

ANZSOG Case Program

Not in my backyard: drones, privacy and regulatory gaps.

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One evening in April 2017, Darwin resident Karli Hyatt had an unsettling encounter: 'I was just finished at the gym' she recalled, 'and I'd come home and decided to go for a bit of a swim between 7.30 and 8.00[pm]. It's 28 degrees at that time of night up here and still quite humid...so instead of going into the house and putting [a] bikini on I just grabbed a towel, stripped off and jumped in.'¹ But Hyatt wasn't alone.

'As I was swimming I could hear this strange noise,' she said, 'and when I looked up I noticed a drone with the green and red flashing lights. It came over into my backyard and then just hovered above the pool, for about 30 to 60 seconds.' On seeing the dark circular object, she was initially in shock, '...it just probably even took me a second to register that whoever was navigating it must have been looking at me in the pool,' Hyatt said, '[The drone] was just very centre, just hovering right there...It was a really bewildering experience. I just stayed in the deep end and looked at it and sort of covered myself up a little bit, and then eventually it just buzzed away.'²

Recounting her story to the ABC Law Report's Damien Carrick, Hyatt felt that her privacy had been invaded and was concerned about where any images or footage could have ended up. She had no idea where the drone had come from or who might have been operating it.

The drone invasion

Initially developed for the military, drones³ are increasingly being used for civilian purposes. They have a very wide range of private and public applications, including law enforcement, science and agriculture. In recent years, plummeting prices along with expanding capabilities have made drones immensely popular with recreational users as well as businesses. Readily available in Australia from department stores, toy shops, electronics retailers and online vendors, drones can be purchased for

This case was written by Marinella Padula for Associate Professor Michael Di Francesco, Australia New Zealand School of Government. It has been prepared from published materials as a basis for class discussion rather than to illustrate either effective or ineffective handling of a managerial situation.

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¹ Adapted from <http://www.abc.net.au/radionational/programs/lawreport/regulating-eyes-in-the-sky/8466636>

² Ibid.

³ Often referred to as remotely piloted aircraft (RPAs) or unmanned aerial vehicles (UAVs).

less than \$50. For a few hundred or thousand more, consumers can access off-the-shelf models that can travel for kilometres and carry sophisticated camera equipment able to live-stream high quality video (*Exhibit A*). Micro drones weigh less than 100gms while large commercial drones might exceed more than 150kgs. Most, though not all drones, have GPS navigation systems and some can fly completely autonomously – a feature of great interest to companies such as Amazon and Australia Post who want RPA technology to reduce delivery times and costs.

By early 2017, there were an estimated 50,000 recreational drone users in Australia, along with almost 4000 registered commercial operators.⁴ Those numbers are expected to grow exponentially over the next decade as the many benefits of RPAs are realised and more applications developed. However, as their popularity take off, potential (and actual) negative consequences also lurk on the horizon. Terrorism and drug smuggling are just a couple of the threats occupying legislators. Another issue, as Hyatt discovered, is privacy. But after consulting the internet she was left unsure about where she should turn for help and what, if anything, could be done.

Northern Territory Police

The Northern Territory, like all Australian jurisdictions, has laws prohibiting stalking and harassment. However, as Brendan Gogarty, senior lecturer in law at the University of Tasmania, pointed out, prosecutors generally must prove a ‘pattern of behaviour’. In Hyatt’s case, Gogarty noted, NT authorities would need to demonstrate that she was deliberately observed ‘on at least two separate occasions’ with the ‘intention of causing harm’ to her or causing her to ‘fear harm’.⁵ Criminal trespass laws are also unlikely to apply in most cases.

There is more scope under the Surveillance Devices Act 2007 (NT) which regulates the use of optical, surveillance, listening and tracking devices. The Act includes devices such as mobile phones and drones, and states: ‘It is an offence for a person, knowing that they do not have the express or implied consent of each party to a private activity, to install, use or maintain an optical surveillance device to monitor, record visually or observe a private activity to which the person is not a party’.⁶ It is also illegal to communicate or publish material obtained from unauthorised use of an optical surveillance device. Penalties for either offence include fines and up to 2 years imprisonment. (Exceptions are made for emergencies and for law enforcement officials carrying out their duties.) However, surveillance laws are not consistent across the states and territories. In Victoria, for example, drones may film activity occurring outside a property (without audio). By contrast in New South Wales, fixed surveillance devices cannot be installed without permission but there is no explicit mention of mobile equipment. Meanwhile, surveillance legislation in Queensland, the ACT and Tasmania is limited to audio surveillance devices.⁷

Although Northern Territory surveillance laws are amongst the most comprehensive in the country, Police have no straightforward way of identifying suspects, especially in the absence of physical evidence. Even when police have leads to follow, they still have to establish who was operating the drone at the time of the offence and for what purpose. Meanwhile, people trying to defend their personal airspace by damaging or confiscating RPAs flying overhead could find themselves subject to prosecution.⁸ Another difficulty is that police services across Australia are already struggling with an explosion in cyber and tech-enabled crimes in the context of limited resources and insufficient expertise.

⁴ Registered users weren’t necessarily active <http://www.abc.net.au/news/2017-02-10/how-drone-laws-apply-to-a-new-breed-of-high-flyers/8258908>

⁵ <http://www.abc.net.au/news/2017-04-26/peeping-drones-backyard-skinny-dippers-and-the-law/8472446>

⁶ <http://www.smartsafe.org.au/legal-guides/legal-guide-surveillance-legislation-northern-territory#three>

⁷ <http://www.abc.net.au/radionational/programs/lawreport/regulating-eyes-in-the-sky/8466636#transcript>

⁸ <http://www.abc.net.au/radionational/programs/lawreport/regulating-eyes-in-the-sky/8466636#transcript>

City of Darwin

Darwin Council alerts residents to Civil Aviation Safety Authority (CASA) rules governing drone and model aircraft use in Australia, which also apply to the Darwin local government area. 'If you have a complaint surrounding the use of drones in your area or on Council Land, you can report it to CASA,' advises the Council website.⁹

Civil Aviation Safety Authority

The Civil Aviation Safety Authority (CASA) is the federal agency responsible for maintaining and promoting the safety of civil air operations in Australia. This encompasses private and commercial passenger aircraft, light sport aircraft (such as gliders and balloons) and unmanned aircraft like drones. People using drones for commercial purposes are required to register themselves and their organisation (if applicable) with CASA. In September 2016, CASA relaxed its requirements for commercial operators using sub-2kg drones, meaning that they no longer required a Remote Pilot Licence (RePL) or RPA Operator's Certificate (ReOC). These certifications ensure operators have sufficient knowledge and training to control larger RPAs (2kgs+) and permit them to fly with fewer restrictions. Recreational and commercial small drone pilots, meanwhile, must abide by CASA's standard safety regulations which include:

- Maintaining constant visual contact with their RPA;
- Flying at least 30m above people;
- Flying under 120m in controlled airspace; and
- Avoiding populous areas.

There are no restrictions on who can purchase and/or operate a drone for recreational purposes, nor any registration requirements (provided it weighs less than 25kg). Retailers are encouraged to supply customers with a CASA brochure outlining operator obligations but are not compelled to do so (*Exhibit B*). CASA has also produced an app to inform operators where they can and can't fly. In 2014, CASA made approximately 100 safety notifications to recreational drone users and in 2015 issued 15 infringement notices for illegal recreational use. (Fines can reach up to \$9000 per offence.¹⁰) Said CASA spokesperson Peter Gibson: 'If you believe that the drone operator is breaching any of the safety rules, then yes, absolutely, that's reported to us, and we can investigate and, if appropriate, issue an infringement notice. So yes, we certainly can act if there has been a breach of our rules, and naturally if we can prove that breach'.¹¹ Though Gibson conceded that in most cases it would be difficult to identify an offender. CASA does advise operators to respect personal privacy and comply with relevant state surveillance laws. 'RPAs can have real privacy impacts,' its website notes, 'However, CASA's role is restricted to aviation safety - privacy is not in its remit.'¹² It suggests that citizens with privacy concerns contact the Office of the Australian Information Commissioner.

Office of the Australian Information Commissioner

Unfortunately for people in Karli Hyatt's situation, the Office of the Australian Information Commissioner (OAIC) also has little help to offer. Says the website: 'The OAIC investigates privacy complaints from individuals about Australian and Norfolk Island government agencies, and private sector organisations covered by the Privacy Act [1988]. The Privacy Act does not cover state and territory government agencies, however the OAIC does investigate complaints about ACT public sector agencies covered by the Information Privacy Act 2014 (ACT)'.¹³ OAIC matters tend to be related to data collection. Investigations of private companies and not-for-profit entities are generally limited

⁹ <https://www.darwin.nt.gov.au/council/about-council/laws-and-by-laws/flying-drones-on-council-land>

¹⁰ <http://www.abc.net.au/news/2017-02-10/how-drone-laws-apply-to-a-new-breed-of-high-flyers/8258908>

¹¹ <http://www.abc.net.au/radionational/programs/lawreport/regulating-eyes-in-the-sky/8466636#transcript>

¹² <https://www.casa.gov.au/aircraft/standard-page/reporting-unsafe-operation-drones-and-remotely-piloted-aircraft>

¹³ <https://www.oaic.gov.au/individuals/what-can-i-complain-about>

to organisations with an annual turnover more than \$3 million. Breaches occurring more than 12 months ago are typically not pursued. Complainants are also required to contact the offending organisation to attempt to resolve the matter prior to lodging a complaint. People concerned by the surveillance activities of private individuals and others exempt from the Privacy Act are advised to check state laws and/or approach their local community justice or neighbourhood mediation centre for help – if they cannot resolve the matter with the other party first.

Civil courts

With no tort of privacy in Australia, victims of RPA misuse are unlikely to find redress through litigation. Laws relating to nuisance and trespass, for example, might be applicable in some situations but as Special Counsel Matthew Craven of Corrs Chambers Westgarth told Choice magazine in early 2017: 'I am not aware of any case in Australia where a private individual has successfully taken action against a drone pilot for breaching their privacy, whether under the Privacy Act or under any other law'.¹⁴ Speaking to the Law Report, Queensland University of Technology law professor Des Butler commented: 'Quite frankly our privacy laws in Australia are a bit of a mess when it comes to someone who's had their privacy invaded, trying to take legal action...Our common laws are wholly deficient in providing any sort of meaningful remedy to someone in that kind of position, very different from overseas. We're the only major common-law country in fact [that] doesn't have laws to protect personal privacy'.¹⁵ Historically, the courts had been reluctant to make rulings that might 'set a precedent by which neighbours could sue one another for simply peering over a fence'.¹⁶ Judges had tended to reason that people concerned about being observed in their properties should simply build a taller fence.¹⁷

However, even with privacy laws in place, the high costs of mounting cases would be prohibitive for most plaintiffs (assuming that they can identify the offender). Meanwhile, compelling websites to remove unlawfully obtained footage could well require separate actions (in other countries). Legal judgements also frequently take months/years to obtain and enforcing orders can be challenging.

Up in the air

'I don't think that we should be prohibiting drones at all,' Gogarty explained to the Law Report, 'but we do need to have a mature conversation about what's acceptable and what's not, and actually have really working remedies for the public, people like Karli who feel like their privacy has been invaded, to actually stop this activity.' Defining privacy and setting appropriate boundaries is difficult, subjective and heavily dependent on context but often includes notions of the 'right to be left alone', especially in personal domestic spaces.¹⁸ Just the prospect of being watched can have the same impact as being watched, which frequently leads people to modify their behaviour. Particularly when we can't be sure exactly who might be looking. In 2012 Gogarty wrote: '...there is at least some evidence to suggest the panopticon effect operates to deter people from engaging in behaviour that might result in sanction. As major or minor as that impact might be, it is an impact all the same; an impact which will mean that we cannot ever describe our speech or association as completely free. The question is just how much of an impact we are willing to accept, and, once the boundary line is drawn, how we will limit further incursions and encroachment'.¹⁹

In 2014, the Australian Senate released its *Eyes in the sky* report which described the nation's rather frayed 'patchwork' of privacy laws that hadn't kept pace with technological developments. It recommended updating and harmonising Australia's privacy laws, with a focus on 'protecting against

¹⁴ <https://www.choice.com.au/electronics-and-technology/gadgets/tech-gadgets/articles/drones-and-privacy-rights#new-rules>

¹⁵ <http://www.abc.net.au/radionational/programs/lawreport/regulating-eyes-in-the-sky/8466636#transcript>

¹⁶ <https://www.lifehacker.com.au/2016/10/australias-new-drone-rules-explained/>

¹⁷ Ibid.

¹⁸ <http://www.austlii.edu.au/au/journals/JLLawInfoSci/2012/11.html#fnB74>

¹⁹ Ibid.

intrusions on a person's seclusion or private affairs'.²⁰ This included creating a tort of privacy, to reflect the new and multiplying ways privacy could be breached. Yet as Gogarty pointed out:

...the common law, particularly tort law, is remedial, not prospective; operating ex-post-facto to sanction past behaviour. It is not particularly adapted to limiting or controlling future behaviour in the absence of ascertainable or substantive proof of harm. Given that surveillance may occur without the knowledge of those watched, and in such situations, no person can claim to be more harmed than any other member of the community, such law is a poor mechanism to balance the competing social interests of privacy and security.²¹

Professor Butler also noted that, '...part of the problem with any sort of breach of privacy is that a person who then seeks to get some sort of reparation for breach of privacy in fact breaches their own privacy again. So, people may be reluctant to complain simply because it reignites the whole deal'.²² The Government had thus far failed to take up the report's recommendation to extend privacy coverage, though there was another Senate inquiry into RPA's underway and due to report in late 2017. Meanwhile, opponents of increased drone regulation argued that CCTV and satellite surveillance was already widespread with relatively little pushback.²³ Moreover, people's expectations of privacy had shifted. More and more individuals were willingly divulging personal information on social media platforms which sold the data to third parties. Facebook founder Mark Zuckerberg famously declared that privacy was no longer a 'social norm' though his assertion has been hotly contested.²⁴

In the meantime, tech experts and commentators such as Gogarty were looking at other means to thwart airborne voyeurs. Compulsory mobile-style SIM cards were one suggestion but one that also raised its own set of issues. The USA had instituted a registration system for all drones above .55 pounds but gave private pilots no specific guidance on privacy matters. Enlisting the assistance of drone manufacturers was another option and though companies such as DJI equipped its devices with software to help drone pilots avoid restricted areas, a company spokesperson indicated that the company was not interested in policing drone pilots: 'That's not our job any more than a car manufacturer is responsible for making sure people adhere to the speed limit,' he said.²⁵

²⁰<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2Fbed82620-8cfd-437d-9bee-be372890896e%22>

²¹ <http://www.austlii.edu.au/au/journals/JILawInfoSci/2012/11.html>

²²<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2Fbed82620-8cfd-437d-9bee-be372890896e%22>

²³ <http://www.abc.net.au/news/2017-04-26/peeping-drones-backyard-skinny-dippers-and-the-law/8472446>

²⁴ <https://www.theguardian.com/technology/2010/jan/11/facebook-privacy>

²⁵ <https://www.theatlantic.com/technology/archive/2017/03/drones-invisible-fence-president/518361/>

Exhibit A: Electronic store screenshot

JB HI-FI Search products

Gift Cards Stores My Account 1

Computers & Tablets TV & Home Entertainment Gaming Movies & TV Shows Music Cameras Phones iPods, Docks & Fitness Headphones & DJ Musical Instruments GPS & Car Audio Whitegoods & Appliances

Home > Cameras > DJI Mavic Pro 4K Drone

dji
DJI Mavic Pro 4K Drone
Model: 3388138 SKU: 320989

GPS

- 4K Ultra HD Video & 12MP Camera with Gimbal-Stabilization
- Up to 27 Minutes Flight Time
- OcuSync transmission offers up to 5km of transmission range

★★★★★ 5.0 | (2)

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Australian Government
Civil Aviation Safety Authority



**FLYING YOUR
DRONE FOR FUN?**

KNOW THE RULES—FLY SAFE

Congratulations on your purchase
We hope you have fun flying! But before you take off, there are a few things you need to remember for everyone's safety.

RPAS
REMOVEDLY PILOTED AIRCRAFT SYSTEMS

IMPORTANT SAFETY INFORMATION

You must only fly during the day and keep your RPA **within visual line-of-sight**.

This means being able to see the aircraft with your own eyes (rather than through first-person-view [FPV]) at all times.



If you are in controlled airspace, which covers most Australian cities, you must **not fly higher than 120 metres**.

You must keep your RPA at least **30 metres** away from other people.



You must **not fly over populous areas** where—if your drone was to fail—it could hit someone. This could include beaches, parks, or sport ovals where there is a game in progress.

You should **not fly within 5.5km** of an airfield



It is **illegal to fly for money or economic reward** unless you have an RPA operators certificate, or you are flying an excluded RPA in the sub-2kg or private landholder category.



Remember, you must not **operate your RPA in a way that creates a hazard** to another aircraft, person or property.

Respect personal privacy
Don't record or photograph people without their consent—this may breach state laws.



FURTHER INFORMATION

If you have any questions about flying your RPA recreationally, or have other RPA operational enquiries, please contact CASA's RPAS Office at rpas@casa.gov.au

casa.gov.au/rpa

Source: <https://www.casa.gov.au/files/rpabrochurerecreationaldl150dpi.pdf>