AN AUSTRALIAN PERSPECTIVE ON PRIVACY LAW DEVELOPMENTS

ADDRESS BY THE HONOURABLE JUSTICE RUTH McCOLL AO

COURT OF APPEAL

SUPREME COURT OF NEW SOUTH WALES

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Introduction

1 "Big Bang" or cautious groping? These are both descriptions which have been applied to the development of a common law of privacy. Does either apply to the common law of Australian law?

2 "Big Bang" is the description two Australian academics have given to the approach taken in the United States to the development of a new tort of invasion of privacy.[2] I am sure I need not tell this audience that many trace the relatively rapid development of the American law of privacy to the seminal essay by Samuel Warren and Louis Brandeis, "The Right to Privacy", in which the learned authors denounced the press as "overstepping in every direction the obvious bounds of propriety and of decency" particularly in its penchant for purveying "idle gossip" and asserted that then existing law recognised a principle which could be invoked to protect the privacy of an individual, the individual's "right to be let alone".[3]

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1 I acknowledge the invaluable assistance of my legal researcher, Alice Lam, in the preparation of this paper.

2 Greg Taylor and David Wright, "Australian Broadcasting Corporation v Lenah Game Meats: Privacy, Injunctions and Possums: An Analysis of The High Court's Decision", [2002] 26 *Melbourne University Law Review* 707 (at 710).

3 Warren and Brandeis, "The Right to Privacy" (1890) 4 *Harvard Law Review* 193 (at 195, 196, 205 – 206). Judge Cooley coined the expression, the "right to be let alone" in his work on *Torts* (2nd ed., at 29). The Warren and Brandeis essay is said to have been prompted by press intrusions upon Warren's family life: Amy Gajda, "What if Samuel D.

3 "Cautious groping" can be traced to the work of Professor John G Fleming, for many decades the leading writer on Australian tort law. He wrote in 1998 that "[v]iolation of privacy has not so far, at least under that name, received explicit recognition as a tort by British courts", although he acknowledged that there were " 'strong' judicial statements in New Zealand recognising one aspect of the tort, publicity of private facts". He attributed this lack of explicit recognition, in part, to the fact that "the courts were content to grope forward cautiously along the groove of established legal concepts, like nuisance and libel, rather than make a bold commitment to an entirely new head of liability".[4]

4 In the decade or so since Professor Fleming wrote these words, we have witnessed more "cautious groping" both in Australian and English courts in the area of privacy. That "groping" has not produced an independent cause of action of invasion of privacy, but, at least in the United Kingdom, has led to the recognition of the availability of an action for breach of confidence as capable of being used to protect privacy.[5]

5 However, it would be inaccurate to describe Australian law on privacy as either "cautiously groping", let alone "fast developing". And the concept of a "big bang" in that regard is simply out of this world!

Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to The Right to Privacy" (2008) *Michigan State Law Review* 35, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026680. The influence of the essay on American privacy jurisprudence was recognised by Lord Hoffmann (with whom Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Hutton and Lord Scott of Foscote agreed) in *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 (at [15] – [16]).

[4] Professor John G Fleming, *The Law of Torts*, 9th ed (1998) LBC Information Services (at 664 – 665).

[5] See *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 (at [43] - [44]) per Lord Hoffmann; Lord Nicholls of Birkenhead (at [14]) described the extended action for breach of confidence arising irrespective of a pre-existing relationship, as a tort of "misuse of private information", a description which does not appear to have been endorsed by any of the other Law Lords; cf Baroness Hale (at [132]).

6 Like the United Kingdom, Australia has not developed an "over-arching, all-embracing cause of action for invasion of privacy",[6] nor any express cause of action that might be said to find reflection in one of the four categories identified by in Prosser's classic statement in his article on "Privacy", published in 1960.[7] Those categories are:

> "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
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> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

These categories have been accepted by the United States Supreme Court [*Time Inc v Hill* [1967] USSC 11; 385 US 374 (at 383) (1967); *Cox Broadcasting Corporation v Cohn* [1975] USSC 44; 420 US 469 (at 488) (1975)] and in the *Restatement of the Law Second, Torts* [Section 652A]."[8]

7 By the time *Campbell v MGN Ltd* was decided, Lord Nicholls of Birkenhead described "protection of various aspects of privacy [as] a fast developing area of the law, here and in some other common law jurisdictions".[9] In contrast, Australia's steps towards recognition, even of the extended concept of breach of confidence accepted in the United Kingdom as protecting "privacy" rights, have, at best, been faltering.

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6 *Campbell* (at [11]) per Lord Nicholls of Birkenhead referring to *Wainwright*.

7 William L Prosser, "Privacy" (1960) 48 *California Law Review* 383 (at 389).

8 *Australian Broadcasting Corporation v Lenah Game* Meats [2001] HCA 63; (2001) 208 CLR 199 ("*Lenah*") (at [323]) per Callinan J.

9 *Campbell* (at [11]).

Outline

8 This paper gives an Australian perspective on the law of privacy. It addresses three aspects of the topic:

(a) The current state of Australian law, as exemplified in the only two High Court cases on the subject: *Victoria Park Racing and Recreation Ground Co Limited v Taylor* [1937] HCA 45; (1937) 58 CLR 479 and *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63; (2001) 208 CLR 199;

(b) Expanding the territorial reach of the topic to Australasia, and thus to include New Zealand, the current state of New Zealand law as developed in *Hosking v Runting* [2005] 1 NZLR 1;

(c) The future of privacy law in Australia.

The current state of Australian law

9 The only two cases decided by the High Court of Australia which have considered a "right of privacy" expressly were decided 64 years apart. Both were brought by corporations, a fact which, at least in the later of the two cases, *Lenah*, was held by three of the seven judges to disqualify the plaintiff from the benefit of any such right were it to be held to exist. In both cases the "real" interest the plaintiff sought to protect was its commercial interest in selling its "product". This was not a promising start for the consideration of an independent tort of invasion of privacy.

Victoria Park Racing and Recreation Ground Co Limited v Taylor

10 In *Victoria Park Racing and Recreation Ground Co Limited v Taylor*, the defendants, without the plaintiff's permission, broadcast radio reports of races taking place on the plaintiff's racecourse. It obtained the reports

from an observer who was stationed on a high platform erected on adjoining land by the defendants, who viewed the action in the racecourse and communicated the outcome of the races to the radio station.

11 As a result of the broadcasts, attendances at the plaintiff's racecourse decreased, with consequent loss to the plaintiff. The plaintiff claimed, against the broadcasting company, the observer, and the owner of the adjoining land, an injunction to restrain such broadcasting as amounting to a nuisance, an unnatural use of such adjoining land and an interference with the plaintiff's proprietary right in the spectacle conducted on his land. The issue the case posed was, "[h]ow far can one person restrain another from invading the privacy of land which he occupies, when such invasion does not involve actual entry on the land?"[10] The claim under the head of nuisance was based, in part, on an argument that the law recognised a right of privacy that the defendant had infringed.

12 The High Court (Latham CJ, Dixon and McTiernan JJ; Rich and Evatt JJ dissenting) held that the defendants had not infringed any legal right of the plaintiff. Latham CJ observed (at 496), in what has been described as ''unnecessarily categorical dicta'',[11] in dealing with this submission, (footnotes omitted):

> "However desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists. The contention is answered, in my opinion, by the case of *Chandler v. Thompson*: see also *Turner v. Spooner*, at p. 803: 'With regard to the question of privacy, no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard, but neither this court nor a court of law will interfere on the mere ground of invasion of privacy; and a party has a right even to open a new windows, although he is thereby enabled to overlook his neighbour's

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10 *Victoria Park Racing and Recreation Ground Co Ltd v Taylor* (at 500) per Rich J.

11 Fleming, *op cit*, (at 667).

> premises, and so interfering, perhaps, with his comfort'; see also *Tapling v. Jones*"

13 Dixon J (at 510) was also of the view that "the right to exclude the defendants from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law [and was] not an interest falling within any category which [was] protected at law or in equity."

14 McTiernan J wrote in like terms, observing (at 524):

> "To allege simply that the defendants broadcast a description of a spectacle undertaken by the plaintiff on land in the sole possession of the plaintiff and that the plaintiff thereby lost profits which it would otherwise have made from the undertaking and that the value of the land was diminished, does not state a cause of action in tort. There is no averment of a wrongful act any more than if the plaintiff were to allege that the defendants saw the spectacle and described it to a gathering of bystanders. It is essential to an action on the case in the nature of nuisance to prove that the acts complained of infringe a legal right of the plaintiff."

15 Rich J (in dissent) was of the view (at 501 - 502) that a man has no absolute right "within the ambit of his own land" to act as he pleases, that his right is qualified and such of his acts as invaded his neighbour's property were lawful only in so far as they were reasonable having regard to his own circumstances and those of his neighbour. He held (at 504) that in the absence of any authority to the contrary there was "a limit to this right of overlooking and that the limit must be found in an attempt to reconcile the right of free prospect from one piece of land with the right of profitable enjoyment of another" and (at 505) this fell "within the settled principles upon which the action for nuisance depends". In a prescient statement, his Honour opined (at 505) that:

> "… [T]he prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognize that protection against the complete exposure of the doings of the individual may be a right

> indispensable to the enjoyment of life. For these reasons I am of opinion that the plaintiff's grievance, although of an unprecedented character, falls within the settled principles upon which the action for nuisance depends."

16 While Evatt J (who also dissented) acknowledged (at 517) that the law of England did not recognise any general right of privacy, in his view it was "not merely an interference with privacy which [was] relied upon" and, further, "it [was] not the law that every interference with privacy must be lawful". He proposed (at 521) the following principle to recognise the plaintiff's rights:

> "(a) Although there is no general right of privacy recognized by the common law, neither is there an absolute and unrestricted right to spy on or to overlook the property of another person. (b) A person who creates or uses devices for the purpose of enabling the public generally to overlook or spy upon the premises of another person will generally become liable to an action of nuisance, providing appreciable damage, discomfort or annoyance is caused. (c) As in all cases of private nuisance, all the surrounding circumstances will require examination. (d) The fact that in such cases the defendant's conduct is openly pursued, or that his motive is merely that of profit making, or that he makes no direct for the privilege of overlooking or spying will provide no answer to an action."

which he thought was in accordance with the principles of the common law of England.

17 *Victoria Park* appears to have had the effect of stifling further consideration of a tort of invasion of privacy in Australia, at least until the decision in *Lenah*. Two reports of the Australian Law Reform Commission (the "ALRC")[12], written when Justice Michael Kirby was its chairman, accepted that such a tort could not be developed at common law while *Victoria Park*

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12 See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979), (at 112-116 [215]-[222]); Australian Law Reform Commission, *Privacy*, Report No 22 (1983), vol 2, (at 21 [1076]): *Lenah* (at [186]) per Kirby J, footnote 362.

stood and recommended legislative action instead.[13] Although Kirby J acknowledged in *Lenah* (at [187]) that "it may be that more was read into the decision in *Victoria Park* than the actual holding required", he said it was "because of the general understanding of what the decision stood for (encouraged by the wide language in which Latham CJ, at least, expressed his opinion) …[that] legislatures … and law reform bodies … ha[d], for more than fifty years, proceeded on the footing that no enforceable general right to privacy existed [in Australia]."

18 Although in 1982 in *Church of Scientology v Woodward* [1982] HCA 78; (1982) 154 CLR 25 (at 68), Murphy J identified ''unjustified invasion of privacy'' as one of the ''developing torts'', in *Australian Consolidated Press Ltd v Ettingshausen* (unreported, Court of Appeal (NSW), 13 October 1993, at 15), Justice Michael Kirby, then President of the NSW Court of Appeal, observed that:

> ''The result of legislative inaction is that no tort of privacy invasion exists. Thus, whilst the value of privacy protection may generally inform common law developments, it would not be proper to award Mr Ettingshausen compensation for the invasion of his privacy, as such.''[14]

19 In 2003, after the decision in *Lenah*, Kirby J, by then a member of the High Court of Australia, commented that "the general development of civil remedies for privacy invasion which, in Australia, was largely stillborn after a possibly erroneous misreading of the decision of the High Court in *Victoria Park*".[15]

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13 See *Lenah* (at [186]) per Kirby J. The ALRC proposed that specific legislation should be enacted which defined the values to be protected, the circumstances of the protection and the defences that would be applicable

14 *Lenah* (at [106]) per Gummow and Hayne JJ.

15 Michael Kirby "25 Years of Evolving Information Privacy Law: Where Have We Come From and Where are We Going?" (2003) 105 *FOI Review* 34.

Australian Broadcasting Corporation v Lenah Game Meats

20 The next consideration of the issue by the High Court was in *ABC v Lenah Game Meats*.

21 Lenah had a licence to take and hold brush tail possums from the Tasmanian Department of Parks, Wildlife and Heritage and had all approvals and licences necessary to carry on the business of killing, processing and exporting possums.[16]

22 Lenah asserted that on an unknown date prior to March 1998 persons unknown to it, and without its consent, broke and entered its premises, installed up to three video cameras with audio recording facilities, and filmed through those video cameras and recorded in audible form aspects of its brush tail possum processing operations, in particular the stunning and killing of possums; that persons unknown to it entered the premises without its consent and retrieved the video and audio tapes; and that, on a date prior to 16 March 1999, Animal Liberation Ltd (“Animal Liberation”) gave to the ABC a video tape with sound of approximately 10 minutes duration which depicted the image and sound of the stunning and killing of possums and which had been filmed in the circumstances Lenah alleged. Lenah pleaded that it was the intention of the ABC to incorporate excerpts of this video in a nationally televised programme known as the "7.30 Report". It was not alleged that the ABC was implicated in or privy to the trespasses upon the premises. Nor did Lenah pleaded that the ABC was a party to a combination to commit an unlawful act with the intention of harming Lenah's economic interests, or to perform an act, not itself unlawful, with the predominant object of harming Lenah. Thus the tort of conspiracy was not relevant.[17]

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16 *Lenah* (at [76]).

17 See *Lenah*, per Gummow and Hayne JJ (at [67] - [68]).

23 Lenah commenced proceedings against the ABC and Animal Liberation. On 29 March 1999, the day on which the action was commenced, Lenah sought urgent interlocutory injunctive relief against the ABC and Animal Liberation. There was no appearance for Animal Liberation and Evans J ordered that until further order Animal Liberation be restrained from distributing, publishing or copying the video. There was no appeal by Animal Liberation against that order and it remains in force, as far as I understand, to this day.

24 In addition to interlocutory injunctive relief, Lenah sought in the statement of claim mandatory injunctions obliging Animal Liberation and the ABC to deliver up to it all copies of the video or excerpts from it in their possession, custody or power. Lenah also sought damages.[18]

25 It appears to have been common ground that the ABC received the film probably knowing it was made clandestinely, or, if not at the time of receipt, by the time of the interlocutory application: Gleeson CJ (at [1]).

26 Underwood J heard the application for an interlocutory injunction against the ABC. His Honour held, inter alia, that there was no serious question to be tried which would warrant the grant of interlocutory injunctive relief. Lenah succeeded on an appeal from Underwood J's decision by majority[19] (Wright and Evans JJ, Slicer J dissenting). The Full Court of the Supreme Court of Tasmania granted an injunction restraining the ABC, until further order, from, in substance, publishing the video.

27 In the Full Court, Lenah conceded that it had no maintainable action for defamation nor did it make a claim for breach of confidence (because it conceded that information about the nature of the possum processing was not confidential, and was not imparted in confidence), nor did it rely upon a

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18 *Lenah*, per Gummow and Hayne JJ (at [68]).

19 *Lenah Game Meats Pty Ltd v Australian Broadcasting Commission* [1999] TASSC 114; (1999) 9 Tas R 355.

tort of privacy.[20] However it argued it was entitled to the relief sought either because:

a The way the trespassers obtained the information (illegally, surreptitiously and tortiously) exposed the ABC to restraint in the use of the film; it contended that all information obtained as the result of trespass ought to be treated in the same way as confidential information: Gleeson CJ (at [30]), or

b Because, as it sought to argue for the first time in the proceedings, for the ABC to engage in the activity enjoined by the order would constitute an actionable invasion of its right to ‘‘privacy’’ (Gummow and Hayne JJ at [83]); that such an action was available to be relied upon by corporations as well as individuals; and that “this is the missing cause of action for which everyone in the case has so far been searching”: Gleeson CJ (at [38]).[21]

28 The ABC resisted Lenah’s claim on the basis that the case was not the appropriate occasion to consider whether the common law of Australia recognised an action to protect privacy. It advanced two reasons. First, that ‘‘privacy’’ is not a ‘‘right’’ enjoyed by corporations. Secondly, it submitted that any formulation of a principle whereby injunctive relief could be obtained in the circumstances must give effect to the constitutional protection of the freedom to disseminate information respecting government and political matters which was identified in *Lange v*

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20 See *Lenah*, per Gummow and Hayne (at [65], [71], [73], [74]).

21 A similarly bold approach appears to have been taken by counsel for the Wainwrights, albeit that the invitation that the House of Lords should declare “that there is (and in theory always has been) a tort of invasion of privacy under which the searches of the Wainwrights were actionable” was advanced on the basis that, if accepted, it would enable the United Kingdom to conform to its international obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, even though at that time the *Human Rights Act* 1998 (UK) which gave effect to the Convention was not in force: see *Wainwright* (at [11], [14]) per Lord Hoffmann. The invitation was rejected: *ibid*, (at [35]).

Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520.[22]

29 It was "not suggested that the operations that were filmed were secret, or that requirements of confidentiality were imposed upon people who might see the operations". As Gleeson CJ observed (at [25], [35]):

> "The abattoir is, no doubt, regularly visited by inspectors, and seen by other visitors who come to the premises for business or private reasons. The fact that the operations are required to be, and are, licensed by a public authority, suggests that information about the nature of those operations is not confidential. There is no evidence that, at least before the events giving rise to this case, any special precautions were taken by the respondent to avoid its operations being seen by people outside its organisation. But, like many other lawful animal slaughtering activities, the respondent's activities, if displayed to the public, would cause distress to some viewers. It is claimed that loss of business would result. That claim is not inherently improbable. *A film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion.* In the present state of the evidence, the case has been argued on the basis, and all four judges in the Supreme Court have accepted, that the respondent will suffer some financial harm if the film is broadcast.
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> [35] … The activities filmed were carried out on private property. They were not shown, or alleged, to be private in any other sense." (emphasis added)

30 *Lenah* was really a case about the circumstances in which equity will grant an interlocutory injunction, namely whether before such relief could be granted, it is necessary to identify the legal or equitable rights which are to be determined at the trial and in respect of which final relief is sought (which need not be injunctive in nature). The High Court was divided on that point. Gleeson CJ, Gaudron, Gummow and Hayne JJ held that it was necessary to identify such a cause of action. Kirby J held it was not, while Callinan J held (at [297]) that equity should regard the relationship created

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[22] *Lenah*, (at [84]) per Gummow and Hayne JJ.

by the ABC's possession of a tangible item of property obtained in violation of Lenah's right of possession, and the exploitation of which would be to its detriment, and to the financial advantage of the appellant, as "a relationship of a fiduciary kind and of confidence", which was sufficient to support an underlying remedy sufficient to support an interlocutory injunction.

31 Because Gleeson CJ in his judgment, and Gummow and Hayne JJ in their joint judgment (with which Gaudron J agreed), held it was necessary to identify a cause of action to found a right to an interlocutory injunction, their judgments closely addressed the question whether Lenah should have the benefit of the privacy cause of action for which it contended. Despite his conclusion as to Lenah's right to interlocutory relief resting on "a relationship of a fiduciary kind and of confidence", Callinan J also expressed strong views on the privacy topic. Only Kirby J, some might say uncharacteristically, refrained from doing so.

32 Unlike the majority view in *Victoria Park*, none of the judgments in *Lenah* shut the door to the development of the common law in a manner which might reflect underlying principles of privacy. Indeed it is fair to say that they left that door at least ajar. However their Honours did not, with the exception of Callinan J, embrace the development of a tort of privacy *per se*. Rather they contemplated that if the law were to develop in that direction, it might do so by the development of existing principles.

33 Gleeson CJ appears to have been of the view (at [38]) that the course Lenah invited the Court to take represented a departure from *Victoria Park*. However his Honour undertook an examination of the question whether the common law should develop a tort of privacy, even though he was also of the view that the information Lenah sought to protect, the process by which possums were slaughtered, was not private: (at [25]).

34 His Honour accepted, (at [39]), "[t]he law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy" and that:

> "If the activities filmed were private, then the law of breach of confidence is adequate to cover the case. I would regard images and sounds of private activities, recorded by the methods employed in the present case, as confidential. There would be an obligation of confidence upon the persons who obtained them, and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained."

35 Gleeson CJ was concerned, however, (at [41]) that:

> "… the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends. Another reason is the tension that exists between interests in privacy and interests in free speech."

36 Gummow and Hayne JJ were also concerned about the difficulty of giving concrete expression to the concept of privacy *per se.* In their view, (at [116]) "the necessarily tentative consideration of the topic [of privacy] in *Victoria Park* assume[d] rather than explain[ed] what 'privacy' comprehends and what would amount to a tortious invasion of it." This confirmed what in their view, were the recognised "difficulties in obtaining in this field something approaching definition rather than abstracted generalisation".[23]

37 However Gleeson CJ (at [34] - [35]), and Callinan J (albeit in dissent) (at [306]) appeared to accept that:

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[23] One author has stated, "[l]awyers, judges, philosophers, and scholars have attempted to define the scope and meaning of privacy, and it would be unfair to suggest that they have failed. It would be kinder to say that they have all produced different answers": Robert Gellman, "Does Privacy Law Work?" in Philip Agre and Marc Rotenberg (eds), *Technology and Privacy: The New Landscape* (1997) MIT Press 193, 193, cited in "An exploration of the conceptual basis of privacy and the implications for the future of Australian privacy law", David Lindsay (2005) 29 *Melbourne University Law Review* 131 (at footnote 14).

> "…[E]quity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. And the principle of good faith upon which equity acts to protect information imparted in confidence may also be invoked to 'restrain the publication of confidential information improperly or surreptitiously obtained'. The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information."

This extension of the notion of breach of confidence is, of course, what has substantially influenced the development of relief for privacy infringements in the United Kingdom.

38 In Gleeson CJ's view (at [41]), the categories developed in the United States for the purpose of giving greater specificity to the kinds of interest protected by a ''right to privacy'' illustrated the problem of declaring a new tort of privacy. His Honour observed that:

> "The first of those categories, which includes intrusion upon private affairs or concerns, *requires that the intrusion be highly offensive to a reasonable person*. Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people." (emphasis added)

[The last sentence was cited by Hoffmann in his dissenting judgment in *Campbell* (at [73]) as illustrating why Ms Campbell should accept that she may be photographed by other people without her consent.]

39 In a typically pithy and astute observation, Gleeson CJ said:

> "[42] There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the

> activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private." (emphasis added)

40 While rejecting the invitation to recognise a tort of invasion of privacy, Gleeson CJ concluded (at [55]) that he regarded:

> "…the law of breach of confidence as providing a remedy, in a case such as the present, *if the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential.* But, if that condition is not fulfilled, then the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it. The consequences of such a proposition are too large." (emphasis added)

41 Gummow and Hayne JJ (at [79]) characterised the interests Lenah sought to protect as the goodwill of its business against the damage it apprehended was a likely consequence of publicity respecting its methods of slaughtering possums whose meat it processes and sells. Although they did not expressly say so, it appears implicit in this statement that they did not regard those methods as constituting "private" information. They perceived (at [79]) the fact that Lenah's sensitivity was "that of the pocket book", as providing an important point of distinction from "the situation where an individual is subjected to unwanted intrusion into his or her personal life and seeks to protect seclusion from surveillance and to prevent the communication or publication of the fruits of such surveillance."

42 Gummow and Hayne JJ substantially disposed of Lenah's claim to invoke a tort of privacy on the basis that, even if such a tort should be recognised, it would not avail a corporation. As a corporation, an "artificial legal person", it "lack[ed] the sensibilities, offence and injury which provide a staple value for any developing law of privacy." They concluded (at [130]) that the common law in Australia of corporate privacy should not depart from the course which had been worked out over a century in the United States denying privacy remedies to corporations and (at [131]) that the court should not, develop "a generalised tort of privacy protecting the commercial interests of a corporation".

43 However Gummow and Hayne JJ's reasons give some encouragement to the proposition that Australian law might yet develop a "privacy remedy". Thus they rejected (at [107]) the premise that *Victoria Park* stood in the path of the development of an "an enforceable right to privacy". While they noted (at [108]) that "Latham CJ [had] rejected the proposition that under the head of nuisance the law recognised a right of privacy", they held that that case did "not stand for any proposition respecting the existence or otherwise of a tort identified as unjustified invasion of privacy".[24]

44 They accepted (at [108]) Professor Morison's characterisation of *Victoria Park* as turning not on "a racecourse proprietor … seeking privacy for [its] race meetings as such, [but] … seeking a protection which would enable [it] to sell the rights to a particular kind of publicity" and, too, Professor Morison's view that:

> "The independent questions of the rights of a plaintiff who is genuinely seeking seclusion from surveillance and communication of what surveillance reveals, it may be argued, should be regarded

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[24] A matter Lenah had conceded: see *Lenah*, per Kirby J (at [140]), footnote 275.

> as open to review in future cases even by courts bound by the High Court decision.''[25]

45 Further, their Honours were also of the view (at [123]) that one or more of the four invasions of privacy, referred to in s 652A of the *Restatement of the Law Second, Torts*, published in 1977 (footnotes inserted) were:

> "[I]n Australia … in many instances [as] actionable at general law under recognised causes of action. Injurious falsehood, defamation (particularly in those jurisdictions where, by statute, truth of itself is not a complete defence), confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the plaintiff [*Breen v Williams* (1996) 186 CLR 71 at 128], and the activities of eavesdroppers and the like [Gurry, *Breach of Confidence*, (1984) at 162-168; Richardson, "Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law", (1994) 19 *Melbourne University Law Review* 673 at 684-697], passing-off (as extended to include false representations of sponsorship or endorsement [*Henderson v Radio Corporation Pty Ltd* (1960) 60 SR (NSW) 576; *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* [1984] HCA 73; (1984) 156 CLR 414 at 445], the tort of conspiracy, the intentional infliction of harm to the individual based in *Wilkinson v Downton* [1897] 2 QB 57 and what may be a developing tort of harassment [Townshend-Smith, "Harassment as a Tort in English and American Law: The Boundaries of Wilkinson v Downton", (1995) 24 *Anglo-American Law Review* 299; Todd, "Protection of Privacy", in Mullany (ed), *Torts in the Nineties* (1997) 174 at 200-204], and the action on the case for nuisance constituted by watching or besetting the plaintiff's premises [*J Lyons & Sons v Wilkins* [1899] 1 Ch 255 at 267-268, 271-272, 273-274; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479 at 504, 517, 524; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760 at 767] come to mind."

46 In their Honours' view (at [125]) of the four *Restatement* categories, "the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps [came] closest to reflecting a concern for privacy 'as a legal

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[25] New South Wales, Parliament, *Report on the Law of Privacy*, Paper No 170 (1973), at par 12.

principle drawn from the fundamental value of personal autonomy', [in] the words of Sedley LJ in *Douglas v Hello! Ltd*".

47 Gummow and Hayne JJ concluded (at [132) that:

> "Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. *Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs*. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the Restatement, ''free from the prying eyes, ears and publications of others'' (Restatement of Torts, 2d, §652A, Comment b). *Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in Victoria Park*." (emphasis added)

48 Kirby J held that Lenah did not have to identify a cause of action to sustain its right to interlocutory relief. In his view (at [183]) the Supreme Court, had "the statutory power to grant an injunction to restrain the use of information which had been obtained by a trespasser or by some other illegal, tortious, surreptitious or improper means where the use of such information would be unconscionable."

49 He concluded (at [189]) that whether it would be appropriate for the High Court to "declare the existence of an actionable wrong of invasion of privacy [was] a difficult question to which he would prefer to postpone an answer as on his analysis, no answer was required. He also deferred (at [190]) expressing a final view on the question whether a corporation could enjoy any common law right to privacy, although he did observe that "Art 17 of the International Covenant on Civil and Political Rights appear[ed] to relate only to the privacy of the human individual …[not] to a corporation or agency of government".

50 Callinan J also held that, in the circumstances, Lenah had established a right to interlocutory relief independently of the necessity to rely upon a tort of invasion of privacy. This was because, in his view, (at [287]) there did not appear "to be any strong reason, in principle, modern authority, or in the interests of justice, why an injunction, without more, should not be granted to restrain the enjoyment of property unlawfully obtained, certainly when the person sought to be enjoined knows or ought reasonably to know of its illegal genesis".

51 In his view (at [297]) equity should regard the relationship created by the ABC's possession of a tangible item of property obtained in violation of Lenah's right of possession, and the exploitation of which would be to its detriment, and to the financial advantage of the appellant, as a relationship of a fiduciary kind and of confidence", which was sufficient to support an underlying remedy sufficient to support an interlocutory injunction. He regarded (at [306]) his conclusion as conforming to the reasoning of Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 (at 281) (the *"Spycatcher case"*), that:

> "[A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice . . . that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

52 Because of his conclusion on the availability of interlocutory relief, it was unnecessary for Callinan J to consider the question whether Australian law should recognise a tort of privacy, however he expressed some views.

53 Like Gummow and Hayne JJ, Callinan J (at [320]) regarded *Victoria Park* as distinguishable and unlikely to apply in a case in which there had been physical interference with a plaintiff 's property.

54 After referring (at [321] – [327]) to the US, UK, NZ and Canadian position, Callinan J said (at [328]) that he "would not rule out the possibility that in

some circumstances, despite its existence as a non-natural statutory creature, a corporation might be able to enjoy the same or similar rights to privacy as a natural person, not inconsistent with its accountability, and obligations of disclosure, reporting and otherwise."

55 His Honour concluded (at [335]) "that, having regard to current conditions in this country, and developments of the law in other common law jurisdictions, *the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made*" (emphasis added). He accepted (at [334]) that "[u]ltimately the questions involved are ones of proportion and balance" and that the appropriate balance must be struck between the value of free speech and publication in the public interest and the value of privacy".[26]

Lenah summary

56 Lenah represents the last statement by the highest court in Australia about a law of privacy.

57 As will be apparent the views of the judges differed, although it might be thought not substantially.

58 First, a majority, accepted in obiter statements that Australian law may recognise, albeit cautiously either through the development of existing causes of action or possibly as an independent cause of action, "principles

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[26] Subsequently, in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 (at [216]), Callinan J declared the need for caution, retreating somewhat from his view in *Lenah* that "the time was ripe for the consideration at least of the recognition by the law of a cause of action for invasion of privacy". Although his Honour observed that the law in the United Kingdom was moving in the direction of recognising a cause of action for invasion of privacy, he noted that the results may have been influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), incorporated into the domestic law of the United Kingdom by the *Human Rights Act* 1998 (UK).

[to] protect[] the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the [Restatement of the Law Second, Torts], 'free from the prying eyes, ears and publications of others' ".[27]

59 Secondly, of the majority, all recognised the difficulty of formulating an independent concept of privacy, rather than recognising privacy interests through an existing cause(s) of action and/or its (their) development.

60 Thirdly, their Honours were cautious about taking guidance from the United States law, having regard to the powerful effect in that jurisdiction of the First Amendment to the Constitution.

61 Fourthly, and interestingly, views were somewhat divided on the question whether a corporation might have a right of privacy. Gummow and Hayne JJ (with whom it will be recalled Gaudron J agreed) were adamant that such a right could not benefit a corporation. Kirby J appeared tentatively inclined to that view. However while Gleeson CJ observed (at [43]) that "the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity [and that] [t]his may be incongruous when applied to a corporation", he noted, as Callinan J did, that United Kingdom legislation recognised the possibility of a corporation having such a right (referring to *R v Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2001] QB 885 (at 896-897)), and added that "[s]ome forms of corporate activity are private", noting that neither "members of the public, nor even shareholders, are ordinarily entitled to attend directors' meetings".

62 Fifthly, there is a majority of views in favour of the proposition that *Victoria Park* does not inhibit the development of a law of privacy.

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[27] *Lenah*, (at [132]) per Gummow and Hayne JJ.

Subsequent decisions

63 In 2003, in *Grosse v Purvis* [2003] QDC 151; (2003) Aust Torts Reports ¶81-706 Skoien SJDC of the Queensland District Court, was the first to award damages for breach of privacy to a plaintiff who was persistently and intentionally stalked and harassed by the defendant, a former lover. His Honour held she was entitled to damages for invasion of her privacy by the defendant. That decision was not, apparently, appealed, but has not been the subject of any favourable consideration.

64 In *Kalaba v Commonwealth of Australia* [2004] FCA 763, affirmed by the Full Federal Court (*Kalaba v Commonwealth of Australia* [2004] FCAFC 326), Heerey J said at [6] that the law had not developed to a point where it could validly be said that there was a freestanding tort of invasion of privacy, although he accepted that in *Lenah*, Gummow and Hayne JJ left open that possibility.

65 However, In *Doe v ABC & Ors* [2007] VCC 281 Judge Hampel of the County Court of Victoria held that a sexual assault victim was entitled to an award of damages for the breach of privacy which occurred when, contrary to s 4(1A) of the *Judicial Proceedings Reports Act* 1958 (Vic), the ABC published her name and the fact that her former husband had been convicted of raping her. In her Honour's view (at [157]) the invasion, or breach of privacy alleged was an actionable wrong which gave rise to a right to recover damages according to the ordinary principles governing damages in tort. [28]

66 In *Giller v Procopets* [2004] VSC 113 (at [187] to [189]), the appellant, Alma Giller, and the respondent, Boris Procopets, lived together in a de

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[28] This decision has been criticised for holding that negligent conduct by the media gives rise to a tort for breach of privacy, where there was no pre-existing relationship or obligation of confidence: see Loughlan, McDonald, Van Krieken, *The Law of Celebrity*, (forthcoming, 2010) Federation Press Australia, (at 62), last chapter.

facto relationship between mid-March 1990 and early July 1993. Procopets videotaped their sexual encounters. Initially, Giller was unaware of the taping of their encounters. However, after she became aware of it, she acquiesced in the taping of further encounters. After the termination of their relationship, Procopets showed the videotapes to Giller's family and friends. In early December 1999, Giller commenced proceedings against Procopets in the Supreme Court of Victoria. She sought, relevantly, damages for breach of confidence, intentional infliction of mental harm and invasion of privacy in relation to a sex tape and damages for assaults.

67 Gillard J held that the law had not developed to the point where an action for breach of privacy was recognised in Australia. He awarded Ms Giller $5,000 in respect of the assaults. On appeal (*Giller v Procopets* [2008] VSCA 236; (2008) 79 IPR 489), Neave JA (Maxwell P agreeing) held (at [1], [447], [452]) that it was unnecessary to decide whether Australian law recognises a tort of invasion of privacy. Ashley JA held (at [129], [167] – [168]) that a generalised tort of invasion of privacy was not yet recognised in Australia. As he had concluded that a claim founded in breach of confidence was available to the appellant and conferred upon her an entitlement to equitable compensation, he thought it unnecessary to consider whether a generalised tort of invasion of privacy should be recognised. He added that as the appellant had an existing remedy, if a tort of invasion of privacy did come to be recognised, it would not extend to a case such as hers.

68 One commentator has suggested that *Giller* reflects the proposition that the courts are likely to defer a decision on a privacy tort as long as plaintiffs can be sufficiently protected through other causes of action and

that breach of confidence will, until more specific protection is in place, continue to act as Australia's quasi-privacy tort. [29]

New Zealand

69 It is convenient to deal with the position in New Zealand in the context of that class of "privacy" cases which concerns third party rights to privacy. By "third parties" I refer to persons who are in some manner associated with a person, usually a celebrity, and who claim, directly or indirectly, a right to privacy protection. In all the cases to which I refer the "third party" was the celebrity's offspring.

70 In the first of these cases of which I am aware, *Tom Cruise and Nicole Kidman v Southdown Press Pty Ltd* (1993) 26 IPR 125, Gray J in the Federal Court of Australia, dismissed an application by the celebrity couple for an interlocutory injunction to restrain the publication of a photograph of their child in one of the respondent's magazines. His Honour found that the right of privacy was not recognised in Australia, and even if a claim for confidentiality did exist in respect of the appearance of the child, the respondent had no knowledge of the obligation of confidence when the photograph was received. However, relevantly, he expressed doubt as to whether the law of confidence offered protection of the interests that the applicants claimed, stating:

> "The confidential nature of the photograph is asserted to be a right to keep private the appearance of the child shown in the

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[29] Normann Witzleb, "*Giller v Procopets:* Australia's privacy protection shows signs of improvement", (2009) 17 *Torts Law Journal* 121 (at 123 - 125). Mr Witzleb observed (at 124) that taking the $40,000 Ms Giller was awarded, with the decisions in *Grosse v Purvis* [(2003) Aust Torts Reports ¶81-706; [2003] QDC 151 (total of $50,000)] and *Doe v ABC* [2007] VCC 281 (equitable compensation of $25,000 for mental distress following inadvertent identification of the plaintiff in TV news programme as a rape victim) the developing Australian jurisprudence on mental distress damages for breach of confidence already displayed more generosity than most English cases, where awards (even for privacy breaches by media) tend to stay around the £3,000 – £4,000 mark.

> photograph. I am not at all sure that that is a matter which is capable of being the subject of a claim to impose confidentiality."

71 In *Hosking v Runting* (2004) 7 HRNZ 301; [2005] 1 NZLR 1, the New Zealand Court of Appeal, by majority, held that breaches of confidence and privacy should be recognised as separate causes of action.

72 Mr Hosking was a well-known television personality and was frequently in the public eye, both in his employment in the broadcast media and also in magazines such as that published by the second respondent, Pacific Magazines NZ Ltd. Mr Runting was commissioned by Pacific Magazines to get some up-to-date photographs of the Hoskings' small children. He took photographs of them being pushed in a pushchair in the street by their mother. Upon learning of the photographs, the Hoskings advised Pacific Magazines that they did not consent to the taking of the photographs, nor to their publication, and that they objected to both. They sought an injunction restraining Pacific Magazines from publishing the photographs, claiming intentional infliction of distress and invasion of their right to privacy.

73 They argued that the right of the children to privacy could not be synonymous with their parents' privacy rights. If it were, they submitted, "the celebrity status and behaviour of parents will always determine the privacy rights of their families, regardless of how those family members behave[d]".[30]

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[30] See *Hosking* (at [123]).

74 They were unsuccessful at first instance, the trial judge holding that the law in New Zealand did not recognise a tortious cause of action in privacy based upon the publication of photographs taken in a public place.[31]

75 On appeal, Gault P and Blanchard J (with whom Tipping J generally agreed) held (at [45]) that breaches of confidence and privacy should be recognised as separate causes of action. They did so in the context that, in their view (at [2]), "[t]he emergence internationally of concern for the protection of human rights and of individual consumers provides examples reflecting the shift in emphasis from the traditional approach to tort liability (liability for reprehensible conduct) to the protection of identified rights".

76 While their Honours were quick to add that they were "not to be taken as establishing a general cause of action encompassing all conduct that may be described as invasion of privacy", they were of the view (at [48]) that privacy and confidence were different concepts and that "[t]o press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence [would] be to confuse those concepts".

77 Their Honours observed that:

> "[49] If breach of confidence is to be used as the privacy remedy in New Zealand, then the requirement of a confidential relationship must necessarily change. That will lead to confusion in the trade secrets and employment fields. The English authorities seem largely to ignore the fact that Lord Goff of Chieveley's dictum was only directed at exceptional cases where the relevant information was 'obviously confidential', yet no confidential relationship existed. The expansion of the focus of the cause of action was not contemplated by him to change the nature of the information disclosed, but rather the nature of the relationship or circumstances of the parties."

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31 Although New Zealand has a *Bill of Rights Act* 1990, it does not guarantee a right of privacy: *Lange v Atkinson* [2000] 3 NZLR 385 (at 396) and *R v Jefferies* [1994] 1 NZLR 290: *Hosking* (at [77]).

The reference to Lord Goff was to his Lordship's reasons in the *Spycatcher case*.

78 They concluded (at [117]) that while the scope of a cause, or causes, of action protecting privacy should be left to incremental development by future courts, the elements of the tort as it related to publicising private information set down by Nicholson J in *P v D* [2000] 2 NZLR 591 provided a starting point. The four elements Nicholson J identified in that case were:

> "1. That the disclosure of the private facts must be a public disclosure and not a private one.
>
> 2. Facts disclosed to the public must be private facts and not public ones.
>
> 3. The matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
>
> 4. The nature and extent of legitimate public interest in having the information disclosed must be weighed."[32]

79 Their Honours recognised that "[t]here is no simple test for what constitutes a private fact". They held, however, that "[p]rivate facts are those that may be known to some people, but not to the world at large" and that "[i]n many instances the identification of private facts will be analogous to the test of "information with the necessary quality of confidence" employed in breach of confidence cases."

80 They held (at [126] – [127]), that "[t]he right of action … should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm" or to be "highly offensive to the reasonable person", a test they observed appeared in the *Restatement* and had been adopted by Gleeson CJ in *Lenah*. They

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[32] *Hosking* (at [15]).

accepted (at [129]) that "[t]here should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information".

81 Despite their success in persuading the Court of Appeal that a right of privacy in respect of publicising private information should be recognised, the Hoskings failed on the facts. The majority held (at [159] – [172]) that "generally there is no right to privacy when a person is photographed on a public street". They did not accept that there was "a real risk of physical harm" to the children from the publication of the photographs. They were "not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children are involved" or that their publication "would … publicise any fact in respect of which there could be a reasonable expectation of privacy", observing that the photographs did not disclose anything more than could have been observed by any member of the public" in the vicinity where they were taken.

82 The last case in this class of third party rights of privacy is the decision of the English Court of Appeal in *David Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446; (2008) 3 WLR 1360. In *Murray*, the author of the Harry Potter books, JK Rowling sought to carry on an action to protect her son's privacy in relation to photographs taken and published of him with his parents walking in an Edinburgh street. At trial, the action had been struck out as failing to disclose a cause of action. In overturning that decision, the Court of Appeal considered that it was relevant that the parents sought privacy for a child. The Court held that Article 8 of the ECHR created a greater onus for protection of children's interests. The Court (at [58]) was of the view that there may be a reasonable expectation of privacy, in the case of "… an expedition to a café of the kind which occurred here" as it seemed to them "to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that

publicity of it is intrusive and such as adversely to affect such activities in the future."[33]

The future of privacy law in Australia.

83 In considering the future of privacy law in Australia, it is important to bear in mind the fact that the international community accords privacy the status of a human right through such key documents as *The Universal Declaration of Human Rights*, and the *International Covenant on Civil and Political Rights* ("ICCPR", [1980] ATS 23).[34] Australia is a signatory to the ICCPR which entered into force for Australia on 13 November 1980.

84 Article 17 of the ICCPR provides:

> "**Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

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[33] The judgment built on the decision of the Third Section of the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1 which held that held that Germany had violated the Princess of Monaco's right to privacy under the European Convention for the Protection of Human Rights and Fundamental Freedoms when its courts denied her damages for the publication of pictures showing her shopping, in a restaurant courtyard and at a private beach club. That case has been said to be seminal in the designation by the European Court of Human Rights of a "private sphere" within a public space: see Loughlan, McDonald, Van Krieken, *The Law of Celebrity*, (forthcoming, 2010) (at 53), last chapter. Such decisions also recognise that public figures have a "residual area of privacy": see *Campbell* (at [68]) per Lord Hoffmann; see also the discussion in *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364; (2007) 70 NSWLR 484 (at [123] – [178]) of the circumstances in which, by courting public attention, a person may expressly or inferentially invite public criticism or discussion.

[34] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (May 2008), (at 146) ("ALRC Report 108").

85 Some privacy legislation has already been enacted in Australia in what has been described as partial fulfilment of Australia's international obligations under the ICCPR.[35]

86 However the ICCPR is not part of the common law of Australia, and even though it has been said that its "provisions will inevitably influence the common law of Australia",[36] that influence has not yet been manifested in that sphere.

87 Section 13 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) provides:

> "13. Privacy and reputation
>
> A person has the right-

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[35] (a) ALRC Report 108 (at 104, 162). According to ALRC Report 108 (at 134), referring to the *Privacy Act* 1988 (Cth):

> "The *Privacy Act* itself is substantially the product of a seven-year research effort by the ALRC, which culminated in 1983 with the three volume report, *Privacy* (ALRC 22). The Act also gave effect to Australia's obligations to implement the Organisation for Economic Co-operation and Development *Guidelines for the Protection of Privacy and Transborder Flows of Personal Data* (OECD Guidelines), and partially implemented into domestic law Australia's obligations under art 17 of the *International Covenant on Civil and Political Rights* (ICCPR). In 2000 The Commonwealth Government introduced National Privacy Principles pursuant to which the operation of the *Privacy Act* was extended to the private sector."

However the Privacy Act "stops short of enacting what might be called a statutory tort of privacy invasion": *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199 (at [106]) per Gummow and Hayne JJ.

(b) Section 13 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) effectively mirrors Article 17(1) of the ICCPR: *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 (at [170]) per Vickery J.

(c) Art 17 appears to relate only to the privacy of the human individual and does not appear to apply to a corporation or agency of government: *Lenah Game Meats* (at [190] per Kirby J.

[36] The Hon Justice Michael Kirby AC CMG "Privacy in the Courts" (2001) 24(1) *University of New South Wales Law Journal* 247 (at [24]).

(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have his or her reputation unlawfully attacked."

88 The Charter does not, however, create rights, but merely provides a test against which legislation can be assessed to determine whether ti conforms to the Charter. Even if it does not, a court cannot declare the legislation invalid. It can merely refer the matter back to parliament to consider amending the law in the light of its observations.

89 The Australian Government is currently conducting an inquiry into whether Australia should adopt a federal Charter of Rights. It is not envisaged, as I understand the tentative proposals, that if a national Charter is enacted, it will differ conceptually from the Victorian Charter. Its potential to influence the development of the common law in the way the UK *Human Rights Act* appears unlikely.

Legislative reform

90 Time and again you find in cases in which a party has sought to persuade the court to identify a right founded on privacy as a principle of law, rather than an underlying value (*Wainwright* (at [31])) per Lord Hoffmann, an exhortation that Parliaments, rather than the Courts must act.

91 In *Peck v United Kingdom* (2003) 36 EHRR 719, the applicant was photographed in a public place by closed circuit television with a knife in his hands after attempting to commit suicide. The film was released to the media by the local Council and widely published. Peck argued that by failing to consult the police to see if he had been charged with a criminal offence and to impose sufficient restrictions as regards disclosure of his identity, the Council had facilitated an unwarranted invasion of his privacy which was contrary to the spirit, if not the letter, of the Council's guidelines. The High Court judge who heard his application held he had no remedy in the absence of a general right of privacy recognised by English law. The

applicant complained, among other things, of the lack of a domestic remedy against infringement of his right to respect for private life in relation to facts that occurred before the *Human Rights Act* came into effect. He was unsuccessful in the United Kingdom in demonstrating the availability of a remedy. However he succeeded in demonstrating, in the European Court of Human Rights, that the UK provided him with no effective remedy. The European Court held, inter alia, (at [105]) that the applicant's "right to respect for his private life … was violated by the disclosure by the Council of the relevant footage".

92 Commenting on *Peck* in *Wainwright* (at [33]), Lord Hoffmann said:

> "But in my opinion it shows no more than the need, in English law, for a system of control of the use of film from CCTV cameras which shows greater sensitivity to the feelings of people who happen to have been caught by the lens. For the reasons so cogently explained by Sir Robert Megarry *in Malone v Metropolitan Police Comr* [1979] Ch 344, [1979] 2 All ER 620, this is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle."[37]

93 While there have been many law reform commission inquiries in Australia about the question of whether, and to what extent, privacy should have legislative protection, most of which have recommended legislative action of one sort or another, parliaments have shown little or no interest in adopting the recommendations.

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[37] See also *Kaye v Robertson* [1991] FSR 62 (at 66) per Glidewell LJ, (at 71) per Leggatt LJ. At the time of the judgment of the Court of Appeal in *Kaye v Robertson*, a Committee under the chairmanship of Sir David Calcutt QC was considering whether individual privacy required statutory protection against intrusion by the press. When the Calcutt Committee reported in June 1990, it recommended "that 'entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication' should be made a criminal offence: see Report of the Committee on Privacy and Related Matters (1990) Cm 1102, para 6.33 [and that] … certain other forms of intrusion, like the use of surveillance devices on private property and long-distance photography and sound recording, should be made offences. …[It] did not recommend… the creation of a generalised tort of infringement of privacy": see *Wainwright* (at [23]) per Lord Hoffmann.

94 In May 2008, the ALRC concluded that, "[t]here was strong support for the enactment of a statutory cause of action for a serious invasion of privacy." It noted that media organisations, among others, were concerned that such a cause of action may inhibit journalists' ability "to watch, film, record and gather information without any further restrictions"

95 The ALRC recommended that federal legislation should provide for a statutory cause of action for a serious invasion of the privacy of a natural person as follows:[38]

> "**Recommendation 74–1** Federal legislation should provide for a statutory cause of action for a serious invasion of privacy. The Act should contain a non-exhaustive list of the types of invasion that fall within the cause of action. For example, a serious invasion of privacy may occur where:
>
> (a) there has been an interference with an individual's home or family life;
>
> (b) an individual has been subjected to unauthorised surveillance;
>
> (c) an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or
>
> (d) sensitive facts relating to an individual's private life have been disclosed.
>
> **Recommendation 74–2** Federal legislation should provide that, for the purpose of establishing liability under the statutory cause of action for invasion of privacy, a claimant must show that in the circumstances:
>
> (a) there is a reasonable expectation of privacy; and
>
> (b) the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.
>
> In determining whether an individual's privacy has been invaded for the purpose of establishing the cause of action, the court must take into account whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest

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38 ALRC Report 108, Vol 3 Ch 74, see recommendations 74-1, 74-3(a).

(including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression).

Recommendation 74–3 Federal legislation should provide that an action for a serious invasion of privacy:

(a) may only be brought by natural persons;

(b) is actionable without proof of damage; and

(c) is restricted to intentional or reckless acts on the part of the respondent.

Recommendation 74–4 The range of defences to the statutory cause of action for a serious invasion of privacy provided for in federal legislation should be listed exhaustively. The defences should include that the:

(a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;

(b) act or conduct was required or authorised by or under law; or

(c) publication of the information was, under the law of defamation, privileged.

Recommendation 74–5 To address a serious invasion of privacy, the court should be empowered to choose the remedy that is most appropriate in the circumstances, free from the jurisdictional constraints that may apply to that remedy in the general law. For example, the court should be empowered to grant any one or more of the following:

(a) damages, including aggravated damages, but not exemplary damages;

(b) an account of profits;

(c) an injunction;

(d) an order requiring the respondent to apologise to the claimant;

(e) a correction order;

(f) an order for the delivery up and destruction of material; and

(g) a declaration.

Recommendation 74–6 Federal legislation should provide that any action at common law for invasion of a person's privacy should be abolished on enactment of these provisions.

> **Recommendation 74–7** The Office of the Privacy Commissioner should provide information to the public concerning the recommended statutory cause of action for a serious invasion of privacy."

96 The ALRC Report contained 295 recommendations for reform. When he launched the Report, Senator John Faulkner said that the government would deal with the recommendations in two stages, the first of which would focus on unified privacy principles (which refers to the recommendation 18-2, that the *Privacy Act* should be amended to consolidate the current Information Privacy Principles and National Privacy Principles into a single set of privacy principles, referred to in this Report as the model Unified Privacy Principles) and other matters of a regulatory nature. He did not refer specifically to recommendation 74.[39]

97 In August 2009, the New South Wales Law Reform Commission published a report on the Invasion of Privacy.[40] It supported the ALRC's recommendation, noting (at 1.2) that it was "similar to that put forward" in its own earlier Consultation Paper. While it agreed with the ALRC that there ought to be a statutory cause of action for invasion of privacy in Australian law, it did so on the proviso that its introduction was part of a uniform law exercise.

98 Some commentators have queried whether it is now open to the courts "to develop a general right of privacy in an area in which various legislatures have shown some moderate interest but have not gone so far as to endorse a general right of privacy". They also support the view "that a fully-fledged tort of privacy will be more coherent … if it is the subject of considered legislation setting out its elements and exceptions in some

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39 Joint Media Release by Senator the Hon John Faulkner and Attorney-General Robert McClelland MP, *Report on Australian Privacy Law and Practice*, 11 August 2008.

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

detail rather than produced by the haphazard process of judicial development which (in their view) has failed in the US".[41]

99 However, hopes that legislatures will enact a statutory cause of action for invasion of privacy should not be raised too high. As far as I am aware the NSWLRC's recommendation has not received any governmental support. Bills to enact a statutory tort of privacy were introduced in South Australia in 1973 (and were defeated in the Legislative Council) and Tasmania in 1974.[42]

Conclusion

100 In *Douglas v Hello! Ltd* [2001] QB 967 (at [110] – [111]), Sedley LJ explained the courts' reluctance to articulate … a discrete principle of [privacy] law" as "resid[ing] in the common law's perennial need (for the best of reasons, that of legal certainty) to appear not to be doing anything for the first time". As can be seen from this paper, Australian law might be said to be a long way from even suggesting it might do something "for the first time" in the area of privacy. In some respects the courts' silence in this area lies in the absence of suitable fact scenarios which would enable the issues to be confronted head-on.

101 This may be because the industry of celebrity that thrives on privacy intrusions does not have the sizeable market in Australia that it has in the UK. Indeed Britons buy almost half as many celebrity magazines as Americans do, despite having a population that is only one-fifth the size.[43]

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41 Taylor and Wright, op cit, (at 711).

42 *Lenah* (at [187]) per Kirby J.

43 See Andrew T Kenyon and Megan Richardson, "New Dimensions in privacy: Communications technologies, media practices and law", citing a report in *The Economist* in September 2005, published in Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law: International and Comparative Perspectives* (2006) Cambridge University Press, (at 3).

102 Another potentially inhibiting factor, differentiating Australia from the United Kingdom, is that Australian law does not operate under the influence of legislation such as the *Human Rights Act* 1998 (UK) which led to a "shift in the centre of gravity of the action for breach of confidence when … used as a remedy for the unjustified publication of personal information".[44]

103 And might not the question also be posed: does the failure to develop a "discrete principle of [privacy] law" really matter? Two answers may be given.

104 The first is that while, like "English law [Australian law] has so far been unwilling, perhaps unable, to formulate any such high-level principle [as 'invasion of privacy'], [t]here are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy".[45]

105 Secondly, as Gummow and Hayne JJ observed in *Lenah* (at [119]):

> "…Privacy law in the United States delivers far less than it promises, because it resolves virtually all these conflicts in favour of information, candour, and free speech. The sweeping language of privacy law serves largely to mask the fact that the law provides almost no protection against privacy-invading disclosures."

106 Their Honours' remarks echo what Professor Diane L Zimmerman wrote in her article "Requiem for a heavyweight: a farewell to Warren and Brandeis's privacy tort" (1983) 68 *Cornell L Rev* 291. She had found "fewer than 18 cases in the United States – or about two each decade – in which a plaintiff was either awarded damages or found to have stated a

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44 *Campbell* (at [51]) per Lord Hoffmann.

45 *Wainwright* (at [18]) per Lord Hoffmann, a theme to which his Lordship returned in *Campbell* (at [43]); *Lenah* (at [123]) per Gummow and Hayne JJ.

cause of action sufficient to withstand a motion for summary judgment or a motion to dismiss (at 293, n 5). She concluded:

> "After ninety years of evolution, the common law private-facts tort has failed to become a usable and effective means of redress for plaintiffs. Nevertheless, it continues to spawn an ever-increasing amount of costly, time-consuming litigation and rare, unpredictable awards of damages. In addition, this 'phantom tort' and the false hopes that it has generated may well have obscured analysis and impeded efforts to develop a more effective and carefully tailored body of privacy-protecting laws."

Professor Zimmerman identified many of the most troubling privacy questions today as arising not from widespread publicising of private information by the media, but from electronic eavesdropping, exchange of computerised information, and recommended "thoughtful elaboration of privacy law involving intrusions on solitude [as] likely to promote greater protection of the individual's interest in being free of public scrutiny than is the vague and hard-to-apply law governing the publicity of private facts."[46]

107 Finally I would note that, speaking extracurially after the decision in *Lenah*, Gleeson CJ said:

> "The ground seems to me to be shifting under the concept of privacy. I wrote a judgment a few years ago in which I said there seemed to me to be certain things that were self-evidently private. I'm not sure about that any more. When you look at the kind of information that people publish about themselves it makes you wonder. I used to think that having a telephone conversation was normally private, but you can't walk down the street without hearing a number of telephone conversations." [47]

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46 Zimmerman, *op cit*, (at 362 – 363); cited by Keith J in his dissenting judgment in *Hosking* (at [216]); for similarly discouraging conclusions see *Hosking* per Gault and Blanchard JJ, (at [74] – [75]).

47 Nicola Berkovic, "Why Privacy isn't what it used to be", *The Australian*, 22 August 2008: http://www.theaustralian.news.com.au/story/0,25197,24219643-17044,00.html

108 If a law of privacy is developed, and if its breach is tested, inter alia, by reference to whether "the act or conduct complained of highly offensive to a reasonable person of ordinary sensibilities"[48], is the person who walks down the street and/or sits on public transport broadcasting what many would regard as personal and intimate details to be taken to be "a reasonable person of ordinary sensibilities"? If he or she is, I fear for some of our privacy, if people who do not share this desire to communicate their private lives to the world as seen as the "unduly sensitive".[49]

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[48] A test I note was criticised by Lord Nicholls in *Campbell* (at [22]); cf Lord Hope (at [94]); Baroness Hale (at [135] –[136]); but found favour with the majority judgment in *Hosking* (at [117]).

[49] *Campbell*, per Lord Hope (at [94]).