**7 The Right to be Forgotten**

**A. What is ‘The Right to be Forgotten’?**

The right to be forgotten (also known as the ‘right to erasure’) grants individuals the ability, in certain circumstances, to have their personal and private information removed from the internet, where it no longer serves a significant public interest. Exercising the right to be forgotten removes the subject information from search engine results. Although it’s not completely ‘deleted’, it significantly reduces the visibility and accessibility of the information. There have been recent calls for Australia to introduce a ‘right to be forgotten’.

**B. The Right to be Forgotten in Europe**

In the 2014 case of *Google Spain SL v Agencia Española de Protección de Datos* (**Google Spain**), the right to be forgotten was formally recognised as a fundamental right for Europeans.

Mr Mario Costeja Gonzalez filed a complaint against Google Spain and the Spanish Data Protection Agency, because searching his name on Google revealed a link to a 1998 newspaper article, which described information about his personal debts. Gonzalez argued that the information was irrelevant and infringed on his personal privacy. In its decision, the European Court of Justice ruled in Gonzalez’s favour. The court stated that individuals had the right to request the removal of links to personal information when the information was ‘inadequate, irrelevant, no longer relevant, or excessive’. This gave rise to the right to be forgotten (also known as the right to erasure) for Europeans, which prior to the decision, was far more theoretical and lacked legal definition. The General Data Protection Regulation (**GDPR**) now outlines the right to erasure under Article 17.

**C. Australia and the Right to be Forgotten**

The case of Google Spain and the enaction of the GDPR indicates that privacy protection for individuals with unequal bargaining power against large corporations, is a significant policy concern in the European Union. Whilst many of these privacy issues are similarly addressed by Australian policymakers and courts, Australians do not have the right to be forgotten.

Instead, Australians rely on protection from the Australian Privacy Principles (**APPs**) under the *Privacy Act 1988* (Cth) and traditional remedies, such as the tort of defamation. Although APP 11 and 13 require the destruction, de-identification or correction of information, Australia does not come close to providing adequate protection for citizens in comparison to the GDPR. Currently, there is minimal legislative guidance as to how and what steps should be taken by entities to remove personal information. On the other hand, whilst the tort of defamation may help remove slanderous content, it cannot address privacy concerns regarding harmful, yet true, public information. Defamation is also limited by practical issues, for example, the difficulty of enforcing a judgment when the online content is posted by an unknown or foreign individual. This has drawn sharp criticism from Australians seeking stronger safeguards regarding the handling of their personal information.

**Australian Common Law**

In the South Australian case of *Duffy v Google Inc*, whilst not directly referring to the right to be forgotten, the Supreme Court held that because Google Inc had published the personal data of Dr Duffy, they were responsible for its removal. It still remains to be seen whether higher courts in Australia adopt this position in similar cases.

**Legislative Reform**

In 2019, the Attorney-General released its report on the *Privacy Act 1988* (Cth) and proposed the adoption of a right to be forgotten into Federal legislation. In 2023, the Australian Government released its response to the Attorney-General’s Privacy Act Review Report. The Government’s response concluded that it was necessary to overhaul Australia’s privacy laws, with the ultimate goal to ensure that the Privacy Act remained fit for purpose in the ever-changing digital age. Within the response, the Government announced a number of proposed updates and agreed in-principle at proposal 18.3 that Australians required the individual right to request an entity to delete (or de-identify) personal information, with the exception of purposes required for law enforcement and national security:

*Proposal 18.3*

Introduce a right to erasure with the following features:

1. An individual may seek to exercise the right to erasure for any of their personal information.
2. An APP entity who has collected the information from a third party or disclosed the information to a third party must inform the individual about the third party and notify the third party of the erasure request unless it is impossible or involves disproportionate effort. In addition to the general exceptions, certain limited information should be quarantined rather than erased on request, to ensure that the information remains available for the purposes of law enforcement.

In September 2024, the first tranche of the Government’s proposed Privacy Act reforms were announced. However, proposal 18.3 was not amongst the selected reforms put forward in the Privacy and Other Legislation Amendment Bill 2024. There remains no right to be forgotten in Australia.