Battle of the Drones – Legal Issues for High Flyers

Sophie Dawson and Daniela Lai, Ashurst

Drones have quickly gone from being a science fiction-like futuristic concept to being an everyday device available in electronic stores at very reasonable prices. Consequently, they are being used domestically, commercially and by government organisations to an increasing extent.

This article discusses some of the key legal considerations to bear in mind when considering creative uses for drones. No doubt, there are many others that can come into play with specific uses.

1. INCREASING POPULARITY OF DRONES

Before delving into the legal technicalities, it is worthwhile to quickly discuss some of the uses to which drones are being productively put.

Google has recently trialled the use of drones for the delivery of packages. It is used by a Queensland farm on the Darling Downs as the testing ground for a drone delivery project which could see cost effective autonomous drones deliver medicines, gifts and other supplies to people in remote areas. According to media reports, the first person in the world to receive a delivery from a deliverable drone was a Warwick farmer called Neil Parfitt, who was delivered a package of Cherry Ripes[1]. Amazon has engaged in similar trials and, according to one report, has proposed that there be a "drones only" airspace between 200 feet and 500 feet above ground level.[2] Governments have also used drones around the world for military purposes.

Further, many real estate agents are now taking photographs of homes for sale using drones in order to cheaply obtain aerial shots for marketing purposes, and people are also using drones domestically for similar photographic purposes.

WHAT ARE THE KEY LEGAL ISSUES?

The key issues that arise in relation to drones include:

1. The Civil Aviation Safety Authority's (**CASA**) Regulations, in relation to remotely piloted aircraft;
2. Surveillance laws;
3. Privacy; and
4. The laws of trespass.

There are other laws of potential significance too, including nuisance and negligence. Those laws are outside the scope of this article.

1. CASA Regulations

The *Civil Aviation Safety Regulations 1998* (**CAS Regulations**) place restrictions on the operation of remotely piloted aircraft (**RPA**) such as drones.

Operations of RPA for commercial purposes will generally require certification for the business conducting the operation, known as a remotely piloted aircraft operator's certificate and a remote pilot licence for the pilot flying the drone. Amendments to the regulations which will come into effect on 29 September 2016 will allow RPAs which are considered to be lower risk, known as excluded RPAs, to have fewer restrictions such as not needing a remote pilot licence or remotely piloted aircraft operator's certificate. The regulations create new weight classifications for RPA where very small RPA weigh less than 2 kg, small RPA weigh between 2 to 25 kg, medium RPA weigh between 25-150 kg and large RPA weigh more than 150 kg.

Consequently, use of a camera attached to a drone is likely to be use of an "optical surveillance device" and care needs to be taken in every case to ensure that the applicable laws are complied with

Commercial operators flying very small RPAs will not require a remote pilot licence or operator's certificate. Operators flying very small RPAs must provide one notification to CASA at least five days before their commercial flight and operate by the standard operating conditions.

Private landowners are also exempt from needing a remote pilot licence or operator's certificate for operating a small RPA on their own land for certain purposes if they follow the standard operating conditions and none of the parties receive remuneration. Private landowners operating a medium RPA on their own land will be required to hold a remote pilot licence.

The standard RPA operating conditions include:

- an RPA must only be flown during the day and kept within visual line of sight;
- an RPA must not be flown higher than 400 feet;
- an RPA must be kept at least 30 metres away from other people;
- an RPA must be kept at least 5.5km away from controlled aerodromes;

1 Brisbane Times 29 August 2014 "Google drones tested in Queensland".

2 The Guardian 29 July 2015 "Amazon proposes drones-only airspace to facilitate high-speed delivery".

- an RPA must not be flown over populous areas such as beaches, parks and sporting ovals;
- an RPA must not be flown over or near an area affecting public safety or where emergency operations are underway without prior approval; and
- an operator must only operate one RPA at a time.

The operating of RPA without a required remote pilot licence or operator's certificate attracts a penalty of up to $9000.

The Privacy Act does not generally affect use of drones by individuals for personal or domestic reasons. This is, among other things, because the Act contains a carve out in relation to the non-business activities of individuals

2. SURVEILLANCE LAWS

Optical surveillance is regulated in Victoria, the Northern Territory, Western Australia and New South Wales. An Act has also passed but has not yet commenced in South Australia. Each jurisdiction which regulates optical surveillance has a prohibition on publication or communication of information obtained through unlawful use of an optical surveillance device. We have assumed for the purpose of this article that the recording equipment that can be included in drones is probably inadequate for collecting clear audio recordings. We have therefore focussed in this article on the use of optical surveillance devices.

In Victoria, the Northern Territory and Western Australia, surveillance legislation prohibits the installation, use and maintenance of optical surveillance devices to monitor or record private activities by a person who is not a party to those activities subject to exceptions, including where the parties to those private activities consent.

The New South Wales Act, the *Surveillance Devices Act 2007*, is narrower. It prohibits the installation, use, or maintenance involving entry onto premises, or entry into or interference with a vehicle or object, without the express or implied consent of the owner or occupier of the premises or the individual having lawful possession or control of the vehicle or object. The effect of this is that it is likely to apply in the same circumstances in which trespass issues arise.

An "optical surveillance device" is defined broadly in each Act. For example, in the NSW Act it is defined to mean "any device capable of being used to record visually or observe an activity", and is likely to include binoculars, telescopes, cameras, video cameras, security cameras, closed-circuit television (CCTV) and webcams. However, glasses, monocles, contact lenses and similar devices used by persons with impaired sight to overcome the disability are specifically excluded from the definition.

Consequently, use of a camera attached to a drone is likely to be use of an "optical surveillance device" and care needs to be taken in every case to ensure that the applicable laws are complied with.

The ACT has workplace surveillance legislation, the *Workplace Privacy Act 2011*, but does not have general surveillance prohibitions. NSW has workplace surveillance legislation, the *Workplace Surveillance Act 2010*, in addition to the general Act above.

3. PRIVACY

3.1 Regulation under the *Privacy Act 1988* (Cth)

Drones that are used to take photographs in places where there are people may collect "personal information" as defined by the *Privacy Act 1988* (Cth).

Media organisations which have publicly committed to standards which deal with privacy in a media context have the benefit of the journalism exemption to the *Privacy Act*, which applies in relation to acts in the course of journalism. That is likely to be available in respect of any use of drones in the course of gathering news.

Media organisations must of course take into account and comply with the standards to which they have publicly committed. In general terms, such standards generally require that media organisations refrain from invading a person's privacy unless there is a public interest reason to do so: see for example clause 3.5.1 of the *Commercial Television Code of Practice*; the Press Council's *Statement of General Principles* and *Statement of Privacy Principles*; clause 2.2 of the *Subscription Television Code of Practice*; and clause 2.3(d) of the *Commercial Radio Code of Practice*.

The *Privacy Act* is an important consideration for non-media organisations and for media organisations outside of the scope of journalism. Personal information is defined in the Act to include information about an identified individual, or an individual who is reasonably identifiable. This means that photographs which show people's faces are likely to be "personal information" regulated by the Act where they are collected by an entity such as a Commonwealth Government Agency to which the Act applies.

The Privacy Act does not generally affect use of drones by individuals for personal or domestic reasons. This is, among other things, because the Act contains a carve out in relation to the non-business activities of individuals under s16 for the collection of personal information for personal, family or household affairs.

The *Privacy Act* only permits collection of "sensitive information" generally where there is consent or another exception applies. An interesting question which has been discussed in Privacy circles for many years is whether or not a photograph constitutes "sensitive information" on the basis that it conveys information

about an individual's health. A pragmatic approach is taken to this issue by most entities, in that there are many circumstances (such as where a crowd is involved) in which as a matter of practice photographs are taken without people's consent, or in which it is arguable that no health information is conveyed. It can be argued that where a person is in a public place, such consent may be implicit.

In addition, Australian Privacy Principle 6 prevents use or disclosure of information for a purpose other than the primary purpose of collection.

There are also interesting questions about how Australian Privacy Principle 5, which requires that reasonable steps be taken to ensure that individuals are aware of particular specified matters, can be met where information is collected in this way. The Privacy Commissioner's Guidelines acknowledge that there are circumstances in which "reasonable steps" means taking no steps at all and it is arguable that this is such a circumstance. However, until tested and clarified, some uncertainty will remain.

3.2 Cause of action

Since the decision of the High Court in *Australian Broadcasting Corp v Lenah Game Meats* (2001) 208 CLR 199, the way has been open for introduction in Australia of a tort of a cause of action for interference with privacy. A majority of the court in *Lenah Game Meats* found that the High Court's decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 does not stand in the way of development of such a tort.

No member of the court in *Lenah Game Meats* actually held there is a privacy tort. Callinan J was the only judge who appeared to clearly favour development of the tort, stating at [335] that:

> "It seems to me that, having regard to current conditions in this country, and the developments of the law in other common law jurisdictions, the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made."

Gummow and Hayne JJ (with whom Gaudron J agreed) and Callinan J each discussed in detail in their judgments the possibility of a tort. Gummow and Hayne JJ found that any tort would protect individuals and not corporations. They discussed the United States tort at length and with apparent approval (stating, for example, in respect of corporate privacy, that any Australian tort "not depart from the course which has been worked out over a century in the United States": at ([129)]. However, they did not express any concluded view on whether such a tort should develop in Australia. Nor did they express any view that the approach taken in the United Kingdom of extending the law of confidentiality is correct.

Gleeson CJ in *Lenah Game Meats* found that the law of confidence in Australia should develop in the same way as in the United Kingdom. Gleeson CJ said that:

> The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information. In *Hellewell v Chief Constable of Derbyshire* [[1995] 1 WLR 804 at 807; [1995] 4 All ER 473 at 476, Laws J said:
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> > If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on public interest would be available. I agree with that proposition, although, to adapt it to the Australian context, it is necessary to add a qualification concerning the constitutional freedom of political communication.

Gleeson CJ gave some guidance as to what activities might be relevantly "private" (at [42]):

> There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

Gleeson CJ favoured the development of the law of confidentiality to protect privacy and only briefly considered the possibility of a tort (which it appears from his Honour's position on confidentiality he did not favour).

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Kirby J deferred the question of whether there is any cause of action for invasion of privacy altogether and did not consider whether any such cause of action would be a tort or part of the law of confidence.

The United States privacy tort is likely to be very influential in the development of any Australian tort. Judges representing a majority of the court (Gummow and Hayne JJ, with whom Gaudron J agreed, and Callinan J) discussed the United States privacy tort in some detail. The US privacy tort is divided into four categories:

1. intrusion upon seclusion;
2. appropriation of name or likeness;
3. publicity given to private life; and
4. publicity placing a person in a false light.

It is likely that any tort of invasion of privacy in Australia would be similar to the third category, "publicity given to private life", which, as noted by Gummow and Hayne JJ in *Lenah Game Meats* is described as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicised is of a kind that:
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> a) would be highly offensive to a reasonable person; and
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> b) is not of legitimate concern to the public: *Lenah Game Meats* at [120], quoting Restatement of the Law, Second, Torts.

A number of cases have been decided since *Lenah Game Meats*, but none has yet progressed to the High Court, where the existence or otherwise of privacy rights at tort will no doubt ultimately be determined.

In *Grosse v Purvis* [2003] Aust Tort Reports 81-706; [2003] QDC 151 the Queensland District Court found that a common law tort of privacy existed. An appeal against this decision was discontinued. In that case, Skoien J noted that no right to privacy existed in the common law, and saw it as a "bold" but "logical and desirable step" to be the first to find such an actionable right existed in the circumstances. Judge Skoien found that to establish the tort, it was necessary to establish the following elements:

a) [that there was] a willed act by the defendant;

b) which intrudes upon the privacy or seclusion of the plaintiff;

c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and

d) which causes the plaintiff detriment in the form of emotional or physical harm or distress which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

Justice Hampel found both a cause of action based on a tort of privacy and one based on breach of confidence in a 2007 case against the Australian Broadcasting Corporation involving identification in a news broadcast of a sexual assault victim in *Doe v ABC* [2007] VCC 281. In that case, the victim of sexual assault was awarded general and special damages in the sum of $234,190 after three separate ABC news bulletins identified her rapist by name, revealed that the offences had occurred in the victim's home, and named the suburb and described the area of Melbourne where the suburb is located. In addition, one of the bulletins referred to the victim by name. The ABC appealed the decision, but then agreed to have the appeal dismissed by consent. The substantive issues raised have not therefore been considered at an appellate level.

In *Seven Network (Operations) Ltd v Australian Broadcasting Corporation* [2007] NSWSC 1289, Barrett J found there was a serious question to be tried as to whether the Australian Broadcasting corporation, or entities associated with the Chaser's War on Everything, had "breached an equitable obligation of confidence of the kind recognised at various parts of the judgments in *Lenah Game Meats Pty Ltd* and in *Douglas v Hello! Ltd* [2007] UKHL 21 where the Chaser had entered the Seven premises in Martin Place to perform a "stunt" for the show. His Honour said that:

> "... confidences go to a number of matters, the peripheral aspects of which are probably the means of access to the premises, while the central aspects are matters to do with the production and content of the Channel 7 program "Today Tonight", including matters such as the layout of the production premises (described by the Chaser team on the film as "the temple of mediocrity") and the planning of the "Today Tonight" program displayed on boards on the wall of the work area."

In *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236 the Victorian Court of Appeal found that the plaintiff was entitled to damages for distress for breach of confidence and that it was unnecessary to decide whether there is a tort of privacy.

In that case it was found that the defendant had videotaped sexual activities involving himself and the plaintiff, had shown it to be at least two people and had tried to show it to other people. The plaintiff had not consented to any disclosure of the tapes; and was found to have suffered mental distress falling short of psychiatric injury.

The court found that disclosure of the tapes constituted a breach of confidence. That finding is consistent with traditional breach of confidence principles which apply in Australia in that it was held that the videotape of sexual activities contained information imparted in circumstances giving rise to an obligation of confidence on the part of the defendant. The decision is not therefore authority in support of an extended obligation of confidence which would protect private information in the absence of such a relationship, which is the English approach supported by Gleeson CJ in *Lenah Game Meats*. However the court does appear from the judgments to have been generally supportive of the Gleeson approach. However, the court's finding that compensation can be awarded for distress falling short of psychiatric injury is a significant extension of the law of confidence which is likely to result in breach of confidence claims analogous to defamation claims (and often in tandem with defamation claims).

However, in *Kalaba v Commonwealth* [2004] FCA 763, Heerey J found that there is not yet a tort of privacy in Australia and that "the weight of authority … is against" the proposition that there is such a tort (at [6]).

Likewise, in *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364, McColl JA stated at [124]:

> "Australian common law does not recognise a tort of privacy, although some members of the High Court have tentatively acknowledged that such a tort may emerge, at least for individuals rather than corporations."

McColl JA's statement was quoted and followed by the decision in *Maynes v Casey* (2010) 13 DCLR (NSW) 83 which is a decision of the NSW District Court which declined to recognise a tort of breach of privacy in Australia.

Thus the case law is at this stage mixed and there is no clear trend. In *Dye v Commonwealth Securities* [2010] FCA 720, Katzmann J noted the uncertain state of the law as to the existence or otherwise of a tort for breach of privacy, stating at [290]:

"I accept, therefore, that it would be inappropriate to deny someone the opportunity to sue for breach of privacy on the basis of the current state of the common law, although whether the matters complained of in the present case would be actionable if a tort of privacy were recognised is another question."

The position will no doubt eventually be clarified by the High Court. Until this occurs, it is inevitable that claims will from time to time be made, and that varying decisions will be made by the lower courts.

It is easy to imagine circumstances in which a cause of action for breach of privacy could be alleged. These include where, for example, drones are flown over suburban backyards and record private activities of residents, which could later be published online or in the media or where a moment of particular personal distress or of intimate engagement is caught on camera by a drone. Unlike the *Privacy Act*, a cause of action would not have any media exemption.

4. NO STATUTORY CAUSE OF ACTION FOR BREACH OF PRIVACY – YET

Recommendations by various law reform bodies for a statutory cause of action have so far successfully been resisted by media organisations. In August 2008, the Australian Law Reform Commission released *For Your Information: Australian Privacy Law and Practice Report* dated May 2008 (the "Report") which proposed extensive national reforms of Australian privacy laws, including a new statutory cause of action for breach of privacy and adjustments to the media exemption in the Privacy Act 1988 (Cth). In May 2007, the New South Wales Law Reform Commission released a consultation paper which also proposed a new statutory cause of action for invasion of privacy.[3]

it can be expected that the Courts will start to clarify the many uncertainties which currently exist in relation to drone use. Courts will need to balance the public interest in utilising the benefits which drone technology has to offer against the public interest in protecting privacy and other individual rights

Most recently, on 3 March 2016, the Standing Committee on Law and Justice of the NSW Legislative Council published a report entitled "Remedies for the Serious Invasion of Privacy in New South Wales" which recommended that the NSW Government introduce a statutory cause of action for serious invasions of privacy. It recommended that the cause of action be based on the Australian Law Reform Commission model detailed in the 2014 report *Serious Invasions of Privacy in the Digital Era*. It recommended that the NSW Government should also consider incorporating a fault element of intent, recklessness and negligence for governments and corporations, and a fault element of intent and recklessness for natural persons. The Standing Committee cited concerns about drones as a significant consideration, whilst acknowledging that it had not heard from anyone who had been adversely affected by use of drones.

In relation to each of these law reform proposals, media organisations have pointed out that any cause of action could have an adverse effect on freedom of communication and would add to the thicket of laws which already protects privacy interests in relation to media reporting (such as court reporting restrictions). Freedom of communication is of course im-

3 http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref113.

portant to the community as a whole, and not just to media interests: as Louis D. Brandeis (widely credited as one of the fathers of privacy law) famously said in *Other People's Money – and How Bankers Use it* in 1914:

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

It is likely that any cause of action will burden freedom of communication, including freedom of communication about government and political matters. This means that it will need to pass the test enunciated by a majority of the High Court in *McCloy v New South Wales* [2015] HCA 34 in order to be valid. That test requires that the purpose of the law and the means adopted to achieve that purpose be legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government. It also requires that the law be reasonably appropriate and adapted to advance that legitimate object.

5. TRESPASS

There are also issues about how the laws of trespass apply in relation to drones. A cause of action for trespass to land can arise where there is intrusion into property. In *LJP Investments v Howard Chia Investments* (1989) 24 NSWLR 490, the Supreme Court found that trespass to airspace will occur where the interference is "of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake." This test has since been approved and applied in cases which deal with a physical encroachment, rather than an aircraft encroachment onto property, such as *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464 and *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311.

However, it is doubtful whether the test for trespass into airspace would apply to drones. Bryson J stated in *Bendal v Mirvac* at 470 that activities above the surface of land which cease to have a sufficiently close relationship with it will not be protected by the law of trespass, citing the English case of *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479. *Bernstein of Leigh v Skyviews* concerned an action of trespass and invasion of privacy for flying over the plaintiff's land to take an aerial photo of the plaintiff's country house that the plaintiff had offered to sell to the defendants. Griffiths J found that the defendant's flight over the plaintiff's property was not trespass because flying hundreds of feet above the ground did not cause any interference with any use to which the plaintiff might wish to use his land. Furthermore, the mere taking of a photograph could not constitute trespass into the plaintiff's airspace. However, Griffiths J suggested that activity such as constant surveillance and harassment could constitute trespass, stating at 489 that:

> "although an owner can found no action in trespass or nuisance if he relies solely upon the flight of the aircraft above his property as founding his cause of action, the section will not preclude him from bringing an action if he can point to some activity carried on by or from the aircraft that can properly be considered a trespass or nuisance, or some other tort."

The issue of trespass into airspace by an overflying aircraft has not been dealt with in Australia, and it remains to be seen whether the courts would follow the decision in *Bernstein of Leigh (Baron) v Skyviews* in relation to drones.

In considering the Australian position concerning drones used to record activities on private property, existing media cases are likely to be a key consideration. Courts recognised an implied licence to enter a property to approach the occupier to request permission to film, but in the absence of permission filming on private land may constitute a trespass. For example, in *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333; [2002] NSWCA 82, a television news crew entered a residential property with the intention of filming a police raid on the premises and conducting interviews with a view to broadcasting. District Court Judge English found that TCN Channel Nine Pty Ltd did not have any express or implied licence to enter and remain on the property to film and had committed the tort of trespass to land. On appeal, the NSW Court of Appeal unanimously upheld English DCJ's finding. The *Anning* decision was followed in *Craftsman Homes Australia v TCN Channel Nine Pty Ltd* [2006] NSWSC 519.

By analogy a Court may well find that, where a drone is found to have entered upon private property, the permission of the occupier is required to lawfully film.

6. CONCLUSION

Where common sense is exercised it is likely that use of a drone will not upset anybody and will not result in any claims.

It is also inevitable, however, that at some stage someone will use a drone in Australia so as to seriously offend someone or to cause a substantial loss.

When that occurs, it can be expected that the Courts will start to clarify the many uncertainties which currently exist in relation to drone use. Courts will need to balance the public interest in utilising the benefits which drone technology has to offer against the public interest in protecting privacy and other individual rights.

In the meantime, it is prudent for those who wish to fly drones to carefully assess the legal risks involved in relation to each intended use.