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A RIGHT TO PRIVACY?

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A right to privacy?

Dr Robert Dean*

Darwin tells us that life's forms evolve as Mother Nature's forces respond to new pressures exerted by changes in the environment. The more dramatic the change, the greater the pressure, the faster the evolution. The law develops, particularly at the hand of equity (Burke v LFOT Pty Ltd (2002) 209 CLR 282 at 326), as courts respond to pressures exerted by changes in the community. Courts do not invent new law but uphold new applications for existing laws and declare new hitherto unexplored boundaries to existing causes of action. The most important demonstration, in the modern era of this principle is the courts' development of laws which protect the problematic right by an individual to personal privacy. This article examines a most dramatic example found in pronouncements on privacy by Australia's historically appropriately conservative High Court. These welcome, and by many, unexpected, comments in ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, unlocked the hitherto firmly bolted privacy door. It now remains to be seen how far and how fast that door will open under the considerable pressure to protect personal privacy in the modern community.

HAS THE HIGH COURT OPENED THE DOOR TO PRIVACY?

It has long been assumed that Anglo-Australian common law does not contain a cause of action that protects personal privacy.[1] Nevertheless, a Queensland District Court judge sent shock waves through legal and media circles recently when he announced that he would take up a challenge by the High Court in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 76 ALJR 1, and declare that there was a tort of privacy. In *Grosse v Purvis* [2003] QDC 151 (16 June 2003), after an analysis of the High Court's decision in *Lenah Game Meats*, Senior Judge Skoien said:

> It is a bold step to take, as it seems, the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy. But I see it as a logical and desirable step. In my view there is such an actionable right.

The judge awarded $178,000 in damages. The response of media lawyers and the media generally has been scathing with claims that such a test "will impede the work of serious investigative journalists"[2] "will ruin tabloids", "is contrary to the will of Parliament", "is accidental law", and "inappropriate".[3] Not surprisingly lawyers who have celebrity clients take a different view.

Is it time for a law of privacy? Did the High Court in *Lenah Game Meats* give the green light to such a cause of action to protect privacy and if so upon what basis? If the High Court opened the door for such an action should it be a tort or should it be an equitable doctrine, and what shape will it take?

Is it time for a law to protect personal privacy?

Given the Australian legislatures' hesitancy, possibly because of fear of media backlash, to follow the lead in North America, Britain, Canada and countries within the European Union to provide legislative protection for personal privacy, it is inevitable that Australian courts would come under pressure to fill that void. The pressure has been building for some time fuelled by an ever more

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[1] *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 372; cf *GS v News Ltd* (1998) Aust Tort Reports 81-466 at 64,915; Finn, "Confidentiality and the Public Interest" (1985) 58 ALJ 497.

[2] "Privacy: Good Idea, Bad Law", *The Australian*, 10 July 2003.

[3] "Privacy Invaded – Prying Press Band", *The Australian*, 10 July 2003.

aggressive media and information hungry world. Both the desire and the capacity to breach privacy have increased exponentially in modern times. (A common law right to privacy should not be confused with the plethora of legislation, whose titles include the word "privacy", which protect personal data in the hands of public and private bodies.)

The expansion of the internet, computer technology and data collection, the convergence of communications with information technology and of news with entertainment, coupled with the increased sophistication of spying devices such as motion detectors, continuous computer monitoring, minute bugs and directional microphones, led a Canadian Privacy Commissioner to say: "I would not go so far as to say privacy no longer exists, but it is certainly breathing hard to stay alive."[4] Gleeson CJ said in *Lenah Game Meats* at [40]: "The law should be more astute than in the past to identify and protect interests of a kind which fall within the context of privacy." Kirby J and Callinan J expressed similar concerns.

Current Anglo-Australian judicial position on privacy

Before turning to *Lenah Game Meats* to analyse whether there is sufficient foundation for a law of privacy in Australia and whether that case invited or even encouraged the creation or declaration of such a cause of action in Australia, it is useful to analyse the current position in Australia, England and New Zealand. Both England and New Zealand have progressed a great deal farther down the "privacy path" than Australia. They have taken different paths to reach the same conclusion, in one case the equity path, in the other the common law. I will return to particular decisions in those countries in due course.

AUSTRALIA PRIOR TO LENAH GAME MEATS

In Australia, the position is much more confused, and either the equitable or common law path is open for consideration. In 1986, Young J was faced with a gross breach of the defendant's privacy in *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457. Investitive journalists with cameras rolling, while committing a trespass, had filmed inside the defendant's premises. His Honour held that it was a case for exemplary damages not an injunction. He held that a breach of confidence would not lie because the video footage was inside the public lobby of the defendant's premises, but even so suggested that: "where a film is taken by a trespasser, made in circumstances as the present, upon private premises where publication ... would effect goodwill ... an injunction should be seriously considered" (at 464). In *Lenah Game Meats*, Gleeson CJ agreed with this view as did Gaudron J, Kirby J and Callinan J.

It is significant that Young J was of the view that this injunction would follow as a consequence of equity's ability to meet new situations acting upon the conscience of the defendant (at 463).

In 1987, again in New South Wales, Needham J refused to enjoin a media organisation from broadcasting video footage taken inside premises of the Scientology Church. His Honour adopted Young J's approach, relying upon equity's capacity to enjoin publication of private material where it was unconscionable to allow that publication even if the information was not confidential. When it came to the balance of convenience, however, the "freedom of speech" of the defendant outweighed the "privacy" of the plaintiff particularly given that the plaintiff had not answered significant charges made against it by the defendant and had not asked the defendant to leave the premises.[5] The following year, in *Emcorp Pty Ltd v ABC* [1988] 2 Qd R 169 at 174, Williams J, referring to the previous New South Wales decisions, enjoined the Australian Broadcasting Commission from airing footage of a police video showing the defendant being accused of criminal behaviour by police while the police were trespassing on the defendant's property. His Honour based the court's power to enjoin upon the trespass, and on the question of balance of convenience decided that, "by abusing its rights of freedom of speech in the way in which the material was obtained the defendants are deprived of the right to rely on that as a material consideration".

Again in Queensland, in 1993, investigative journalists from the Australian Broadcasting Commission were enjoined from airing footage obtained whilst trespassing, showing the defendant

[4] Vinson and Longheinrich, "I will be watching you", *The Nation*, March 1998, p 34.
[5] *Church of Scientology Inc v Transmedia Productions Pty Ltd* [1987] Aust Tort Reports 80-101.

being accused of breaches of the law.[6] It was held that on the balance of convenience the irreparable harm that would be done to the plaintiff added to the "high handed way the information had been obtained", outweighed the right of the defendant to freedom of speech, making it unconscionable to allow the publication.

In 1998, Hodgson CJ granted an injunction in a case where the police had video-taped the plaintiff in his underpants while they searched his house pursuant to a search warrant. By means unknown the police video had come into the possession of the television station, Channel 7. In language usually identified with breach of confidence actions, his Honour said that information gratuitously humiliating, albeit not confidential, obtained improperly, could be the subject of an injunction.[7] His Honour noted the importance of free speech. The difference in this case was that the law was breached while obtaining the information. Had the information been obtained from a public road rather than by trespassing inside the plaintiff's house his decision may have been different. Finally, in 2000, in *Takhar & Takhar v Animal Liberation SA Inc* [2000] SASC 400, Lander J, referring to the previous Australian authorities, refused to enjoin the defendant because, despite the trespass, the video footage of battery hens in captivity was no longer "confidential".

While the various Australian judges referred to above made reference to the equitable doctrine of "breach of confidence" it is not at all clear whether the courts were acting pursuant to the development of that doctrine, or upon a new development of the law of trespass whereby information obtained as a result of the trespass would be denied the trespasser if upon the balance of convenience it is unconscionable to allow the use or dissemination of that information. In the latter case it should be irrelevant whether the information was confidential or not.

NEW ZEALAND

The common law position in New Zealand is much clearer. In *Tucker v Newsmedia Ownership Ltd* [1986] 2 NZLR 716 at 732, Jefferies J granted an injunction to prevent the broadcast of footage revealing past criminal offences by the plaintiff who was engaged in appealing to the public to raise money for his heart transplant operation. Jefferies J held that a right to privacy "was a natural progression" of the tort of "intentional infliction of emotional distress". Later, McGechan J, refusing an application to discharge the injunction, said he "supported the introduction into New Zealand common law of the tort covering invasion of personal privacy at least by public disclosure of private facts". His Honour limited his comments to an "expression of support" noting that the need for privacy protection "was more and more pressing" (at 733).

Seven years later in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 at 423, the same court accepted that there was a cause of action in tort protecting privacy based on "a cautious" approach to intentional infliction of emotional distress by public disclosure of private facts. The court noted that the New Zealand Court of Appeal had upheld *Tucker* but had not expressly referred to the tort of privacy. Six years later in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129, the New Zealand Court of Appeal enjoined the use of information obtained by a concealed microphone recording a conversation between a patient and her doctor in which the patient accused the doctor of sexual misconduct. Richardson P referred (at 135) to trespass and invasion of privacy and then referred to the balancing exercise undertaken in cases of breach of confidence. He ostensibly relied upon the *Broadcasting Act 1989* (NZ), s 4(1) (c), and made no reference to *Tucker* or *Bradley*.

In *P v D* [2000] 2 NZLR 591 at 601, Nicholson J, relying on *Tucker* and *Bradley* held: "I consider that the tort of privacy in New Zealand encompasses public disclosure of private facts". But his Honour added a fourth factor which was "the nature and extent of legitimate public interest in having the information disclosed". This is effectively a broad view of the defence of public interest under the doctrine of breach of confidence.

Consequently, the position in New Zealand is that it would seem to be unlikely that the Court of Appeal would "disown" a tort of privacy derived from the development of the "tort of intentional infliction of emotional distress" by the publication of private facts with a public interest rider based

[6] *Rinsale Pty Ltd v ABC* [1993] Aust Tort Reports 81-231.
[7] *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 at 575.

upon freedom of speech, which may either be an element of the cause of action or a balance of convenience consideration.

ENGLAND

The position in England is also clearer than that in Australia. It has been analysed in *Douglas v Hello! Ltd* [2000] 2 WLR 992, where all three members of the Court of Appeal recognised that a right of privacy had developed in English law in response to "an increasingly insensitive invasive social environment". The court described it as a right to protect information that was derived from personal or private situations where any reasonable person would understand privacy was intended. In addition to their reliance upon Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, each of their Lordships said that this "right" had developed from the equitable doctrine of "breach of confidence". This development, said their Lordships, had come about because the courts made it clear that to protect such information, be it in a form of a video or photograph, there was no requirement for a pre-existing relationship between the parties or any communication of the information. All that was needed was that a third party obtain private information which he or she ought reasonably to have known was reasonably intended by the victim to be kept confidential or private. Brooke LJ said:

> in other words, if on some private occasion the prospective claimants make it clear, expressly or impliedly, that no photographic images are to be taken of them, then all of those who are present will be bound by the obligation of confidence created by their knowledge (or imputed knowledge) of this restriction ... .[8]

Sedley LJ first cast doubt on *Kay v Robertson* [1991] FSR 62 and then noted a series of cases which upheld equity's jurisdiction in confidence to prevent an abuse of privacy. His Lordship then said:

> the law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.[9]

Keen LJ said:

> it was said in argument ... that the case has more to do with privacy than confidentiality ... It is clear that there is no water tight division between the two concepts ... breach of confidence is a developing area of the law, the boundaries of which ... change to reflect changes in society, technology and business practice.[10]

His Lordship then referred to a number of decisions to support the proposition that equity's protection of private information may simply arise from the "nature of the subject matter or the circumstances of the defendant's activities".

LENAH GAME MEATS

In *Lenah Game Meats* each of their Honours discussed the submissions of the respondent that Australian law should now recognise a tort of privacy. The appellant had appealed against the decision of the New South Wales Court of Appeal enjoining the respondent from airing a video obtained by an unknown trespasser showing the workings of the applicant's possum-meat abattoir.

Each of their Honours implied or expressly declared that to the extent rightly or wrongly that *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 had been seen as a case rejecting any law of privacy in Australia, it did not now stand in the way of such a law being declared or developed. Their Honours cleared the way for a possible law of privacy in Australia, however, it is their comments on such a law of privacy that hold the key to whether such a law will be recognised in this country.

[8] *Douglas v Hello! Ltd* [2000] 2 WLR 992 at 1012.
[9] *Douglas v Hello! Ltd* [2000] 2 WLR 992 at 1022.
[10] *Douglas v Hello! Ltd* [2000] 2 WLR 992 at 1036.

Gleeson CJ found that the law of the breach of confidence would have been a remedy in the present case had the acquisition of the material been sufficiently private.[11] His Honour held that if the tort of trespass was to be relied upon the courts will not enjoin a third party unless there is unconscionability (knowledge of the trespass) on behalf of the otherwise innocent recipient. He noted the difficulties of defining privacy and balancing it with free speech and urged caution in any consideration of a new tort of privacy.[12]

In a brief statement at the conclusion of their judgment, Gummow and Hayne JJ appear at first glance to wind back the doctrine of breach of confidence by first reversing what had been thought to have been a well established principle that equity had the power to protect a confidence, unconscientiously breached, if necessary by enjoining an otherwise innocent third party. Secondly, they appeared to hold that that doctrine will not reach the unconscionable use of seditiously obtained information which is not subject to a confidence.[13] Their Honours went to some lengths to suggest that Australian cases commonly regarded as relying on a development of the law of trespass or breach of confidence had in fact possibly been decided on the law of copyright, even though the parties did not put such arguments and the particular judges in those courts had not mentioned those grounds in their judgments.[14]

As to a tort of privacy, Gummow and Hayne JJ spent a significant portion of their judgment analysing the concept, in particular *Douglas v Hello!*, which had expansively dealt with the principle of the breach of confidence doctrine. They did not discuss that doctrine in the Australian context. Their Honours came to the conclusion that, even though at this stage they would not declare a tort of privacy to exist (nor would they rule it out), if one did exist it would not include corporate bodies and hence the respondent's argument would have failed. However, they did indicate that rather than create a new tort, privacy may best be protected with a ménage of separate causes of action which included:

> confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the plaintiff ... and the activities of eavesdroppers and the like) ... .[15]

Gummow and Hayne JJ agreed with Gleeson CJ that there was no capacity to enjoin at large, innocent third parties who use information obtained as a consequence of a crime. It is not clear whether their short obiter comments at the conclusion of their judgment were restricted to their rejection of a general right in equity to enjoin unconscionable acts not caught within a cause of action, however, it is presumed they were. If those comments did extend to a view that it is not within the power of equity to enjoin an innocent third party from disseminating information to protect a victim from disclosure of his or her information in circumstances where it was improperly obtained in breach of confidence, then, with respect, they have overruled much previous authority.[16]

Gummow and Hayne JJ appear concerned that the courts may confuse the notion of unconscionable conduct being a requirement of an equitable cause of action in confidence with the considerations of the defendant's conduct and public interest considerations which are contained within the balance of convenience undertaken when deciding whether or not to grant an injunction.[17] The first is a part of the cause of action in which the court "enforces" the conscience of a defendant who proposes to disclose private information improperly obtained, the latter is not part of the cause of action. If courts were to consider unconscionability sufficient to ground an injunction without first having secured the cause of action upon which the injunction is based, their Honours would, with respect, be rightly concerned. On the other hand it is submitted that it would inhibit the proper development of the law of breach of confidence, if in an endeavour to prevent the latter, the former is denied.

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[11] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 230.
[12] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 225-226.
[13] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 259.
[14] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 246.
[15] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 255 (Gaudron J agreed with Gummow and Hayne JJ).
[16] See Gummow, "Equity: Too successful?" (2003) 77 ALJ 30 at 39.
[17] See Gummow, n 8 at 39.

Kirby J relied[18] on Deane J's statement in *Moorgate Tobacco Co Ltd v Phillip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438: "the notion of an obligation of conscience [arises] from the circumstances in or through which the information was communicated or obtained.". Kirby J rejects any view that equity has petrified. He disagrees with the proposal that equity would not intervene to protect private information which has been surreptitiously obtained through unconscionable conduct even though there is no relationship or communication. He also disagrees with the view that third parties who innocently acquire the information cannot be enjoined to prevent the dissemination of that information as a means of enforcing the original "confidence".[19] Kirby J noted the broad reach exercised by equity in early cases and then referred to a number of Australian cases where courts had intervened to prevent the publication of private information, unconscionably obtained, when not to intervene would leave equity impotent.[20] His Honour postponed any decision by the court to declare a tort of privacy.

Callinan J took matters a step further by stating that equity would imply a relationship "of a fiduciary kind and of confidence" between a victim and a respondent who obtained information illegally or "in violation of the respondent's right of possession" and would enjoin that respondent from using that information to the detriment of the victim.[21] Callinan J (like Hayne and Gummow JJ) was of the view that to enjoin a third party in the circumstances of this case, where the perpetrator was unknown, that party must have actual or implied knowledge of the improper conduct and therefore could not "in good conscience" use it. This proposition was framed squarely within the doctrine of breach of confidence.[22] As to a tort of privacy, his Honour believes that "the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country"[23] but as yet "there is still no 'right of privacy' properly so called in the Australian common law".[24]

A summary of their Honours views with respect to declaring a law of privacy in Australia is that they each removed any impediments that may linger from *Victoria Park Racing*, and left the door ajar for a future development of such a law: Gleeson CJ suggested caution; Gummow and Hayne JJ, with whom Gaudron J agreed, suggested that a ménage of causes of action may do the same work; Kirby J left the matter to be decided; and Callinan J declared there to be no tort of privacy but said that the time was right to consider it.

All of their Honours in one form or another linked the equitable doctrine breach of confidence with privacy cases: Gleeson CJ held that subject to the information being "private" the doctrine would apply; Gummow and Hayne JJ, subject to restrictions, gave considerable emphasis to the role of the confidence doctrine in the protection of privacy as developed in *Douglas v Hello!* – they held that if a bold step is required it may best be achieved by a clearly defined new tort; Kirby J also appears to favour equity's capacity to protect privacy; whereas Callinan J placed significant weight on the development of a tort.

In his bold judgment,[25] Senior Judge Skoien did not say that the High Court had declared that a tort of privacy or that one did or should exist but that the High Court had cleared impediments to its being considered. The High Court deliberately chose to leave the door ajar and his Honour took the opportunity to open it – a course that the High Court must have anticipated. Hopefully sooner rather than later the High Court will decide whether to permanently open the door or permanently close it. If the former course were taken the next question is: What form would such a tort take?

WHAT SHAPE WOULD SUCH A LAW TAKE: TORT OR EQUITABLE RIGHT?

As already discussed, New Zealand courts have declared a tort of privacy based on a tort of "intentional infliction of emotional harm by public disclosure of private facts", and English courts have also declared a right to privacy, based on the development of the equitable doctrine of "breach of

[18] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 271.
[19] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 272.
[20] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 274.
[21] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 315.
[22] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 320.
[23] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 328.
[24] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 330.
[25] *Grosse v Purvis* [2003] QDC 151.

confidence" as it has been developed to embrace the use or disclosure of private information improperly obtained. However, in Australia the position is less clear and is based on a number of cases involving illegally obtained private information, usually by the media trespassing on private property to obtain information on video.[26] The Australian courts have struggled to deal with the complex balance of freedom of speech and personal privacy. This balance is somewhat confusingly dealt with on the basis of "unconscionability" either as a necessary ingredient to an equitable cause of action or as one of the considerations within the exercise of discretion upon the balance of convenience upon the grant of an injunction.

Lenah Game Meats is a watershed judgment in a number of ways. First, because it has cleared the decks of any impediment to establishing a law of privacy in Australia. This included dismantling any notion that *Victoria Park Racing* stood for the proposition that a right of privacy was not part of the Australian common law, and secondly, because the court went out of its way to say that some sort of legal protection of privacy in today's world was needed. The High Court discussed the respondent's submission that it should declare a tort of privacy in Australia in the form of a right to personal autonomy, or put more simply as a "right to be left alone". The judgments do not clearly indicate whether to protect personal privacy their Honours would favour taking a step into the unknown by expressly defining a new tort of privacy or seek to use the development of breach of confidence (supplemented by existing torts) to provide that personal protection.

The Australian authorities appear to refer to both the equitable doctrine of "breach of confidence" protecting confidential or private information while at the same time referring to the emergence of a tort of privacy based on trespass. The difficulty with this scenario is that the two approaches are quite separate. While equity may not be past the age of child bearing – should it give birth to a tort, it would have some serious questions to answer.

It is proposed that any action of personal privacy in Australian law should emanate from equity, preferably as a development of the law of "breach of confidence". In developing that proposition it is desirable first to isolate those elements (in most cases noted by the High Court) which would be requirements in any law of personal privacy. It is suggested that those requirements are:

1. The intentional public disclosure of private, but not necessarily secret, facts.[27]
2. That the disclosure is harmful to the victim and clearly obtained against the victim's will.[28]
3. That given the circumstances of the particular case, particularly the circumstances of their acquisition, the reasonable person would regard public disclosure of those facts as reprehensible or unconscionable.[29]
4. That breach of privacy should be weighted against the public interest in the right of free speech and against the right of the public to be fairly informed of alleged iniquity.[30]

Courts are the institutions best equipped to make these judgments of balance. Whether or not legislation was passed, the courts would still be required to decide these questions. If that is correct it is important, given the complexity of these elements, that courts initially have maximum flexibility while building certainty into the law on a case-by-case basis. Gummow and Hayne JJ said:

> Rather than a search to identify ingredients of a generally expressed wrong, the better course, as Deane J recognised, is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances.[31]

My contention is that many of the above requirements have already been developed by the courts in adapting the doctrine of "breach of confidence" to personal information. Further, the flexibility of

[26] *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Church of Scientology Inc v Transmedia Productions Pty Ltd* [1987] Aust Tort Reports 80-101; *Emcorp Pty Ltd v ABC* [1988] 2 Qd R 169 at 174; *Rinsale Pty Ltd v ABC* [1993] Aust Tort Reports 81-231; *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 at 575; *Takhar & Takhar v Animal Liberation SA Inc* [2000] SASC 400.

[27] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 224, 225, 253-256, 272, 325.

[28] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 253-256, 327.

[29] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226, 253, 254, 272, 273.

[30] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226, 253, 275, 276, 328.

[31] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 250.

equity makes it the appropriate path to an inevitable declaration of the protection of personal privacy in Australia.

After a period of self-imposed limits on the doctrine of "breach of confidence" the courts have in recent times re-affirmed the original breadth of that doctrine. This development is initially adequate to provide the basis for the reasoned development of a right to protection of personal privacy. The original breadth of the doctrine of breach of confidence saw equity enjoined the use of private information obtained in surreptitious circumstances. The extent of equity's reach was underpinned by two considerations. The first was that where private information was improperly obtained and it was unconscionable that the perpetrator use or publish that information, equity would intervene.[32] Secondly, given that the damage to the victim was publication, equity would protect the victim by enforcing the defendant's conscience even if that meant enjoining innocent third parties who had not been shown to have any knowledge of the original confidence. This would be done even where the original perpetrator was unknown.[33]

The first principle was encapsulated by Sir Thomas Moore's often repeated statement that "three things are to be keep in conscience; fraud, accident and things of confidence". The second is a capacity equity has always possessed which is the power to reach third parties, innocent or otherwise, to protect an "in personam" relationship. Examples include protecting beneficiaries, tracing trust moneys, creating constructive trusts and enforcing contractual licenses, restrictive covenants or an estoppel.[34]

There then followed a period beginning with *Rob v Green* [1895] 2 QB 1 where, in a time of industrial development, the protection of confidential information in the form of trade secrets came to the fore and the courts appeared to rely almost entirely on contract, particularly contracts of employment. During this time the emphasis was on the existence of a "confidential communication" or the "imparting" of commercial confidential information within an employment or other fiduciary relationship.

In recent times,[35] the courts, including the High Court,[36] have re-affirmed the equitable basis and extent of the doctrine of the breach of confidence and developed it to meet modern needs. In fact the term "breach of confidence" was and remains a misnomer. If it is taken literally, it pre-supposes a "confidence" between two people which has been breached. That never was and certainly is not now, the limit of the doctrine of breach of confidence. A more appropriate description of the doctrine would be the protection of commercially confidential or private information improperly obtained.

There are a number of characteristics of this equitable doctrine which provide ample basis to protect personal privacy.

First, there is a distinct difference between the courts intervention in cases of trade secrets and its intervention to protect personal information. The commercial realities of the former necessitate a pre-occupation with the secret nature of the information. It would undermine the establishment of the regimes of patents, trade marks, copyright and design if the courts protected non-secret information. It would be unfair and anti-competitive to give the owner of information a common law monopoly. Consequently, courts agonise over whether the plaintiff has kept the information secret and whether it is or is not in the public domain. The public domain in trade secret cases is effectively defined, not as "the public" but as the "plaintiff's rivals".[37] There need only be a small group which has the knowledge,[38] or even "just determined rivals" who can be expected to acquire it before protection is

[32] See *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293; *Abernethy v Hutchinson* (1824) 1 H & Tw 28; 47 ER 1313.

[33] *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293 at 315; *Morison v Moat* (1851) 9 Hare 241; 68 ER 492; *Lamb v Evans* [1893] 1 Ch 218; *Lord Ashburton v Pope* [1913] 2 Ch 469.

[34] *Errington v Errington & Woods* [1952] 1 KB 290; *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143; see generally Hanbury and Martin, *Modern Equity* (16th ed, 2001) p 17.

[35] See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203.

[36] *Mooregate Tobacco Co Ltd v Phillip Morris Ltd [No 2]* (1984) 154 CLR 414 at 438; *Johns v ASC* (1993) 178 CLR 408 at 459.

[37] *Potters-Ballotini Ltd v Western-Baker* [1977] RPC 202 at 206.

[38] *Secton Pty Ltd v Delwood Pty Ltd* (1991) 21 IPR 136 at 161.

refused.[39] The courts have even invented the "spring board doctrine" to ensure that fair competition is not undermined.[40]

However, the detriment equity seeks to prevent in relation to personal information obtained in breach of privacy is quite different to the detriment suffered by a commercial enterprise as are the principles used by the courts to bring about that protection. Whereas the confidentiality of trade secrets is lost should the secret leak out to a rival, the fact that private information has been produced in court or even aired on television will not prevent equity's intervention.[41] This is because the *repetition* of the private information creates embarrassment and personal hurt and this is the detriment equity seeks to prevent. The information is no longer confidential in the trade secret sense but is still worthy of protection in the privacy sense. The unconscionability of the defendant's act is determined by the nature and circumstances surrounding the acquisition and disclosure of the information. It is not unconscionable to disclose a trade secret received in confidence when it is no longer a secret because there is no danger to profits. It is unconscionable to parade harmful private facts even if they are known to many because the hurt and harm continues. A decade ago Tettenborn suggested that private information remains sufficiently confidential until it is "notorious":

> Bad publicity unlike trade secret disclosure hurts by way of actual not potential knowledge. Public disclosure, even of widely known intimate secrets (such as those involved in *Argyll v Argyll* [1967] Ch 302 may none the less cause further moral or even tangible harm.[42]

The touchstone is the likelihood of harm to the plaintiff of the intended publication.[43] What is important is the level of embarrassment or hurt.[44]

Secondly, the courts have re-affirmed the original basis upon which they intervened to prevent the misuse of confidential or private information which was the unconscionable obtaining and use of that information. The courts test the defendant's conscience in the light of modern ethics. Given the very large number of cases that have re-affirmed this as the basis of intervention it is now too late to suggest that unconscionability is only referred to as part of the balance of convenience assessment and that the courts' intervention is limited to situations of "a confidence" or "a fiduciary relationship".[45]

Despite the fact that some courts and commentators have remained pre-occupied with the narrow parameters of the debates concerning the sui juris nature of the law protecting confidential information, ignoring the broad original basis of "conscience" upon which equity intervened, it has been said that equity is now not only "fully awake and on the march again" but "indeed it is rampant".[46] To say that the category of equitable intervention to protect the misuse of confidential information is determined upon the unconscionable conduct of the defendant in improperly obtaining and using confidential or private information is not to invent a category of meaningless reference.[47] The lucky finder, the industrial espionage agent and the snoop are now all at risk. They are at risk

[39] *Worsley & Co Ltd v Cooper* (1939) 1 All ER 290 at 308.
[40] Dean, *The Law of Trade Secrets and Personal Secrets* (2nd ed, Law Book Co, 2002) para 3.390ff.
[41] *Falconer v ABC* [1992] 1 VR 662; *Wiggington v Brisbane TV Ltd* (1992) 25 IPR 58 at 64.
[42] Tettenborn, "Breach of Confidence, Secrecy and the Public Domain" (1982) 11 Anglo-Amer L Rev 273 at 275.
[43] *Gooley v Westpac Banking Corporation* (1995) 53 IR 262.
[44] *P v D* [2000] NZLR 591 at 608.
[45] *Franklin v Giddins* [1978] Qd R 72; *Titan Group Pty Ltd v Steriline Manufacturing Pty Ltd* (1990) 19 IPR 353 at 376 at 377; *Smith Kline & French Laboratories (Aust) Ltd v Secretary Dept Community Services & Health* (1991) 28 FCR 291; *Johns v ASC* (1993) 178 CLR 408 at 459; *American Cyanamid Co v Alcoa Australia Ltd* (1993) 27 IPR 16; *Shelley Films Ltd v Rex Features* [1994] EMLR 134; *Breen v Williams* (1996) 186 CLR 71; *DPP (Cth) v Kane* (1997) 140 FLR 468; *Creation Records v News Group Newspapers Ltd* (1997) 39 IPR 1 at 7; *Mars UK Ltd v Teknowledge Ltd* (1999) 46 IPR 248; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577 at 587; *Sullivan v Sclanders* (2000) 77 SASR 419 at 428; *R v Dept of Health; Ex parte Source Informatics Ltd* [2001] FSR 74 at 75; *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 271; *Douglas v Hello! Ltd* [2000] 2 WLR 992 at 1010; *P v D* [2000] 2 NZLR 591; *X v A-G* [1997] 2 NZLR 623.
[46] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241.
[47] *ACCC v CG Berbatis Holdings Pty Ltd [No 2]* (2000) 96 FCR 491 at 498.

because the touch stone of intervention is the nature of the circumstances surrounding the obtaining and intended disclosure of that information.[48]

Thirdly, it has been repeated many times by the courts that to be confidential, information need not have any merit save that it is capable of being secret or private, the disclosure or further disclosure of which would cause the plaintiff to suffer concern and prejudice. It may only be of value to the plaintiff and possessed by the plaintiff. It includes a person's identity because, although that person may be widely known, what is private is the association of that identity with particular facts.[49] It includes a person's opinions[50] or cultural practice.[51] It covers private events in public places[52] or maybe even includes pictures of couples together in a public place engaged in acts which any reasonable person would understand they wished to remain private.

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, the subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case the law would protect what might reasonable be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course elementary that in all cases a defence based on the public interest would be available.[53]

Fourthly, where a defendant has obtained the information improperly and surreptitiously the courts will assume that, subject to the defence of public interest, he or she has acted unconscionably and the implication is that the information obtained was intended to be private or confidential. The courts have resorted to the "reasonable person" when deciding whether the conduct of the defendant is such to warrant intervention. In *P v D* the court relied on "what a reasonable person of ordinary sensibilities would feel if they were in the same position".[54]

Fifthly, as noted earlier, equity will intervene to enjoin a third party where, given the equities arising out of the circumstances, to do so is necessary to protect the plaintiff and enforce the defendant's conscience by preventing the disclosure of information of a private or confidential nature surreptitiously obtained.

It is not clear whether in a short statement at the conclusion of their judgment in *Lenah Game Meats* Hayne and Gummow JJ conclude that equity would never enjoin a third party from using information if the third party was innocent.[55] The implication of such a proposition is that if A breaches B's confidence and then gives the information to C who is unaware of A's wrongful conduct, then equity cannot protect B by preventing C's publication of the material regardless of the equities of the situation. C will usually have knowledge of the wrong either because of the nature of the information or because C has been served with a writ giving notice of the wrong. It should make no difference if the identity of A is unknown to C save that A will not be a party to the action. C's innocence or otherwise is a matter of considerable concern to the court when determining whether "upon the balance of convenience" an interlocutory injunction should arise.

However, it is submitted with respect, that where it is equitable and just to do so, equity will and often has enjoined the party not concerned in the wrong in an endeavour to protect the original confidence or trust or to ensure that where damages cannot adequately compensate the wronged party, he or she will not lose the privacy or confidentiality originally possessed. This proposition is proposed on three grounds:

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[48] *Moorgate Tabacco Co Ltd v Phillip Morris Ltd* (1984) 156 CLR 414 at 438.
[49] *G v Day* [1982] 1 NSWLR 24 at 35; *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; *X v A-G* [1997] 2 NZLR 623.
[50] *Couthard v South Australia* (1995) 63 SASR 531.
[51] *Foster v Mountford* (1976) 29 FLR 233.
[52] *Creation Records v News Group Newspapers Ltd* (1997) 39 IPR 1.
[53] *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807 per Laws J; see also *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 463; *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 224; *Douglas v Hello! Ltd* [2001] 2 WLR 992 at 1023.
[54] *P v D* [2000] 2 NZLR 591 at 601; see also *Coulthard v South Australia* (1995) 63 SASR 531 at 534.
[55] Gummow J has described the area as "unsettled": see Gummow, n 16 at 39.

1. There is much authority to the effect that equity will take such action when justice demands it.[56] Lloyd-Jacob J took the view in *Stevenson Jordon & Harrison Ltd v MacDonald & Evans* (1951) 68 RPC 190 at 195 that such a proposition was "so well established that finding authorities to the contrary would be required to alter that proposition". As far back as *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293 at 315 Knight-Bruce J said:

> However [the third party] may have conducted himself, he did not in my option, I repeat, confer a better right than he had himself on Jasper Thompset Judge [the fourth party] nor did Jasper Thompset Judge confer a better right that he had on the publisher [the fifth party].

   There are other direct statements where courts have stated categorically that parties in C's position will be enjoined.[57] In fact, equity will reach those who obtain information by accident,[58] or even unconsciously use such information.[59] These authorities are not to be confused with the many authorities where knowledge or lack of knowledge of the third party has been a critical factor taken into account by equity in determining, on the balance of convenience, whether to enjoin that party.
2. Equity has already demonstrated this power in relation to other categories of intervention.
3. To hold otherwise would rob equity of its ability to enforce a conscience and to act fairly, particularly in relation to confidential information where its publication instantly and permanently destroys the original cause of action and any "rights" the owner of the secret information may have had and where to enjoin the third party will cause it little inconvenience. *Commonwealth v John Fairfax & Son Ltd* (1980) 147 CLR 39, to which Hayne and Gummow JJ referred in this connection, is a case which, even though it was concerned with government secrets decided 20 years ago upon the basis of copyright, is regarded as the Australian case which most eloquently describes the fundamental difference between private and government secrets. The onus of proof for those seeking to protect government secrets is effectively reversed for the reason that while the public interest is more likely to rest in ensuring that private secrets are not disclosed, the public interest attaching to government secrets is more likely to rest in their public exposure. The only comments in that case that may be able to assist in the question as to the extent of equity's capacity to intervene in cases concerning the improper obtaining of information not "confided" or obtained within a relationship and its ability to extend its reach to innocent third parties are the words of Mason J:

> employees who had access to confidential information ... have been restrained from divulging [it] to third parties ... and if they have already divulged [it], the third parties themselves have been restrained from making disclosure ... .[60]

Finally, one of the most important reasons why the equitable doctrine for the protection of confidential and private personal information is well suited to protect privacy is the now well established "defence" of public interest that is available to the courts. This "defence" ensures that despite an equitable breach, if it is in the public interest that information be released to the public (or appropriate authority), the courts will not intervene. Much has been said about the nature and extent of this defence and whether it is best seen as a defence or simply a consideration taken into account by equity when deciding whether a confidence exists because there is no confidence in an iniquity.[61] But whatever arguments commentators may offer there is no doubt as to its existence and that it provides the best avenue for the courts to legitimately develop a means of weighing the public interest

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[56] *Talbot v General Television Corp Pty Ltd* [1980] VR 224; *G v Day* [1982] 1 NSWLR 24; *Wheatley v Bell* [1982] 2 NSWLR 544; *Butler v Board of Trade* [1971] Ch 680; *Falconer v ABC* [1992] 1 VR 662; *Johns v ASC* (1993) 178 CLR 408; *DPP (Cth) v Kane* (1997) 140 FLR 468 at 473; *Sullivan v Sclanders* (2000) 77 SASR 419 at 428; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Stevenson Jordon & Harrison Ltd v MacDonald & Evans* (1951) 68 RPC 190 at 195; *Butler v Board of Trade* [1971] Ch 680 .

[57] *Ashburton v Hope* [1913] 2 Ch 469 at 472; *Morison v Moat* (1851) 9 Hare 241 at 257; 68 ER 492 at 499.

[58] *American Insurance v Herbert Smith* [1988] FSR 232 at 237.

[59] *Seager v Copydex Ltd [No 1]* (1967) 1 WLR 923.

[60] *Commonwealth v John Fairfax & Son Ltd* (1980) 147 CLR 39 at 50; Mason J refers to a number of authorities that have demonstrated the length of equity's reach in protecting private secrets leaked by unknown sources to third parties.

[61] Compare *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434 (Gummow J) with *Attorney General (UK) v Heinemann Publishers Aust Pty Ltd* (1987) 10 NSWLR 86 (Kirby J): it is suggested that Kirby P's view is to be preferred. This view prevails in the UK.

in free speech against the rights of a plaintiff who seeks to protect him or herself against the disclosure of private facts in breach of privacy.

Obviously there are limits to the extent to which equity's protection of private and personal information can provide an all embracing law of privacy in Australia. The "right to be left alone" includes a right not to be intimidated, or harassed by those seeking to obtain personal facts. But as Hayne and Gummow JJ pointed out in *Lenah Game Meats*, a ménage of "recognised forms of action to meet new situations and circumstances" may be the appropriate way for Australian courts to be able, as Gleeson CJ put it, to be "more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy". Certainly the wide and flexible jurisdiction equity has already demonstrated to protect personal information performs much of the work an Australian law of privacy must do and through further legitimate development could go a long way to providing the protection of personal autonomy now so urgently missing in our modern state.

POSTCRIPT

There have been a number of cases reported and commentaries written which consider *Douglas v Hello! Ltd* and *Lenah Game Meats*. Cases include: *Venables v News Group Newspapers Ltd* [2001] 2 WLR 1038; *Payne v Payne* [2001] 2 WLR 1826; *Wainwright v Home Office* [2003] 3 All ER 943; *A v B* [2002] 2 All ER 545; *Campbell v MGN Ltd* [2003] QB 633. Articles include Moreham, "Douglas v Hello! Ltd – the Protection of Privacy in English Private Law" (2001) 64 MLR 767; Stewart, "Protecting Privacy, Property, and Possums: ABC v Lenah Game Meats Pty Ltd"; Richardson, "Whither Breach of Confidence: A Right of Privacy for Australia?" (2002) 26 MULR 381; Doyle and Mirko "The Right to Privacy and Corporations" (2003) 31 ABLR 237; Phillipson, "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 Mod LR 726 (see at 726-728, where further unreported English cases concerning personal privacy are referred to); Tang Hang Wu, "Confidence and the Constructive Trust" (2003) 23 LS 135.

These commentaries and cases confirm the principles set out in *Douglas v Hello!* and *Lenah Game Meats*. They expose the increasing tension in English cases between the autonomy of domestic law and the effect of the European Convention on Human Rights both before and after the enactment in Britain of the *Human Rights Act 1998*. This tension is exhibited in the judgments in *Douglas v Hello!* itself, but the fact that the exposition of the extent to which the domestic civil law on breach of confidence has developed to protects privacy was expressed in that case to be determined independently of the influence of the European Convention remains undisturbed by these later cases. The confusion over the equitable doctrine of breach of confidence and a tort of privacy is on the one hand unfortunately repeated (*Venables* at 1065, 1066) and on the other pleasingly corrected (*Wainwright* at 943, 946). The analysis as to the extent to which information must be objectively private or to which privacy must be subjectively conveyed continues.

Finally, I claim some support for the proposition that it is through the development of breach of confidence supported by torts which give relief from harassment that is the most likely and justifiable path to protect privacy rather than the creation of a new tort of privacy (*Wainwright* at 965-964, 976 esp [97], [98]).

