

Legal Control of Private Investigators and Associated Private Agents: Profile and Issues

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Abstract

This article reviews the laws relating to private investigators, including the various licensing schemes, the relationship between private investigators, their clients and the public. Effectively regulating the conduct of private investigators is a difficult task. The broad scope of their activities exposes them to a number of areas of risk in common law and various statutes. In addition, the piecemeal nature of law in Australia makes it difficult for private investigators to gain a comprehensive understanding of their powers and limitations. Members of the public are vulnerable to abuses of their rights by private investigators, although the main risk to the public appears to come from the fact that they may not know they are the subject of illegal actions by investigators. At the same time, there is also an argument for enhancing the powers of private investigators in some areas, such as access to government held information, under strictly controlled conditions. The law as it currently stands appears generally adequate to balance the rights and interests of stakeholders – private investigators, their clients and the public – but there is also a case for improved accountability through enhanced licensing schemes, training and an enforceable code of conduct.

Introduction

Any study of private investigators is faced with an initial problem of definition. The term has both generic and specific legal definitions. In its broadest terms it relates to any person who conducts enquiries for a customer or employer. This may include serving summonses after locating a person, as well as repossessing property. Alternatively, these two areas are sometimes separated. Historically in Australia there has tended to be a division in licensing between 'private investigators' or 'inquiry agents' on the one hand and 'commercial agents' and 'process servers' on the other hand. Often, however, it would seem that these functions overlap and it would seem useful to examine the law as it applies to a set of issues associated with these combined functions. An alternative generic term that is sometimes applied is 'private agents'. This would usefully combine private investigators, process servers and debt recovery agents. The term may, however, be considered too vague. Consequently, 'private investigators' and 'associated private agents' have been used in the title of this paper. Throughout the paper however we favour 'private investigator' as a generic term, in part because most repossession agents and process servers have an enquiry function in locating people. Arguably, a more accurate and encompassing term would be 'private justice agents', although this is unfamiliar. Some of the legal issues examined here also apply to security officers generally, and to specific groups such as insurance 'loss adjustors' and 'store detectives'. Our focus, however, is on operators in the private sector who contract out their services or who work for contractors.

Background

The security industry has been the subject of a growing body of research in Britain, Canada and the United States, with an emerging profile in Australia.¹ Despite this growth, the

¹ See for example: A Rees, *Private Security in Australia*, Australian Institute of Criminology, Canberra, 1984; I Warren, "An Air of Uncertainty: Private Security Regulation in Victoria"

international literature has paid very limited attention to private investigators², and in Australia there is an extreme paucity of research. It is clear nonetheless that the security industry has overtaken conventional public sector police to the extent that private and public 'non-police' forms of security are the dominant source of crime and loss prevention services in most Western societies.³ In response to this growth a negative critique has developed of the implications of the 'privatisation' process for democratic values of equality of protection and equality before the law. This concern includes factors such as the affordability of security, but it can also extend to more discrete areas of justice delivery such as searching for missing persons or locating people owing money. There also have been a number of exposés of misconduct by security providers.⁴ Where these cases have been revealed by investigations into individual companies or by inquiries in specific jurisdictions, it is difficult to assess the level of probity across the industry or industry sector. However, it is clear from analysis of such cases that security work has a very high opportunity factor for misconduct. This results from the possession of privileged knowledge about clients' assets and vulnerabilities, and from the potential 'Dirty Harry'-style conflict between noble ends and legal constraints. Growing cognisance of these pressures has produced a clear trend towards increased regulation of the industry.⁵

It is difficult to obtain a true picture of the size of the private investigation sector because of variations in state-based licensing categories. The problem can be illustrated by examining two Australian jurisdictions with comprehensive licensing requirements. South Australia in 1997 had 7,545 'security agents' and 3,681 'investigation agents'. Investigators made up 33% of the total. Of these there were 137 'bodies corporate' and 3,544 'individuals'.⁶ This is indicative of a perhaps surprisingly high number of investigators. However, it may be explained as an effect of generic licensing categories. Jurisdictions with more specific categories show lower numbers. Western Australia, for example, in 1998 had 735 'Inquiry Agents' or 'Investigators' out of a total 6,620 licence holders.⁷ In other words, the 'inquiry' category accounted for 11% of licensees. Queensland in 1998/99 had 1,246 private investigators.⁸

However one looks at the figures, there would appear to be a considerable number of private agents operating in Australia. As part of the larger security industry, their work is significant as a component of a complex and evolving form of 'hybrid' policing.⁹ While conventional police in Australia number approximately 45,000, security providers make up approximately 80-100,000, with the private sector accounting for at least two-thirds of that number.¹⁰ Using the Western Australia example, with 730 licensees in the inquiry category and approximately 4,800 police, there is about one private inquiry agent for every 6 police officers. Similarly, in Queensland, the ratio is approximately 1:5. However, in any police department the majority of officers are in general duties areas. Inquiry agents are more properly compared to detectives. From that perspective inquiry agents account for an important specialist part of the network of 'non-government participants in crime prevention and control'.¹¹ They fill a crucial gap in public provision of detection services. As part of the move in government towards privatisation, there also appears to be a distinct trend towards outsourcing of work to private

(1995) 2 *Deakin Law Review* 223-53; T Prenzler & R Sarre, "Regulating Private Security in Australia" (1998) 98 *Trends and Issues in Crime and Criminal Justice* 1-6.

² M Gill & J Hart, "Exploring Investigative Policing: A Study of Private Detectives in Britain" (1997) 37 *British Journal of Criminology* 549-67.

³ L Johnston, *The Rebirth of Private Policing*, Routledge, London, 1992.

⁴ T Prenzler, "La Sécurité Privée et le Problème de la Confiance: L'expérience Australienne" (1998) 31 *Criminologie* 87-109.

⁵ T Prenzler & R Sarre, "A Survey of Security Legislation and Regulatory Strategies in Australia" (1999) *Security Journal*, 12/3: 7-17.

⁶ South Australian Office of Consumer & Business Affairs.

⁷ Western Australia Police Service.

⁸ Office of Fair Trading.

⁹ Johnston, above, n3.

¹⁰ Prenzler and Sarre, above, n6.

¹¹ P Grabosky, "Law Enforcement and the Citizen: Non-Government Participants in Crime Prevention and Control" (1992) 2 *Policing and Society* 249-71.

investigators. This is occurring with workers compensation and, most notably, in the current crackdown on welfare fraud instigated by the federal Department of Social Security.¹²

A major point of difference between police and private security is that private providers do not have the same powers to detain and question, or obtain search warrants, as police do in some circumstances. Additionally, although there are significant difficulties in ensuring proper accountability of public sector police, private sector operatives are subject to a much less stringent system of scrutiny.¹³ One possible response to this situation of overlap and asymmetry is to more formally integrate private and public police. This would involve two main areas of adjustment.¹⁴ One is in the area of accountability, where the recent expansion of regulation has introduced somewhat similar background checks and training processes for private as for public-sector entrants. The second area is legal powers, involving a far more radical and controversial set of options. Swanton argues that similar accountability might logically imply that 'qualified and accredited private sector operatives might be equipped with the same coercive powers as members of police agencies'.¹⁵

Like policing, private investigating appears highly vulnerable to misconduct. The 1983 Australian Law Reform Commission Report into Privacy found that private agents can be strongly tempted to engage in breaches of privacy. It concluded that they,

might commit trespass, might conspire with others in what on the face of it might amount to a criminal or civil conspiracy, might obtain and disclose information in circumstances amounting to a breach of confidence in the legal sense and might breach legislation aimed at making certain activities criminal, such as that relating to official secrets, interception of telecommunications, and the use of listening devices.¹⁶

This assessment was borne out in the 1992 the New South Wales Independent Commission Against Corruption inquiry which found that private inquiry agents acted as the go-betweens in a 'massive illicit trade' in confidential information.¹⁷ Over 250 people were identified as being involved including police, officials from government departments and private agents. The Commission noted a 'just cause' element in the trade but that illegal means of attainment reduced the pressure for legitimate law reform. Intrusions occurred into a wide range of personal information including passport and bank account details, correspondence and unlisted phone numbers. Some recipients of information were known criminals and in many cases the agents did not know how the information would be used.

It is not clear whether illegal and unethical conduct by private investigators is a result of inadequate controls or the investigators' lack of understanding about the laws regulating their activities. The latter explanation would not be surprising given "the piecemeal array of legal rights, privileges and assumptions of authority"¹⁸. However it seems that both arguments have merit. In response to these issues of legal standing and regulatory control this article aims to provide a summary of the various State and Territory laws relevant to the activities of private investigators. One obvious issue for evaluation is that different stakeholders are involved with potentially competing interests. Consequently, a key criterion will be to find a reasonable balance in terms of the interests of the investigators, their clients, and the public who may become targets of private enquiries.

¹² A Dolahenty, "Happy as Larry with Sureveillance" (2000) September *Security Australia* 8.

¹³ R Sarre, "Accountability and the Private Sector" (1998) 10 *Security Journal* 97-102.

¹⁴ B Swanton, "Police and Private Security: Possible Directions" (1993) 42 *Trends and Issues in Criminal Justice* 1-8.

¹⁵ *Ibid*, at 8.

¹⁶ The Law Reform Commission, Report No.22, *Privacy*, 1983, Australian Government Publishing Service, Canberra, Volume 1 at 319.

¹⁷ ICAC 1992:3; G Greenleaf, "Prosecutions follow NSW ICAC data trafficking report" (1994) 1 *Privacy Law and Policy Reporter* 47.

¹⁸ R Sarre and T Prenzler, "The regulation of private policing: reviewing mechanisms of accountability" (1999) 1 *Crime prevention and community safety: an international journal* 17-28 at 18.

The laws affecting the activities of private investigators can be divided into two broad categories – the laws relating to the personal investigator's relationship with the client and the laws relating to the personal investigator's interaction with the public.

Law as between private investigator and the client

The relationship between private investigators and their clients is contractual. Specifically, it is a contract of agency. Agency is a relationship in which one person has authority or the capacity to act on another person's behalf in dealings with a third person.¹⁹ The contract may be oral or in writing, or a mixture of both.

Duties of the investigator

As an agent, the investigator has a number of common law duties to the client.

The duty to follow instructions: If the private investigator acts outside the client's instructions, he or she will be in breach of contract and may be liable to pay the client damages for any loss caused as a result of the breach.

The duty to act in person: The investigator can only delegate his or her duties to another person with the client's consent or where delegation is a normal part of the business of private investigators. For example, if the investigator is hired to personally conduct surveillance and make enquiries, he or she is not entitled to sub-contract this work to another person. However, the investigator is entitled to employ other people to perform associated tasks, such as typing up the surveillance report or making copies of video tapes.

The duty to act in the interests of the principal: The investigator must not use his or her position to promote his or her interests in preference to the client's. This includes an obligation to maintain confidentiality, that is to keep secret as between the client and the investigator all information provided by the client or received by the investigator on behalf of the client. The investigator is required to make full disclosure to the client of any information that is obtained in the course of carrying out his or her responsibilities on behalf of the client. The investigator is also prohibited from making a secret profit or gain which becomes available as a result of their activities under the contract of agency. For example, assume that the investigator is asked to enquire about the activities of one of the client's business competitors. In the course of that investigation the investigator finds out that the competitor company is about to be the subject of a takeover bid, and that shareholders are likely to make a large profit. The investigator must inform the client and must not use that information to make personal gain, for example by buying shares in that company prior to the takeover.

The duty to take care of the principal's property: The investigator must take care of the principal's property as if it were their own.

The duty to keep separate accounts: The investigator must not mix the client's money with their own. If the client has provided funds in advance to pay for the investigator's activities under the contract, this money must be kept in a separate trust account.

The duty to keep proper accounts and have those accounts available for inspection: The client is entitled to see receipts and other documents which show how their money has been used by the investigator.

Authority of the investigator

As an agent, the private investigator has authority to do certain things on behalf of the client. This authority may be express. For example, a written contract may specify the particular things that the investigator is required to do, how they are to be performed and when. Alternatively, when there is no written authority, or when the express authority does not cover all of the aspects of the things the investigator is required to do, the authority may be implied.

¹⁹ *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644.

Implied authority may cover things that are necessarily or ordinarily incidental to the express authority, or that are customary to the private investigator's business. For example, the written contract may authorise the investigator to "carry out investigations" on behalf of the client. This would imply that the investigator is authorised to perform actions that are necessary or ordinarily incidental to the carrying out of investigations, such as making enquiries. It may also imply that the investigator is authorised to perform an activity such as surveillance, if this is something that is customarily carried out by investigators in the course of "carrying out investigations". For example, the investigator may be authorised to make enquiries about the capacity of one of the client's debtors to pay an overdue loan owed to the client. Without further specific instructions the investigator would not be authorised to attempt to collect the debt from the debtor, as the authority only allows the investigator to make enquiries about their capacity to pay. If the investigator acts beyond these instructions, for example by making threats to the debtor about the consequences of non-payment, and the debtor brings an action against the investigator as a result of that conduct, the investigator is not entitled to any protection from the client.

The private investigator may also have 'ostensible authority', which is the appearance of authority to do something in the eyes of others, regardless of what the agent is actually authorised to do by the client. The type of authority is important when the private investigator performs an act which may give rise to an action against the investigator by a member of the public. This is because the client may also be held liable for acts performed by the private investigator which fall within the scope of the actual or apparent authority. For example, a security officer may be instructed to check the identification of people entering the client's property, and to notify the client if a person is not on the list of authorised entrants. If the officer attempts to physically restrain a person from entering (something that he or she is not authorised to do) and injures that person, giving rise to an action for assault, the client may be held liable if a person attempting to enter the property would reasonably believe that the officer has the authority to physically prevent entry by unauthorised people.²⁰

However, a client may not authorise a private investigator to commit an act which is illegal, and the client will not be liable for such acts performed by the investigator. Accordingly, if the client instructs the investigator to conduct surveillance of a person and the investigator, without the client's knowledge, installs an illegal telephone tapping device on the person's telephone, the client will not be liable for this illegal act.

Rights of the investigator

As an agent, the investigator also has a number of common law rights which may be enforced against the client:

*The right to remuneration*²¹: The investigator is entitled to be paid for any work carried out on behalf of the client in accordance with the terms of the contract between them.

*The right to indemnity and reimbursement*²²: The investigator may incur liabilities as a result of carrying out work for the client. If the investigator has incurred these liabilities while acting within his or her actual authority, he or she is entitled to be indemnified or reimbursed by the client. Where the liabilities have been incurred while acting within his or her apparent authority, the client must meet the cost of any liabilities to the third party, but will be entitled to claim reimbursement from the investigator.

*The right to a lien*²³: A lien is the right to hold the property of another as security for the performance of an obligation or the payment of a debt. If the client gives the investigator documents or other things in the course of the contract, the investigator is entitled to keep

²⁰ *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-Op Assurance Co of Australia Ltd* (1931) 46 CLR 41.

²¹ *Dolphin v Harrison, San Miguel Pty Ltd* (1911) 13 CLR 271.

²² *Hunt and Baird Industries (WA) Pty Ltd v Cartwright Taylor Engineering Pty Ltd* (1984) 2 SR (WA) 198.

²³ *Campbell v Smith* (1887) 13 VLR 439.

those documents or things until the client has paid the investigator for his or her work under the contract and reimbursed the investigator for any lawfully incurred expenses.

Law as between private investigator and the public

The conduct of private investigators is currently regulated by the common law (judge-made law) and by legislation (parliament-made law). Where there is a conflict between these two areas of law, the legislation prevails. However, where there is no legislation covering a particular type of conduct, the common law applies. Private investigators' conduct can be subject to criminal or civil sanctions. Criminal punishment may include fines and/or terms of imprisonment. Civil penalties are likely to be fines or orders to pay monetary damages to the person aggrieved by the private investigator's actions.

It is important to note at the outset that at common law a private investigator does not have any more power in carrying out his or her activities than an ordinary member of the public.²⁴ A provision reiterating this principle has been specifically included in the various jurisdictions' licensing legislation, sometimes with a penalty for acting in a way that implies that the investigator has greater powers.²⁵ This is particularly important given that possession of a licence may give the appearance of special authority.

Interfering with property

The common law reflects the saying that one's home is one's castle.²⁶ At common law neither a police officer nor a private citizen has the right to enter another person's property or conduct a search without express or implied consent.²⁷ Police officers do, however, have statutory authority to enter property in certain circumstances (such as the belief that a criminal offence is being committed). An entrant upon land for some lawful purpose (such as delivering a parcel addressed to an occupant) is assumed to have consent unless notified to the contrary by the occupier.²⁸ If an investigator enters a property where it is clear that there is no consent (for example, a "trespassers will be prosecuted" or "private property – do not enter" sign) or remains on the property after consent has been withdrawn (for example after being asked to leave), the investigator is a trespasser. If the investigator has entered the property by a misrepresentation, this will also negate any consent and constitute a trespass.

For example, a commercial agent may believe that a car ordered for repossession is locked in a person's home garage. Repeated attempts to contact the owner have failed. What can the commercial agent do? The agent is entitled to enter the person's property for a lawful purpose. It would be a lawful purpose to attempt to contact the owner of the property to enquire whether they have the car. The investigator could enter the property and go to the front door to see if the occupier was home. If the investigator happened to be able to see into the garage while doing this, that would not be a trespass. However, the investigator would not be entitled to enter the property for the purpose of trying to break into the garage to see if the car was there. If, after speaking to the occupier of the house, the investigator was asked to leave the property, he or she would have to do so immediately, without any detour past the garage window to see if the car was there.

The person upon whose property the trespass has been committed does not have to prove that they have suffered any particular damage as a result of the trespass, but in the absence of such damage, only nominal compensation will be awarded. However, if the investigator

²⁴ See also Canadian and American decisions to the same effect: *R. v. Anderson* (1960) 32 WWR 329, *R. v. Gibson* [1976] 6 WWR 484, *Schultz v. Frankfort Marine Accident and Plate Glass Insurance Company* (1913) 139 NW 386 (Wisc. Sup. Ct).

²⁵ See for example s. 50 *Auctioneers and Agents Act 1971* (Qld); s.7 *Commercial Agents and Private Inquiry Agents Act 1963* (NSW); s.41 *Commercial and Private Agents Licensing Act 1996* (NT), penalty \$500; s.15 *Commercial and Inquiry Agents Act 1974* (Tas), s.15 offence, penalty up to 20 p.u.; s.21 *Private Agents Act 1966* (Vic), penalty up to 20 p.u.

²⁶ *Semayne's Case* (1604) 77 ER 194.

²⁷ *Plenty v. Dillon and Ors* [1990] 98 ALR 353.

²⁸ *Robson v. Hallett* [1976] 2 QB 939.

has acted in a morally reprehensible way in committing the trespass, the court may order punitive or exemplary damages, which are intended to punish the wrongdoer, rather than compensate the plaintiff for any loss. "Morally reprehensible" conduct may include gaining entry to the property under some misrepresentation – for example, telling the occupier of the house they have won a free car safety check so that the investigator is given access to the garage. The laws of trespass will also give a person the right to bring a civil action against an investigator where the investigator has physically interfered with their land or other property. Physical interference would include placing a listening device in a person's home or taking photographs after forcing entry. One Australian case has also awarded damages for hurt feelings arising out of a trespass.²⁹ The plaintiff's brother had installed a microphone in her flat and listened to her conversations. The court accepted that the plaintiff suffered an affront and indignity as a result of the invasion of her privacy and ordered the defendant to pay punitive damages.

Private investigators will also be subject to the various criminal laws relating to break and enter and unlawful entry. For example, if the investigator has previously been asked to leave a person's property but later returns and enters the house (either through an open window or by forcing a locked door) the investigator will be guilty of a criminal offence, regardless of what they have been instructed to do by their client. Many jurisdictions also have specific legislation making it unlawful for a person to enter a dwelling house³⁰ without the consent of the lawful occupier or lawful excuse.³¹ The Queensland Act also makes it an offence to be found in a house or yard without lawful excuse.³² In Queensland, it is also an offence to enter with consent if the consent has been obtained by "force, threats or intimidation, deceit, fraudulent trick or device, or false and misleading representations as to the reason for entry".³³

Entry to a house or yard is not an offence if the entry is authorised, justified or excused by law, or is bona fide for the protection of a person or the property in question.³⁴ However, a private investigator does not normally fall within this exception simply by virtue of carrying out his or her normal duties. In *Poznanski v. Stosic*³⁵ a private investigator accused of entering a dwelling house defended himself on the basis that his status as an investigator searching for evidence gave him a lawful excuse. The South Australian Supreme Court rejected this defence and stated that:

*"...entries of that kind are liable to lead to breaches of the peace and I do not think that the courts should countenance them. Even a police officer in search of crime is not allowed to enter a private dwelling without the occupier's consent unless under a search warrant or under the provision of a statute giving him authority to do so".*³⁶

Entry for the purpose of repossession

Entering a property for the purpose of repossession may provide a lawful excuse, however the relevant statutes must be strictly complied with. Various statutes provide conditions on entry in certain circumstances, for example when repossessing leased residential premises (the reposessor must not enter leased residential premises unless the tenant abandons, or voluntarily gives up possession, or with an order from the court or Tribunal)³⁷ or repossessing

²⁹ *Greig v. Greig* [1966] VR 376.

³⁰ Non-residential properties are covered by the common law and criminal legislation.

³¹ See for example s.48A *Invasion of Privacy Act 1971* (Qld), s.52 *Auctioneers and Agents Act 1971* (Qld), s.27 *Private Agents Act 1966* (Vic)

³² The penalty for unlawful entry is 20 p.u. and/or imprisonment for one year.

³³ s.48A(1A) *Invasion of Privacy Act 1971* (Qld). The penalty for entry with false consent is 30 p.u. and/or 18 months imprisonment.

³⁴ s.48A(2) *Invasion of Privacy Act 1971* (Qld)

³⁵ [1953] SASR 132.

³⁶ *Ibid*, at 139-140.

³⁷ s.95 *Residential Tenancies Act 1995* – must not enter leased residential premises unless the tenant abandons, or voluntarily gives up possession, or with an order from the court or Tribunal. Penalty up to \$2000.

goods subject to a security interest (such as a mortgage or hire-purchase agreement).³⁸ Generally, the investigator or commercial agent must have a court order³⁹ or consent of the occupier before the investigator may enter residential premises⁴⁰ for the purpose of repossessing goods. Consent is generally only given if the request was made by the agent in writing in the required form or in person by calling at the premises between the hours of 8am and 8pm Monday to Saturday.⁴¹ Note that it is the consent of the occupier that is required, not the consent of the lessee of the goods. It is an offence to enter in breach of these provisions and there is a financial penalty of up to \$5,000. All of the above applies to private property. There is nothing to prevent an agent from seizing goods that are in a public place. It also seems that, as the goods being repossessed are legally the property of the credit provider, the agent can be expressly or impliedly authorised to treat the goods in any manner necessary to affect the repossession. This can include forcibly breaking into a car parked in a street or any other 'public' location.

If the agent is unable to gain access to the goods after following the prescribed procedures, the Court may grant an order directing the debtor to hand over the goods. An agent is not entitled to use force to gain entry to premises or to obtain possession of goods from a person. If an agent does so, he or she will be liable for penalties under the act, an order to pay damages in a civil action for trespass or assault, and possibly criminal prosecution for break and enter or assault. As a last resort the police may be able to attend and assist in order to avoid liability on the part of the agent.

Interfering with chattels

If an agent interferes with another person's chattels (personal property), for example by wrongly repossessing goods or by placing a monitoring device on a vehicle, they will be potentially liable under the common laws relating to trespass or torts to chattels. These causes of action generally provide for a remedy of damages to the person with lawful possession of the chattel. For example, an investigator who attaches a tracking device to a person's car would be liable in trespass for interference with that person's chattel. The person would be able to claim monetary compensation for that interference, even if there has been no physical damage to the car.

Various State laws provide conditions which must be met before leased goods can be repossessed. These conditions generally include a period of notice or a requirement for a court order allowing repossession.⁴² There are financial penalties for breach of the conditions. Some jurisdictions also require certain records to be kept in relation to repossessions.⁴³ Where a motor vehicle is being repossessed, many jurisdictions require that the nearest police station be notified of the repossession.⁴⁴

Most of the statutory requirements relating to repossession relate to formalities of notice and record keeping. There is no legislative guide to the manner in which the repossession must be carried out in practice. Generally speaking, the person carrying out the repossession may do whatever is necessary to gain possession of the goods, so long as he or she does not act in a way that gives rise to civil or criminal liability or breach of a legislative provision. For example, the person must not commit an assault, damage property or make any

³⁸ s.91 *Consumer Credit Code*.

³⁹ A court order can be obtained by application to the court by a credit provider under s.92 *Consumer Credit Code*.

⁴⁰ Entry to non-residential premises will be covered by the common law (discussed above).

⁴¹ s.24 *Consumer Credit Regulations 1995*.

⁴² See for example s.156 *Consumer Credit Code* (Qld), s.156 *Consumer Credit Code 1996* (WA).

⁴³ See for example s.8 *Commercial and Private Agents Licensing Regulations* (.....) ; s.30 *Commercial and Inquiry Agents Act 1974* (Tas); s.25 *Commercial and Private Agents Licensing Act 1996* (NT); s.53 *Private Agents Act 1966* (Vic).

⁴⁴ S.34 *Commercial and Inquiry Agents Act 1974* (Tas), s.22 *Security and Investigation Agents Act 1995* (SA), s.22 *Commercial Agents and Private Inquiry Agents Act 1963* (NSW); s.37 *Private Agents Act 1966* (Vic).

misrepresentation during the course of the repossession. Again, as a last resort, the police may be called to attend and assist.

Entry for the purpose of process service

Process servers (who personally deliver legal notices) have no greater right than any member of the public to enter private property, and the fact that they enter the property for the purpose of process service will not provide them with an excuse for unlawful entry. The prohibitions against harassment and misrepresentation will also apply to process servers, and they may be subject to disciplinary action if they act inappropriately.

Consider, for example, an investigator who wishes to personally serve a document on Mr X. Mr X's house is surrounded by high fences, and there is a security intercom on the gate. Each time the investigator presses the intercom, Mrs X answers and informs him that Mr X no longer lives there and that the investigator is not welcome on the property. The investigator suspects that she is lying. However, the investigator is not entitled to enter the property without her permission, nor is he able to enter the property by false representation (for example, by telling Mrs X that he is from Australia Post and has a parcel that needs to be signed for). There is no legal recourse in terms of obtaining a court order to allow entry and search for the purpose of locating a person.

Surveillance

The common laws of trespass give some protection to members of the public from surveillance of their activities while they are on private property. The laws of nuisance will also give a remedy if the investigator has been guilty of a "monstrous invasion of privacy"⁴⁵ by constant surveillance of a person's house. In other words, the surveillance must cause a substantial and unreasonable interference with the person's right to the use and enjoyment of land. Whether the interference is unreasonable and substantial is a question of fact to be determined in reference to all the circumstances of each particular case, including the nature of the location of the land, the character, duration and time of the interference and the effect of the interference. The standard is measured by reference to ordinary use by normal people.

The Canadian case of *Davis v. McArthur*⁴⁶ is a good example of a situation which might give rise to an action for trespass as a result of surveillance. This case was decided on the basis of invasion of privacy, which is not an action available in Australia. However, the general principles may be applied to support an action in trespass. In this case the investigator was acting for the wife. Surveillance of the husband was carried out over eight months, although it was said to be discreet and sporadic. The investigator conducted surveillance from the street and never entered private property. The husband suspected he was under surveillance, and his suspicions were confirmed when he discovered a tracking device attached to his car. The court found that knowing one was being watched was not sufficient for an invasion of privacy. However, any surveillance must be taken in context. Here an invasion of privacy was found because some other surveillance was being conducted of the husband at the same time by some other party. The court held that combined surveillance by different parties was an invasion of privacy. The investigator was ordered to pay compensation to the husband.

The common law of nuisance does not prevent a person overlooking another's land, home or activities⁴⁷, or taking photographs⁴⁸ unless those activities are substantial enough to constitute an unreasonable interference.⁴⁹ In *Bathurst City Council v. Saban* a council officer took photographs and video tape of the defendants' back yard without their consent. The photographs and tape were taken from a public street and from neighbouring properties with

⁴⁵ *Bernstein v Skyviews* [1977] 1 QB 479 at 489.

⁴⁶ [1971] 2 WWR 142

⁴⁷ *Victoria Park Racing and Recreation Grounds v. Taylor* (1937) 58 CLR 497.

⁴⁸ *Bathurst City Council v. Saban* (1985) 2 NSWLR 704.

⁴⁹ *Raciti v. Hughes* (1995) 7 BPR 14,837, SC(NSW) (deliberate snooping on neighbour and recording on video tape). Compare *Bathurst City Council v. Saban* (1985) 2 NSWLR 704; 55 LGRA 165 (no right to privacy from photography).

the consent of the owners of those properties. The court held that this was not a trespass. In contrast, in *Raciti v. Hughes* the plaintiffs' neighbour set up an elaborate system of floodlights and cameras so that when someone moved in the plaintiffs' back yard, a sensor was activated, the lights came on and the video cameras filmed what they were doing. The court held that bright lights can be a nuisance and a proper degree of inconvenience was established. The system was found to be more than merely photographing and filming a neighbouring property, it was "approaching the condition of watching and besetting". This was held to be an actionable nuisance.

It would appear then that an investigator is perfectly entitled to sit in a car outside a person's house and photograph the occupants coming and going. However, it may be that continuation of this, or more overt forms of surveillance, would be illegal. Certainly, it is likely that more elaborate systems of surveillance would be found to constitute unreasonable interference. It may also be an unreasonable interference if the investigator openly follows a person in such a manner that it was obvious to others that the person was under surveillance, and this carried on for a period of weeks.

Surveillance also gives rise to ethical issues and the possibility of misleading and deceptive conduct when investigators actively create a situation in which a plaintiff is likely to act in a particular way, as opposed to passive surveillance. Investigations of personal injury claimants are vulnerable to this type of behaviour. Assume that a claimant alleges that as a result of the injury he can no longer bend over and pick up heavy items. The defence solicitor believes that the claimant is not as seriously injured as he says. The private investigator places a large heavy item behind the claimant's car, and waits with a video camera to film the claimant if he attempts to move the item. This kind of "set-up" is not strictly illegal and there are no real sanctions against such conduct. Although, according to the laws of evidence⁵⁰, reliance on the video tape may be excluded (that is, the party seeking to use the video tape may be prohibited from relying upon it in court), the defence may use it to their advantage in other ways. There is also an ethical question about such behaviour. A 'just cause' element might legitimise a test, but the danger is that the subject may injure themselves or be inconvenienced. This is an area in which there seems to be a particular need for clear guidelines as to the appropriate conduct.

Some redress is available to aggrieved persons who have been surveilled or subject to simulation tests. If someone under surveillance wishes to bring an action against an investigator for nuisance, they do not have to prove that they have suffered any particular damage, but in the absence of such damage, only nominal compensation will be awarded. However, if the investigator has acted in a morally reprehensible way in conducting the surveillance, the court may order punitive or exemplary damages. A private investigator who employs someone to conduct surveillance on his or her behalf will be vicariously liable for any damages awarded to the plaintiff as a result of a nuisance created by that person in the course of carrying out their duties.⁵¹

Some activities associated with surveillance and investigative work are specifically regulated by legislation, such as the use of listening devices, privacy of mail and privacy of telecommunications.

Listening Devices

⁵⁰ S.138 *Evidence Act* 1995 (Cth) gives the court a discretion whether or not to accept illegally obtained evidence. The general rule is that it will be excluded unless the desirability of admitting it (having regard to such things as the type of action and how relevant the evidence is) outweighs the undesirability of admitting evidence that has been obtained illegally.

⁵¹ *City of Richmond v. Scantelbury* [1991] 2 VR 38 at 40; (1988) 68 LGRA 49; 6 BCL 286 per Kaye J; *White v. Jameson* (1874) LR 18 Eq 303.

All Australian Jurisdictions have legislation regulating the use of listening devices.⁵² The ACT definition of a listening device is generally representative of that used in the various Acts:

“any instrument, apparatus, equipment or device capable of being used to listen to or to record a conversation, but does not include a hearing aid”.

The legislation generally prohibits the use of listening devices to record private conversations and the communication or publication of a record of a private conversation obtained by the illegal use of a listening device. A representative definition of a “private conversation” is found in Section 3 of the *Listening Devices Act 1991* (Tas):

“any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only -

(a) by themselves; or

(b) by themselves and by some other person who has the consent, express or implied, of all those persons to do so”.

However each jurisdiction has conditions under which use, communication and publication is allowed. The legislation differs in each State in a number of important respects. For example, in Queensland, Western Australian and the Northern Territory an investigator can record a conversation to which he or she is a party without the knowledge or consent of the other parties. In the Australian Capital Territory an investigator can only record a conversation to which he or she is a party with the consent of the other parties to the conversation. In Tasmania, New South Wales, the Australian Capital Territory and South Australia an investigator (or any other person) can record a conversation to which he or she is not a party if it is reasonably necessary (for a variety of reasons, such as where there is an imminent threat of violence or a serious narcotics offence).

In some jurisdictions it is an offence simply to use a listening device, but in New South Wales, the Northern Territory and the Australian Capital Territory it is also an offence to “cause to be used” a listening device contrary to the Act. This would cover clients who instruct the investigator to use such a device. In those jurisdictions it is also an offence to possess or use a record of a private conversation (that is, something that contains the substance, meaning or purport of the conversation) obtained by the use of a listening device contrary to the Act. Accordingly, a client may be committing an offence under the act by possessing a letter written by the investigator which contains a summary of the contents of a cassette recorder using a prohibited listening device. In New South Wales and the Australian Capital Territory it is also an offence to possess a listening device, whether or not it is used in breach of the relevant Acts.

An exception to the general prohibition against publishing and communicating the contents of a private conversation exists in Queensland, New South Wales, Western Australia and the Australian Capital Territory. In these jurisdictions this is allowed “in the course of legal proceedings”. However the definition of legal proceedings differs in each State’s legislation. In some jurisdictions publication or communication is only allowed in legal proceedings which arise as a result of an alleged breach of the Act. That is, the contents of a private conversation in those jurisdictions could not be used in the course of litigation such as claims for compensation for personal injuries or fraud. The penalties for breaches of the various Acts include fines of about \$5000 to \$8000 (for individuals – there are higher penalties for corporations) and terms of imprisonment from 6 months to 5 years.

In New South Wales there is some additional scope for private investigators to use listening devices. All jurisdictions provide for warrants to be issued by a judge to authorise the use of listening devices. In most jurisdictions application can only be made by a member of the police force or other crime fighting body. However in New South Wales an application can be made by any person, provided that they comply with any conditions set by the judge (for example in relation to the particular times when the device may be used). Generally, the

⁵² *Listening Devices Act 1992* (ACT); *Listening Devices Act 1984* (NSW); *Listening Devices Act 1996* (NT); *Invasion of Privacy Act 1971* (Qld); *Listening Devices Act 1972* (SA); *Listening Devices Act 1991* (Tas); *Listening Devices Act 1969* (Vic); *Listening Devices Act 1978* (WA).

legislation requires the applicant to show reasonable grounds to support the need for the listening device (such as the belief that a serious offence has been or is likely to be committed). If the warrant is granted, there will be conditions attached in relation to the placement, timing and retrieval of the listening device.

It seems unlikely that a warrant will be granted to a private investigator unless they are involved in a criminal investigation with the support of the police or a recognised crime fighting authority. For example, assume that a police homicide squad is desperately searching for a serial murderer. They have numerous suspects in mind but have insufficient personnel to follow up all leads and conduct surveillance. The squad has some money which they would like to use to contract a firm of private investigators to plant listening devices in two premises and monitor the devices. In principle there seems to be no reason why the police could not obtain a warrant authorising the investigator to install and monitor the listening devices, provided they comply with the attached conditions.

Mail

There is no general law relating to the privacy of correspondence. However there is an equitable principle that the law will restrain the publication of confidential information “*improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged*”.⁵³ There is also legislation which makes it illegal to steal, tamper with or fraudulently obtain articles in the course of post. The *Crimes Act 1914* (Cth) provides penalties of up to 5 years imprisonment for offences such as stealing or obtaining articles in the course of post.⁵⁴

For example, an investigator may believe that a debtor is staying with her brother. He checks the brother’s letter box on a number of occasions, but does not find any mail addressed to the debtor. However, the investigator finds a letter addressed to the debtor’s brother from their mother. The investigator wishes to open the letter to see whether the mother is writing to the brother and the debtor, which may be evidence that the debtor is residing in the house. If the private investigator opened the letter, they would be committing an offence under the *Crimes Act*.

Telecommunications

Individuals and companies are protected from telephonic eavesdropping by the use of electronic and other phone tapping devices by legislation in all jurisdictions.⁵⁵ The *Telecommunications (Interception) Act 1979* (Cth) provides that it is illegal to intercept a telecommunication.⁵⁶ S.6 defines “interception” as “listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication”. It is also an offence to deal with (use or copy) information where it has been obtained by interception which is suspected to have been unlawful.⁵⁷ The criminal penalty for interception or dealing with information is imprisonment for up to 2 years.⁵⁸ There is also provision for an aggrieved person to claim damages in a civil court, including punitive damages.⁵⁹ It is also illegal to use or possess equipment for the purpose of intercepting a telecommunication in breach of the *Telecommunications (Interception) Act 1979* (Cth). The penalty is imprisonment for up to five years.⁶⁰ A private investigator is not, under any circumstances, able to intercept a telecommunication without a court-issued warrant

⁵³ *Commonwealth v. John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50.

⁵⁴ s.85K and s.85M.

⁵⁵ *Telecommunications (Interception) Act 1979* (Cth), *Listening Devices Act 1984* (NSW), *Invasion of Privacy Act 1971* (Qld), *Listening Devices Act 1972* (SA), *Listening Devices Act 1991* (Tas), *Listening Devices Act 1969* (Vic), *Listening Devices Act 1978* (WA).

⁵⁶ s.7 *Telecommunication (Interception) Act 1979* (Cth)

⁵⁷ s.71 *Telecommunication (Interception) Act 1979* (Cth)

⁵⁸ s.105 *Telecommunication (Interception) Act 1979* (Cth)

⁵⁹ s.107A *Telecommunication (Interception) Act 1979* (Cth)

⁶⁰ s.85ZK and s.85ZKB *Crimes Act 1914* (Cth).

The client may also be liable for breaches of this Act by the private investigator if the client "authorises, suffers or permits" another person to intercept a communication in breach of the Act.⁶¹ The client may also be found guilty of an indictable offence under s.86 *Crimes Act 1914* (Cth) for conspiring to commit an offence against a law of the Commonwealth. The penalty is imprisonment for three years. In Western Australia in 1991 a private investigator and his client were convicted of such offences in *R v. Smith*.⁶² The investigator installed an illegal interception device on one of the client's former employee's telephone service. They were found to have conspired to intercept a telecommunication contrary to the *Telecommunications Act 1979* (Cth). The investigator and his client were sentenced to two years imprisonment under s.86 of the *Crimes Act 1914* (Cth).

Harassment

Harassment is not consistently defined across the different jurisdictions, but generally incorporates acts causing embarrassment, ridicule or shame, such as acts indicating that surveillance is being carried out, unduly visiting or communicating with a person or making statements or enquiries with relation to a person's financial position.⁶³ For example, an investigator who telephones a person's employer, business associates and friends to enquire whether the person usually pays their debts is likely to be found guilty of harassment. This entails a question of degree, so that calling only one person may not be harassment, so long as the enquiries are made tactfully and in such a manner as not to embarrass the person about whom the enquiries are made.

The New South Wales Department of Consumer Affairs *Review of Private Investigation Industry* in 1993 found that harassment was one of the three main areas of complaint against private investigators.⁶⁴ However, most State legislation does not include any penalty for harassment, and simply provides that evidence of harassment by the investigator is a ground to be considered in applications for the granting or cancellation of a licence.⁶⁵ There is some scope for a private investigator to be found liable for stalking, however this generally requires that the private investigator has the "intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety".⁶⁶ This is unlikely to be able to be proved with respect to a private investigator's enquiries. The New South Wales legislation is the only one to specifically provide a penalty for harassment (up to \$1000 and/or six months' imprisonment).⁶⁷ The Victorian Law Reform Commission recommended in its *Report on Inquiry Agents, Guard Agents and Watchmen* in 1989 that the legislation for establishing the licensing system for inquiry agents should specifically prohibit harassment and provide a civil remedy with assessment of damages based on tortious principles.⁶⁸ This has not yet been done. The Commonwealth ALRC Report on Privacy in 1983 made similar recommendations, and included a draft *Privacy (Harassment) Ordinance* (ACT), which has also not been implemented.

⁶¹ s.7(1) *Telecommunications (Interception) Act 1979* (Cth).

⁶² (1991) 52 A Crim R 447 (CCA WA)

⁶³ s.4(8) *Commercial and Inquiry Agents Act 1974* (Tas); s.3 *Private Agents Act 1966* (Vic); s.39C *Commercial Agents and Private Inquiry Agents Act 1963* (NSW); s.3 *Commercial and Private Agents Licensing Act 1996* (NT). The *Security Providers Act 1993* (Qld) does not include a definition of "harassing tactics", which is the term used in the Act.

⁶⁴ "Review of Private Investigation Industry", New South Wales Department of Consumer Affairs, 1993.

⁶⁵ S.4(7) *Commercial Inquiry Agents Act 1974* (Tas); s.11(4)(a)(ii) *Security Providers Act 1993* (Qld); s.13 *Private Agents Act 1966* (Vic); s.11 and s.16 *Commercial and Private Agents Licensing Act 1996* (NT).

⁶⁶ For an example see S.21A *Crimes Act 1958* (Vic).

⁶⁷ S.39C *Commercial Agents and Private Inquiry Agents Act 1963* (NSW).

⁶⁸ "Report on Inquiry Agents, Guard Agents and Watchmen", Victorian Law Reform Commission, 1989.

Nervous Shock

An investigator may be liable in tort for the infliction of nervous shock if their activities are such that emotional distress is caused without lawful justification. In *Janvier v. Sweeney*,⁶⁹ for example, private investigators were found liable for causing a lady emotional distress by accusing her of a number of things that were untrue (including that she was under investigation for corresponding with a German spy) in order to obtain further information to assist their enquiries. It is also foreseeable that a person may suffer nervous shock as a result of excessive surveillance activities.⁷⁰

As an example, an investigator may want to find out whether a person has sufficient money or assets to pay a debt. The investigator goes to the person's house and, in order to gain access to their financial records, claims to be a police officer and asserts the person is under investigation for fraud. This is completely untrue. The investigator is likely to be found liable to pay the person compensation for the distress he causes the person as a result of making these false allegations (apart from the criminal offence of claiming to be a police officer).

Privacy and protection of reputation

A private investigator may be the subject of an action for defamation either as originator of a defamatory statement or as a person passing it on. The making of a defamatory statement can be express or by innuendo. The mere undertaking of an inquiry can raise imputations of wrongful conduct (for example, asking questions of a person's employer about that person's potentially criminal conduct). In the Canadian case of *I.C.B.C. v. Somosh*⁷¹ an investigator was hired to determine the defendants' income and assets to see if they could pay a claim. The investigator telephoned the male defendant's employer and asked questions relating to his employment, salary, character, morals, moods and drinking habits. This was found to be an invasion of privacy. It seems that in Australia, similar activities could found an action under the common law of defamation or the harassment provisions mentioned above.

For example, assume an investigator is employed by a parent who suspects that her daughter is taking drugs. The investigator telephones the daughter's employer, implies that the daughter is a regular drug user and asks whether the daughter has ever come to work under the influence of drugs. As a result of this telephone call the employer terminates the woman's employment, believing she is a drug-user. The daughter would be entitled to claim compensation from the investigator for defaming her to her employer. It may not make any difference whether the allegation is true or not.

Breach of confidence

Where a private investigator receives information in confidence, or knows that it was originally supplied in a situation of confidence, they are not permitted to pass the information on in the absence of just cause or excuse.⁷² A just cause or excuse may be that the disclosure of the information is necessary to ensure public safety (for example, when the investigator becomes aware that a particular model of swing set has an inherent defect that makes it dangerous to children). Whether or not passing on that information to the investigator's client is a sufficient cause or excuse will depend on the type of information and the source of the client's interest in the information.⁷³

For example: a private investigator has previously done work for X Insurance Company. She knows that the company will normally settle claims for less than \$2000 without requiring detailed proof of the loss, but this is a confidential policy. She is subsequently retained by a firm of solicitors who act for a client who is claiming \$1800 compensation from X Insurance

⁶⁹ [1919] 2 KB 316

⁷⁰ See for example *Davis v. McArthur*

⁷¹ (1983) 51 BCLR 344.

⁷² *Seager v. Copydex* [1967] 2 All ER 415.

⁷³ *Seager v. Copydex* [1967] 2 All ER 415.

Company. The investigator is asked to compile a detailed proof of the loss. The investigator would not be entitled to inform her client about the insurance company's policy.

Consumer Protection Issues

There are a number of areas in which the *Trade Practices Act 1974* (Cth) or the various State Fair Trading Acts may apply to activities conducted by a private investigator, whether or not the business is incorporated. These provisions generally prohibit unconscionable, misleading or deceptive conduct by the private investigator in the course of carrying on their business. The legislation provides clients with a number of remedies, most commonly the right to damages, if they suffer loss or damage as a result of such conduct by the investigator. There are also a number of statutory provisions prohibiting licensed agents from making misrepresentations in the course of carrying out their business.⁷⁴ The penalties include fines of up to \$10,000 and the Queensland legislation includes imprisonment for up to 6 months.

An example of unconscionable conduct might occur if a person under investigation believes, without any such representation by the investigator, that the investigator works for a market research firm. The person invites the investigator into her house and agrees to answer his questions on this basis. If the investigator, knowing that the person is under this misapprehension, takes advantage of this, he is acting unconscionably. An example of misleading and deceptive conduct might be when an investigator implies that he is employed by a market research company in order to gain access to the person's house and have them answer questions. An example of misrepresentation would be where an investigator specifically tells the person under investigation that he is employed by a market research company.

Access to information

Australia does not have a general statutory right to privacy contained in a document such as a Bill of Rights. There is an Australian Privacy Charter, but it is a voluntary code and has no penalty provisions.⁷⁵ At common law there is also no general right to privacy. However various parts of the common law in relation to confidentiality, property, search and seizure, liberty and security of person give certain privacy rights in specific contexts. There are also common law actions relating to the disclosure of information, such as defamation, the giving of negligent advice, the making of a negligent report, and inflicting nervous shock. These areas of the common law give aggrieved persons the right of commencing a civil action against someone who has interfered with their rights. Private investigators could be liable to pay damages and court costs if they are the subject of such an action.

Government held information

Commonwealth legislation protects personal information in the hands of Commonwealth agencies, credit providers and credit reporting agencies.⁷⁶ (Similar regulations can be found in the various states and the Northern Territory.⁷⁷ All States and Territories also have

⁷⁴ See for example, s.53 *Auctioneers and Agents Act 1971* (Qld), penalty of up to 40 p.u. or 6 months imprisonment; s.20 *Commercial Agents and Private Inquiry Agents Act 1963* (NSW), penalty up to 20 p.u.; s.17 and s.37 *Security and Investigation Agents Act 1995* (SA), penalty up to \$10000; s.17 *Commercial and Inquiry Agents Act 1974* (Tas), penalty up to 20 p.u.; s.28 *Private Agents Act 1966* (Vic), penalty up to 20 p.u.

⁷⁵ See discussion in T Dixon and G Greenleaf, "Private Parts" (1995) 2 *Privacy Law and Policy Reporter* 20.

⁷⁶ *Privacy Act 1988* (Cth). See also *Privacy Committee Act 1975* (NSW), *Data-Matching Program (Assistance and Tax) Act 1990* (Cth), *Crimes Act 1914* (Cth) Pt VIA, *National Health Act 1953* (Cth), s.135AA, AB, *Income Tax Assessment Act 1936* (Cth) Pt VA, *Taxation Administration Act 1953* (Cth), *Freedom of Information Act 1982* (Cth), *Archives Act 1983* (Cth), *Australian Security Intelligence Organisation Act 1979* (Cth) s.93A.

⁷⁷ For example, *Privacy Committee Act 1975* (NSW).

Freedom of Information legislation which regulates access to personal affairs or information.⁷⁸⁾

Commonwealth agencies must comply with the Information Privacy Principles⁷⁹ which are based on the OECD guidelines.⁸⁰ The Information Privacy Principles contain guidelines in relation to:

- The manner and purpose of collection of personal information;
- Things that the collector must inform the individual to whom the collected information relates;
- The storage and security of personal information;
- Gaining access to personal information stored by a record-keeper;
- The accuracy and alteration of records containing personal information;
- Limits on use and disclosure of personal information.

Commonwealth agencies are only allowed to use information gathered for specific purposes, and are generally unable to release this information to members of the public. This would normally prohibit the release of information to private investigators.

The legislation also provides for the appointment of a Privacy Commissioner who has power to enforce the legislation against anyone, not necessarily a Commonwealth agency. This means that a private investigator who receives information from a Commonwealth agency in breach of the statute may be directed by the Commissioner to destroy or hand over the information, or to pay compensation or costs. However, a determination by the Commissioner is not binding unless action is taken in the Federal Court to enforce it. Determinations are also subject to review by the Administrative Appeals Tribunal.

Some of the specific offences are:

- Access to computer data⁸¹ ;
- Corrupting or bribing a Commonwealth officer to provide data⁸²;
- Obtaining information by false pretences⁸³

Note that a client who requests an investigator to access such data in breach of the *Crimes Act 1914* (Cth) is liable for the same penalties (if he or she aids, abets, counsels or procures) or 12 months imprisonment (if he or she incites the investigator to commit the offence). For example, a client asks the investigator to go to a government office, pretend to be the client's husband and ask for copies of some documents relating to her husband. She gives the investigator copies of accounts with the husband's name on them to use as proof of identity. The investigator does this and gets copies of the documents. Both the client and the investigator have committed an offence under the *Crimes Act* and are liable for a penalty of up to 12 months imprisonment.

Information In the Private Sector

The *Privacy Amendment (Private Sector) Bill 2000* was introduced into the House of Representatives in April. It include provisions similar to those regulating the privacy of information held by government organisations. The Bill includes the National Principles for the Fair Handling of Personal Information which were developed by the Privacy Commissioner after consultation with business and consumer groups. They are similar to the Information Privacy Principles but tailored towards the activities of private businesses and individuals. The Bill sets out detailed guidelines in relation to the manner of collection, storage

⁷⁸ *Freedom of Information Act 1989* (ACT), *Freedom of Information Act 1989* (NSW), *Freedom of Information Act 1992* (Qld), *Freedom of Information Act 1991* (SA), *Freedom of Information Act 1991* (Tas), *Freedom of Information Act 1982* (Vic), *Freedom of Information Act 1992* (WA), *Freedom of Information Act 1982* (Cth).

⁷⁹ s. 14 *Privacy Act 1988* (Cth)

⁸⁰ *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

⁸¹ s.76B *Crimes Act 1914* (Cth)

⁸² s.73 *Crimes Act 1914* (Cth)

⁸³ s.18T *Privacy Act 1988* (Cth), s.10 *Invasion of Privacy Act 1971* (Qld).

and use of personal information. When the Bill is passed, private investigators will have to be careful to conduct their inquiries in a manner consistent with the guidelines.

In the period 1998-1999 the Commonwealth Privacy Hotline received a large number of complaints relating to the activities of private investigators which were outside the jurisdiction of the Privacy Commissioner because they related to private sector bodies. These calls included 205 about surveillance, 392 about telecommunications and 134 about debt collectors.⁸⁴ The *Privacy Amendment (Private Sector) Bill 2000* expands the jurisdiction of the Privacy Commissioner to cover privacy complaints relating to private sector bodies. Aggrieved persons will be able to bring a complaint before the Privacy Commissioner, whose determinations may be enforced by the Federal Court.

Specific rules

Process service

The manner in which process service must be undertaken is set out in the various rules of court. Generally personal service is required, however the means taken to effect service must be lawful. For example, a process server can not unlawfully enter a person's property in order to effect service, nor can they effect service by misrepresentation. Accordingly, process serving can be a very difficult thing to do. The document must be presented to the person on public property, or on private property if the occupier has consented to the private investigator's entry. In circumstances where a person cannot be personally served, either because of avoidance tactics or simply because they cannot be located, the courts can order a form of substituted service.⁸⁵

Debt collecting

In all of the States and the Northern Territory there is legislation regulating the conduct of debt collectors.⁸⁶ Under this legislation, debt collection agents are subject to the provisions prohibiting harassment and misrepresentation and may also be subject to disciplinary proceedings if they behave inappropriately. The New South Wales Privacy Committee has also issued guidelines for debt collectors.⁸⁷ There is also some protection found in the *Trade Practices Act 1974* (Cth) and the various Fair Trading Acts. These provisions generally prohibit the use of "physical force or undue harassment or coercion" in connection with:

- (a) the sale or grant of an interest in land or payment for that interest⁸⁸;
- (b) the supply of goods and services or payment for that supply⁸⁹.

⁸⁴ Privacy Commissioner, *Eleventh Annual Report on the Operation of the Privacy Act for the period 1 July 1998 – 30 June 1999*, Human Rights and Equal Opportunity Commission 1999.

⁸⁵ That is, an alternative method of attempting to notify the person of the document rather than personally handing it to the person. For example, an advertisement in a newspaper.

⁸⁶ *Debt Collectors Licensing Act 1964* (WA), *Auctioneers and Agents Act 1971* (Qld), *Commercial and Private Agents Licensing Act 1979* (NT), *Commercial Agents and Private Inquiry Agents Act 1963* (NSW), *Commercial and Private Agents Act 1972* (SA), *Commercial and Inquiry Agents Act 1974* (Tas), *Private Agents Act 1966* (Vic).

⁸⁷ N.S.W. Privacy Committee, Information Bulletin No.3, *Guidelines for the Use of Debt Collection Letters Referring to People's Credit Ratings* (1976), Paper No.49A, *Guidelines for Debt Collection* (1979).

⁸⁸ *Trade Practices Act 1974* (Cth), s 53A(2); *Fair Trading Act 1992* (ACT), s 15(2); *Fair Trading Act 1987* (NSW), s 45(2); *Consumer Affairs and Fair Trading Act 1990* (NT), s 45(2); *Fair Trading Act 1987* (SA), s 59(2); *Fair Trading Act 1990* (Tas), s 17(2); *Fair Trading Act 1985* (Vic), s 13(2); *Fair Trading Act 1987* (WA), s 12(2)(d). There is no equivalent provision in the *Fair Trading Act 1989* (Qld). 'Interest' is widely defined in the *Trade Practices Act 1974* (Cth), s 53A(3).

⁸⁹ *Trade Practices Act 1974* (Cth), s 60; *Fair Trading Act 1992* (ACT), s 26; *Fair Trading Act 1987* (NSW), s 55; *Consumer Affairs and Fair Trading Act 1990* (NT), s 55; *Fair Trading Act 1989* (Qld), s 50; *Fair Trading Act 1987* (SA), s 69; *Fair Trading Act 1990* (Tas), s 26; *Fair Trading Act 1985* (Vic), s 22; *Fair Trading Act 1987* (WA), s 23. 'Consumer' is defined in the

Contravention of these provisions is a criminal offence with fines of up to \$40,000 for individuals and \$200,000 for corporations. There are also civil sanctions such as injunctions, damages or enforceable undertakings. These can be imposed as a result of action by the aggrieved person or the ACCC itself. These sanctions are enforced in the same way as civil judgments. S.60 of the *Trade Practices Act 1974* (Cth) has not been tested in court, so there is no judicial pronouncement on what kind of conduct will contravene the section. However, the ACCC has published a guideline for debt collection activities.⁹⁰ The guidelines do not have any legal effect and simply provide direction as to the appropriate conduct. According to the ACCC guidelines, some of the things an investigator is required to do are:

- communicate with the debtor at reasonable hours;
- ensure that communications with or visits to the debtor's workplace are handled discretely and with care;
- not make an unreasonable number of unsolicited communications with the debtor;
- not use inappropriate language, violence or physical force.

It is important to note that the force, harassment or coercion does not have to be directed at the consumer personally. For example, an investigator is employed to recover a debt from Mrs D. He contacts Mrs D's husband and informs him that if his wife does not pay her debt within two weeks, he "wouldn't like to be in her shoes". This would amount to undue harassment or coercion, even though it is not directed to Mrs D herself.

Licensing

All States and Territories in Australia have licensing requirements for private investigators and associated occupations (such as commercial agents, process servers and security officers). These schemes are "designed essentially to protect the public from unscrupulous agents"⁹¹ In the last fifteen years there has been a trend to tougher licensing through criminal history checks and compulsory training. This is an area where there is a growing body of research and a number of surveys have shown that licensing is strongly supported by security industry members in Australia.⁹² There are a number of grounds on which someone may object to a licence being granted, including lack of good character, age, bankruptcy, previous use of harassing tactics, prior contravention of the legislation, previous convictions, incapacity and unfitness for duties. Generally speaking, an applicant with a criminal record or who has shown a lack of respect for the law is unlikely to be seen as a fit and proper person. An applicant who has a history of poor work practices, such as the use of harassing tactics, or who does not seem likely to be a competent inquiry agent may have their application rejected. Licences can be suspended or cancelled on similar grounds. In most jurisdictions it is an offence to carry on business as an agent without a licence, to improperly obtain a licence, to use a licence to exceed authorised powers, to lend, sell or dispose of a licence, or to delegate work to an unlicensed person. Penalties range from \$200 to \$20,000 with terms of imprisonment from 3 to 6 months.

Despite these relatively strong measures designed to protect consumers, significant problems remain with the licensing systems. Requirements are not uniform across the different jurisdictions, so that different criteria obtain in different jurisdictions in terms of disqualifying offences, training periods, liability insurance, and the use of codes of conduct. Training remains a major area of concern. Some jurisdictions do not set minimum training periods and,

Trade Practices Act 1974 (Cth), s 4B. There is no 'consumer' limitation under the *Trade Practices Act 1974* (Cth), s 53A(2).

⁹⁰ The guideline can be downloaded for free at <http://www.accc.gov.au/consumer/sec60.html>

⁹¹ *Hoban v. Davey* [1972] NSWLR 59, 65 (Sugerman P); *Glynn v. Denman and Monk* [1978] VR 349, 356-7 (Harris J).

⁹² Prenzler, T and Hayes, H, "An Evaluation of the Queensland Security Providers Act: Implications for National Regulation of the Protective Security Industry". (1999) 32 *Australian and New Zealand Journal of Criminology* 79; Prenzler, T, "Security Managers' Perceptions of Industry Regulation: An Australian Study" (1995) 6 *Security Journal* 227; Younger Report, para 451f; Turner, "Fair Dealing with Consumers in South Australia" (1976) 2 *Legal Services Bulletin* 38 at 42.

for those that do, the average is one week of instruction.⁹³ It is difficult to see how the complex legal principles analysed in this paper could be communicated in one week, alongside other elements of a curriculum. Additionally, very few jurisdictions require any kind of training-based certificate for private investigators and associated agents to hold a licence.⁹⁴

Discussion

The above analysis indicates that there is a continuing process of review and adjustment of the law as it pertains to the activities of private investigators and associated private agents. One of the most recent positive examples of this development is the proposed extension of the jurisdiction of the Commonwealth Privacy Commissioner to private sector bodies. However, this process is fragmented with little in the way of a national approach to the issue. All the same, the law as it stands as present could be said to provide a fairly reasonable balance of the legitimate interests of private investigators, their clients and the public – with a few exceptions. The general laws relating to contracts between private investigators and their clients seem particularly well developed to protect either party from dishonesty or unfairness – subject to the usual constraints regarding knowledge and access to legal assistance. More specific legislation that relates to private investigators – in such areas as privacy, surveillance and harassment – also appears on the whole to be ‘reasonable’ within the terms of a liberal democratic society based on a regulated capitalistic economy. Private investigators are available for citizens to pursue ‘private justice’ in circumstances where the state cannot provide a service or where the client desires a more private service. In many cases this involves a commercial interest, such as locating debtors, recovering property or checking on the authenticity of compensation claims. It can also serve more personal interests, such as locating missing persons or checking the behaviour of partners. These interests may arguably be justifiably pursued and contracted to private agents if the agents conduct themselves in accordance with the law. However, some questions might remain about the adequacy of the law in terms of what private agents are entitled to do. There are also some remaining issues about the adequacy of mechanisms designed to ensure compliance with the law.

In terms of the question of the balance of interests, one possible argument is that at present the law is weighted unfairly in favour of people avoiding legitimate legal process. This applies primarily to the recovery of property and the location of debtors or people facing civil suit. The Australian Institute of Private Detectives has recently developed a draft Bill designed, amongst other things, to allow licensed private investigators to access government databases to find people’s locations and other information relevant to legal proceedings.⁹⁵ The Bill also would allow investigators to apply for search warrants in the company of a solicitor and a police officer. The draft makes an ambit claim for fairly open access and it is unlikely that any government will take it up the Bill in its present form. Nonetheless, the proposal is not without merit and might be considered feasible with more consultation and enhanced controls. For example, applications for access to data might need to be approved by an authority on a case-by-case basis. An additional argument in favour of reform in this area is that prohibition creates an illicit market which can lead to widespread corruption, as revealed by the New South Wales ICAC investigation. There also appears to be a case for closer consideration of the powers of repossessioners and process servers in recovering goods or delivering legal notices in cases of extreme avoidance by the subjects of these processes. Overall, this perspective is consistent with the view, discussed in the background section of this paper, that enhanced accountability of private security providers might justify equipping them with some police powers.⁹⁶

⁹³ Prenzler, T and Sarre, R, “A Survey of Security Legislation and Regulatory Strategies in Australia” (1999) 11 *Security Journal* 7.

⁹⁴ New South Wales, South Australia (loss adjusters and credit providers), Western Australia (security officers and crowd controllers) and Queensland (commercial agents).

⁹⁵ *Private Investigators Bill 1999: A Draft Bill Setting Out the Regulatory Requirements for the Private Investigation Profession in New South Wales*. Sydney: Australian Institute of Private Detectives Limited.

⁹⁶ B Swanton, “Police and Private Security: Possible Directions” (1993) 42 *Trends and Issues in Criminal Justice* 1-8.

There appears to be a consensus amongst security industry stakeholders, policy makers and academics that the more restrictive licensing systems introduced in the last fifteen years have improved the competency and conduct of security providers, including private investigators. Nonetheless, there is room for improvement. A uniform national scheme would also be more appropriate to facilitate the inter-state activities of inquiry agents and provide more comprehensive protection for clients and the public.⁹⁷ For example, harassment is an area that requires more consistent application. A major area that requires attention is that of training. The fact that the activities of private investigators puts them at risk of contravening a wide range of laws means that the State has a duty to ensure that licence holders are properly informed of their powers and limitations. At present it would seem most jurisdictions do not have adequate compulsory training curricula for this purpose. There is also a commendable trend in regulation, albeit slow and fragmented, towards adopting codes of conduct to provide clearer guidance to private investigators about what is expected in the ethically complex circumstances in which they operate.⁹⁸ Codes can become an important part of training curricula and assessment. A code can also be enforced by licensing tribunals in response to complaints or other sources of intelligence about misconduct. Tribunals would require an investigative arm. Decisions about violations of the code would need to be made on a civil standard of proof with options for licence suspension, revocation or fines, and for referral to mediation. This approach would go some way to bridging the gap between “the law in the books and the law in practice”.

⁹⁷ Prenzler, T and Sarre, R, “Regulating Private Security in Australia” (1998) 98 *Trends and Issues in Crime and Criminal Justice* 1.

⁹⁸ Prenzler, T and Sarre, R, “A Survey of Security Legislation and Regulatory Strategies in Australia” (1999) 11 *Security Journal* 7.