstate cases,[123] while NSW remains the only jurisdiction with a privacy statute. NSW law would be more attractive in an interstate case when the alleged conduct satisfied the proposed NSW privacy tort, but did not lead to liability under the current Australian laws protecting privacy incidentally. In these cases, a plaintiff would be likely to wish to sue in NSW where a court in

[120] *United States Constiution* amend I.
[121] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 1.
[122] The development of privacy protection in the United Kingdom has been significantly influenced by the jurisprudence of the European Court of Human Rights, which is tasked with interpreting the European Convention on Human Rights, to which almost all European countries are signatory. As a result, the European law on privacy protection is also converging.
[123] It is assumed that the defendant's ordinary residence or principal place of business is in Australia.

another Australian jurisdiction, pursuant to its own choice-of-law rules,[124] would apply the substantive law of a jurisdiction other than NSW (that is, the current Australian or state law protecting privacy incidentally) whereas a court in New South Wales would, by virtue of the choice-of-law rule contained in the proposed statute, apply the law of New South Wales and thus the NSW privacy tort. However, such forum shopping would be unproblematic if the proposed statute adopted a test of closest connection as choice-of-law rule, as recommended in this article. If the plaintiff's harm is most closely connected with NSW, it will be appropriate for a court in NSW to exercise jurisdiction because the court will apply NSW law to the substance of the claim. If the plaintiff's harm is more closely connected with another Australian jurisdiction, a court in NSW is unlikely to exercise jurisdiction. The Supreme Court of NSW is likely to transfer proceedings under the cross-vesting scheme to the Supreme Court of the jurisdiction with which the plaintiff's harm is most closely connected, such transfer being in the 'interests of justice'.[125] An inferior court in NSW may stay proceedings on the ground that another Australian jurisdiction is a more appropriate forum.[126] These mechanisms should provide sufficient protection against 'privacy claim tourism' in an interstate case.

### *Recommendation*

In our view, the enactment in NSW of a statutory cause of action for invasion of privacy would not require legislative modification of the existing rules on jurisdiction. In particular, we do not see a need for a specific rule to counteract the risk of 'privacy claim tourism'.

## Conclusion

The creation in Australia of a statutory cause of action for invasion of privacy, in particular at state level, would require legislative action in the area of private international law too. While the creation of a statutory privacy action would not by itself require changes to the rules on jurisdiction, it would require legislative action in the area of choice of law. A choice-of-law exercise would be necessary at least where the alleged invasion of privacy occurred in a foreign country, and the current Australian rules on choice of law for tort claims would not work well in that context. Moreover, the creation of a statutory privacy action at State and Territory level without uniformity throughout Australia, which now seems to be a possible scenario, would necessitate a choice-of-law exercise in interstate cases too. Finding the appropriate choice-of-law rules for privacy claims has plagued courts and legislatures around the world. This article has argued that a test of closest

[124] In the absence of legislation, these are the common law rules discussed in the section entitled *The current choice-of-law rules for privacy claims* above.
[125] *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) s 5(2)(b)(iii). If the plaintiff's claim is based on the proposed statute, the transferee court may be obliged to apply 'the written and unwritten law' of NSW: s 11(1)(b) of the relevant *Jurisdiction of Courts (Cross-Vesting) Act*. However, the 'written law' of NSW should include the statutory choice-of-law rule for privacy claims, which (under the assumptions made here) refers back to the law of the transferee jurisdiction, and the transferee court should accept that remission. The same outcome should be reached under the doctrine of *renvoi* if the transferee court applies the common law choice-of-law rules and those rules refer to the law of NSW.
[126] *Service and Execution of Process Act 1992* (Cth) s 20.

connection would fit best with the Australian legal tradition in the area of choice of law. Such a test would also align the choice-of-law rules for privacy claims with the statutory choice-of-law rules for defamation claims where the publication occurred within Australia. Once a statutory privacy action has been created in one Australian jurisdiction, it is desirable that all Australian jurisdictions enact choice-of-law rules for privacy claims, and it is highly desirable that those choice-of-law rules be uniform throughout Australia.

*Annex: Defamation Act 2005 (NSW) s 11*

**11 Choice of law for defamation proceedings**

(1) If a matter is published wholly within a particular Australian jurisdictional area, the substantive law that is applicable in that area must be applied in this jurisdiction to determine any cause of action for defamation based on the publication.

(2) If there is a multiple publication of matter in more than one Australian jurisdictional area, the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication.

(3) In determining the Australian jurisdictional area with which the harm occasioned by a publication of matter has its closest connection, a court may take into account:

  (a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation that may assert a cause of action for defamation, the place where the corporation had its principal place of business at that time, and

  (b) the extent of publication in each relevant Australian jurisdictional area, and

  (c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area, and

  (d) any other matter that the court considers relevant.

(4) For the purposes of this section, the "substantive law" applicable in an Australian jurisdictional area does not include any law prescribing rules for choice of law that differ from the rules prescribed by this section.

(5) In this section:

"**Australian jurisdictional area**" means:

  (a) the geographical area of Australia that lies within the territorial limits of a particular State (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or

  (b) the geographical area of Australia that lies within the territorial limits of a particular Territory (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or

  (c) any territory, place or other geographical area of Australia over which the Commonwealth has legislative competence but over which no State or Territory has legislative competence.

"**geographical area of Australia**" includes:

(a) the territorial sea of Australia, and

(b) the external Territories of the Commonwealth.

"**multiple publication**" means publication by a particular person of the same, or substantially the same, matter in substantially the same form to 2 or more persons.