WHITHER BREACH OF CONFIDENCE: A RIGHT OF PRIVACY FOR AUSTRALIA?

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[Although privacy interests have long been protected under the equitable doctrine of breach of confidence, it is only recently that rights discourse has openly been relied on as the basis. However, some uncertainties remain. First, will a right 'to be left alone' be protected under a separate privacy tort or equitable wrong and how might this be framed? Second, can commercial entities share in the privileges of a right of privacy? Third, what is the relationship between privacy and freedom of speech? It is argued that, while a sui generis privacy doctrine might have advantages in terms of greater transparency, the breach of confidence doctrine has already proved to offer appropriate protection of private information (supplementing the protection of the person and physical property under the torts of trespass). Further, the doctrine's treatment of commercial privacy interests and freedom of speech is consistent with a liberal-utilitarian theory of privacy rights.]

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I INTRODUCTION

Although privacy interests have long been protected under the equitable doctrine of breach of confidence, it is only recently that rights discourse has openly been relied on as the basis. References in several of the judgments in the High Court case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[1] to personal autonomy as the particular reason why privacy interests are and should be protected might lead us to think an Australian right of privacy has finally emerged. However, some uncertainties remain. First, will a right 'to be let alone' be protected under a separate privacy tort or equitable wrong and how might this be framed? Second, can commercial entities share in the privileges of a right of privacy? Third, what is the relationship between privacy and freedom of speech? Uncertainty is difficult to live with but, as the High Court has observed in elucidating a freedom of political communication as a constitutional

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1 (2001) 185 ALR 1 ('*Lenah Game Meats*').

norm,[2] there can be benefits to allowing opportunities for public discussion and debate before a conclusion is reached.[3] In this article I argue that, while a sui generis privacy doctrine might have advantages in terms of greater transparency, the breach of confidence doctrine has already proved to offer appropriate protection of private information (supplementing the protection of the person and physical property under the tort of trespass). Further, the doctrine's treatment of commercial privacy interests and freedom of speech is consistent with at least one version of a privacy rights theory.

II FROM BREACH OF CONFIDENCE TO A RIGHT OF PRIVACY?

Although the earliest breach of confidence cases were cases about privacy, and privacy claims under the aegis of that doctrine have continued to haunt the courts over the years, there was little elaboration of the nature of the interests being protected or the policy reasons for their protection. So, for instance, in the old English case of *Prince Albert v Strange*,[4] Lord Cottenham LC, having noted that 'the property in an author or composer of any work, whether of literature, art or science, such work being unpublished and kept for his private use or pleasure cannot be disputed',[5] briefly added '[b]ut this case by no means depends solely on the question of property'.[6] The 'private character of the work or composition' improperly obtained was sufficient to base a claim for breach of confidence when the defendant sought to publicly exhibit the Prince's etchings and publish a catalogue.[7] Later, in *Argyll v Argyll*,[8] Ungoed-Thomas J observed in passing that 'there could hardly be anything more intimate or confidential than is involved in [the marriage] relationship, or than in the mutual trust and confidences which are shared between husband and wife'[9] as a reason to protect marriage confidences

[2] Eg *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 122 (Mason CJ, Toohey and Gaudron JJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–60; *Levy v Victoria* (1997) 189 CLR 579, 594–5 (Brennan CJ), 644 (Kirby J), 614 (Toohey and Gummow JJ).

[3] On the relationship between the implied freedom and the quality of public debate, see generally Sally Walker, 'The Impact of the High Court's Free Speech Cases on Defamation Law' (1995) 17 *Sydney Law Review* 43; Megan Richardson, 'Constitutional Freedom of Political Speech in Defamation Law: Some Insights from a Utilitarian Economic Perspective' (1996) 4 *Torts Law Journal* 242; see especially Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 315–17.

[4] (1849) 1 H & Tw 1; 47 ER 1302.

[5] Ibid 21; 1310.

[6] Ibid 23; 1311. Interestingly, the Lord Chancellor also referred to privacy as 'the right invaded' (at 1312) but did not appear to attach any significance to the term 'right' used here.

[7] At least, the information was claimed to be improperly obtained in proceedings for an injunction and the Lord Chancellor noted that, although the defendant contended that 'he did not at the time believe the etchings to have been improperly obtained' he did not suggest 'any mode by which they could have been properly obtained, so as to entitle the possessor to use them for publication': ibid 23; 1311. In fact, it seemed most likely that the possession resulted from a breach of 'trust, confidence or contract' by a Mr Brown, to whom the etchings had been given for the purposes of taking impressions (or his employee), or by friends of the plaintiff to whom copies had been given for personal and private possession. Thus the case fell within what later was to emerge as the 'normal' scope of a breach of confidence action: see below n 15.

[8] [1967] Ch 302.

[9] Ibid 322.

from unauthorised disclosure in a newspaper article.[10] And in *Stephens v Avery*,[11] the notorious 'lesbian secrets case' of the 1980s (where the plaintiff's sexual relationship with another woman was published to the world by a former friend and confidant),[12] Browne-Wilkinson V-C simply said, 'I can see no reason why information relating to that most private sector of everybody's life, namely sexual conduct, cannot be the subject of a legally enforceable duty of confidentiality'.[13] Certainly, it would seem that in *Attorney-General v Guardian Newspapers Ltd [No 2]*[14] Lord Goff had privacy interests particularly in mind when formulating the equitable doctrine to cover not only the normal case of confidential information imparted in a relationship of confidence[15] but also other situations where parties have notice, or are 'held to have agreed', 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'.[16] However, again, the nature of these interests and the particular policy reasons for their protection was not explained.

Such brevity has also been a feature of the Australian cases. For instance in *Foster v Mountford & Rigby Ltd*,[17] Muirhead J merely noted the plaintiffs' 'genuine fear' that publication of the defendant's book containing confidential revelations made over the years by the plaintiffs of their tribal secrets 'may further disrupt their social system, and that this fear is not based on fanciful grounds',[18] before finding the action for breach of confidence made out. Similarly, in *G v Day*[19] Yeldham J referred to 'the elementary rules of propriety

[10] Ibid, referring, inter alia, to *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302 and *Pollard v Photographic Co* (1888) 40 ChD 345 (the breach of confidence in that case deriving from the unauthorised publication of the plaintiff's photographic image on Christmas cards) as further authority for an available remedy.

[11] [1988] Ch 449.

[12] The defendant revealed in a nationwide newspaper the plaintiff's confidence that her (female) lover's husband had killed her lover after discovering them together in a compromising position. The husband was subsequently convicted of manslaughter but Rosemary Stephens' name had not been disclosed at trial.

[13] [1988] Ch 449, 455. See also *Barrymore v News Group Newspapers Ltd* [1997] FSR 600 (where an injunction was granted to prevent publication of details of an intimate homosexual relationship).

[14] [1990] 1 AC 109.

[15] The 'normal' scope of the breach of confidence doctrine, as elaborated by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 46–8 — although it was always accepted that third parties may be liable if their possession of the information derives from a confidant's breach, at least once they have had notice of this: see, eg, *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302; *Stephens v Avery* [1988] Ch 449; *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

[16] *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 281 (Lord Goff), giving the example of 'a private diary ... dropped in a public place, and ... picked up by a passer-by'. Later cases have suggested that, in particular, surreptitious obtaining of private information would be covered — see, eg, *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, 476 (Laws J):

> 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, his 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.

[17] (1976) 14 ALR 71.

[18] Ibid 74.

[19] [1982] 1 NSWLR 24.

and of privacy'[20] as a reason to keep secret the plaintiff's identity as a police informant, but without explaining what such rules might entail, beyond that they supported the equitable doctrine's historical role in protecting 'the personal, private and proprietary interests of the citizen'.[21] And, as recently as 1995, when in *Breen v Williams*[22] issues of both proprietary and privacy interests in information recorded by a doctor about a patient (the plaintiff who sought access to her medical file) were raised, it was acknowledged in the High Court that the doctrine of breach of confidence 'extends to information as to the personal affairs and private life of the plaintiff, and in that sense may be protective of privacy.'[23] But breach of confidence was not something the plaintiff claimed and the defendant's argument that the file contained information 'private' to him[24] had no part to play in the High Court's conclusion that the plaintiff had no general entitlement to access the information. Rather, the defendant's property in the physical file was apparently reason enough for the law to support his control over the information within it.[25]

More recently, however, fuelled by the English accession to the *European Convention on Human Rights*,[26] English courts have begun explaining the protection of privacy interests under the equitable doctrine in the explicit language of rights. So, for instance, in *Douglas v Hello! Ltd*[27] Sedley LJ in the Court of Appeal, pointing to the fact that the *Convention* qualified its right of freedom of expression[28] by reference to a right enjoyed by everyone 'to respect for his private and family life, his home and his correspondence',[29] held that under English law the latter right of privacy was 'grounded in the equitable doctrine of breach of confidence'.[30] Already in the United States, and notwithstanding the omission of any reference to privacy as a right in the *United States Constitution*, it had long been accepted that the justification for the common law privacy tort there recognised (deriving in part from the US *Constitution*'s right of security for person and property) was 'the right to be let

[20] Ibid 29.

[21] Ibid 36, quoting *Commonwealth v John Fairfax & Sons Ltd* (1980) 55 ALJR 45, 49 (Mason J).

[22] (1996) 186 CLR 71.

[23] Ibid 128 (Gummow J).

[24] Ibid 85 (Dawson and Toohey JJ).

[25] Ibid 88–90, adding there was no contractual or fiduciary (or other) obligation binding the defendant to make the information in the record available. See also at 80–2 (Brennan CJ), 101–2 (Gaudron and McHugh JJ), 127–8 (Gummow J).

[26] See *Human Rights Act 1998* (UK) c 42, sch 1, implementing the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952) ('*Convention*').

[27] [2001] QB 967.

[28] See art 10(1) of the *Convention*. The right is qualified in art 10(2) as being subject to 'such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence'.

[29] See art 8(1) of the *Convention*. Note that art 8(2) has its own qualification that interference is justified 'as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others'. For resolution of conflicts see below n 92.

[30] *Douglas v Hello! Ltd* [2001] QB 967, 1001, referring also to obiter comments of Laws J in *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473.

alone'.[31] In *Douglas v Hello! Ltd*,[32] Sedley LJ referred to the notion of the right to be let alone, and more particularly to be protected from 'unwarranted intrusion into ... personal lives', as the core of a privacy right deriving from 'the fundamental value of personal autonomy'.[33] Further, his Honour suggested, since this was a right the equitable doctrine already understood, to make this more explicit would simply (albeit usefully) add a label to what 'our courts have ... said already over the years'.[34] In that case the fact that the plaintiffs, actors Michael Douglas and Catherine Zeta-Jones, had already sold the rights to photograph their wedding to another magazine meant they were unable to obtain an interlocutory injunction preventing the defendant from publishing their photographs, notwithstanding the surreptitious method by which they had been obtained.[35] On the balance of convenience, the prospect of a monetary remedy being granted at the final trial, should the plaintiff succeed, was sufficient to protect what were now largely commercial rather than privacy interests.[36] That the information as to how the wedding and those who attended appeared was confidential was not in doubt. Notwithstanding the presence of 250 wedding guests (albeit they were told they could not take photographs) there was still sufficient secrecy to make protection worthwhile.[37] Sedley LJ also noted that the plaintiffs had retained some of their privacy in keeping 'a kind of veto over publication of *OK* [magazine's] photographs in order to maintain the kind of image which is professionally and no doubt personally important to them'.[38] Later English cases have continued the trend of drawing on the *Convention*'s right of privacy as something supported by the breach of confidence action, although declining to follow Sedley LJ's obiter suggestion in *Douglas v Hello! Ltd*[39] that more open acknowledgment in the framing of the law might now be a

31 See Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 193–5ff; William Prosser, 'Privacy' (1960) 48 *California Law Review* 383; *Restatement of the Law (Second): Torts* (1977) ch 28A. See also the cases discussed below n 73. For comparable, quite intriguing, developments in New Zealand in the wake of the *Bill of Rights Act 1990* (NZ), see Rosemary Tobin, 'Invasion of Privacy' [2000] *New Zealand Law Journal* 216.

32 [2001] QB 967.

33 Ibid 1001 (Sedley LJ); see also at 1011–12 (Keene LJ). Cf the judgment of Brooke LJ, suggesting that the 'right' of privacy in the *Convention* was limited by art 8(2) to a right exercisable only against public authorities (at 991), concluding that 'I do not consider that their privacy-based case, as distinct from their confidentiality-based case, adds very much': at 995.

34 Ibid 1001 (Sedley LJ), the suggested value of the right to privacy 'label' being the advantages in more open acknowledgment of the interests being served. Cf Keene LJ at 1012.

35 That the absence of a prior relationship of confidence (the traditional basis of the action) was no impediment to breach of confidence being found in the case is testament to the influence of Lord Goff's obiter statement in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 281. See *Douglas v Hello! Ltd* [2001] QB 967, 1012 (Keane J).

36 See especially *Douglas v Hello! Ltd* [2001] QB 967, 995 (Brooke LJ), 1006 (Sedley LJ), 1013 (Keene LJ).

37 As Keene LJ observed at 1011: 'The photographs conveyed to the public information not otherwise truly obtainable, that is to say, what the event and its participants looked like'. Cf Brooke LJ, who considered that although the plaintiff's case was 'not a particularly strong one', on the present evidence they would be likely to establish sufficient confidentiality for the breach of confidence claim at trial: at 995.

38 Ibid 1006; see also at 1013 (Keene LJ): 'It may be that a limited degree of privacy remains'.

39 [2001] QB 967.

welcome development.[40] In the process, the action has been transformed from one that offered such a subtly muted protection of privacy interests that it could be said there was 'no right of privacy' recognised in the English courts,[41] to one explicitly extolling the right to privacy as a motivating force.

Even without the benefit of a written bill of rights, Australian courts have acknowledged an implied freedom of political communication in the *Australian Constitution*.[42] But there was never a suggestion that privacy could be constitutionally mandated as a freedom let alone as a right. Nevertheless, in the aftermath of *Douglas v Hello! Ltd*,[43] the language of a 'right' to privacy has entered Australian jurisprudence. The issue of the existence and scope of such a right was raised in *Lenah Game Meats*[44] in a claim brought to prevent the defendant broadcasting a surreptitiously obtained film of the plaintiff's possum abattoir operation. Curiously, the information was conceded not to be confidential,[45] an unfortunate concession as it turned out.

Gleeson CJ rejected the plaintiff's claim on the straightforward basis that 'if the activities filmed were private, then the law of breach of confidence is adequate to cover the case',[46] suggesting a more explicit privacy right would not enlarge this.[47] Kirby J would have entertained the claim, but on the basis that the application was interlocutory and a substantive cause of action need not be established.[48] Thus, his Honour postponed the issue of a legal right of privacy for another day.[49] In any event, Kirby J found the constitutional freedom of political

[40] See *Home Office v Wainwright* [2001] EWCA Civ 2081, [60] (Mummery LJ), [96–9] (Buxton LJ); *A v B plc* [2002] 2 All ER 545, 552–3 (Woolf LJ for the Court of Appeal); *Campbell v MGN Ltd* [2002] EWHC 499, [40] (Morland J). See also *Earl Spencer v United Kingdom* (1998) 25 EHRR CD 105, 117–18 (applicants before the European Commission of Human Rights claiming violation of art 8 of the *Convention* had not demonstrated that the breach of confidence doctrine was 'insufficient or ineffective in the circumstances of their case').

[41] *Kaye v Robertson* [1991] 18 FSR 62, 66 (Glidewell LJ).

[42] See *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 122 (Mason CJ, Toohey and Gaudron JJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–60 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Levy v Victoria* (1997) 189 CLR 579, 594–5 (Brennan CJ), 644 (Kirby J).

[43] [2001] QB 967.

[44] (2001) 185 ALR 1. The case will be noted in the December issue of (2002) 26 *Melbourne University Law Review*.

[45] A concession apparently approved by Gleeson CJ, noting that the abattoir was open to inspectors and 'other visitors who come to the premises for business or private reasons': ibid 9.

[46] Ibid 11–12. In reaching this conclusion, Gleeson CJ explicitly accepted the proposition from *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 that the obligation of confidence is not restricted to information imparted in the context of a relationship of confidence: at 12, clarifying the position in Australia.

[47] *Lenah Game Meats* (2001) 185 ALR 1, 13, noting that the categories of wrong recognised under the US privacy tort 'have been developed for the purpose of giving greater specificity to the kinds of interests protected by a "right to privacy"'. Gleeson CJ also suggested talk of 'rights' *may be* 'question-begging' in a jurisdiction with no counterpart to the *United States Constitution* or the *Human Rights Act 1998* (UK) c 42: at 13.

[48] Ibid 49–55, finding instead that the 'unconscionability' of the defendant's conduct in proposing to broadcast a surreptitiously obtained film was sufficient for equity to intervene.

[49] Of all the judges, Kirby J was most explicit in finding that historically it has been accepted that 'no enforceable general right to privacy exists in this country': ibid 54, referring to *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 ('*Victoria Park Racing*') and other authorities collected and discussed in the Australian Law Reform Commission,

communication took precedence in the case at hand, interpreting 'political' broadly to include debates about animal rights.[50] Callinan J who, in a minority of one, would have found for the plaintiff,[51] was ready to conclude that Australian law recognises 'as a category of the law of confidence, a right to privacy'[52] and questioned the plaintiff's concession as to the confidentiality of its information.[53]

Of the other judges, Gummow and Hayne JJ (Gaudron J concurring) suggested it was because of the nature of a right of privacy as deriving from 'the fundamental value of personal autonomy'[54] that the plaintiff should fail. Specifically, their Honours held that the plaintiff could not rely on a right of seclusion from the 'prying eyes, ears and publications of others',[55] given its status as a commercial corporation. It was 'endowed with legal personality only as a consequence of the statute law providing for its incorporation', with a particular purpose of turning a profit,[56] and lacked 'the sensibilities, offence and injury ... which provide a staple value for any developing law of privacy'.[57] Therefore, the plaintiff's reliance upon an emergent tort of invasion of privacy was 'misplaced'.[58] Whatever development in this field — and whether this is achieved by 'looking across the range of already established legal and equitable wrongs'[59] or by identifying a new 'species of genus' based on 'protecting the

Privacy, Report No 22 (1983) vol 2, 21 (note that Kirby J was Chairman of the Commission at the time of the Report). Nevertheless, Kirby J left open the question whether, in the light of international developments, legal 'recognition of a right to individual privacy' would now be in order: *Lenah Game Meats* (2001) 185 ALR 1, 55.

50 *Lenah Game Meats* (2001) 185 ALR 1, 62–3.

51 Following Kirby J in holding that a substantive cause of action is not required on an interlocutory application: ibid 83–95. Callinan J disagreed with Kirby J that the constitutional freedom of political communication ('even if it might be inferred from the *Constitution*') should be broadly construed: at 103. More generally, however, Callinan J acknowledged that '[t]he value of free speech and publication in the public interest must be properly assessed, but so too must be the value of privacy. The appropriate balance would need to be struck in each case': at 95.

52 Ibid 88–9 and especially at fn 420, referring to *Douglas v Hello! Ltd* [2001] QB 967, 1001 (Sedley LJ).

53 *Lenah Game Meats* (2001) 185 ALR 1, 84. See also at 89, where his Honour referred to the plaintiff's proprietary right 'to exclusive possession of its abattoir and to control what might be done inside it', including its right to control any filming that occurred.

54 Ibid 36–7, with reference to *Douglas v Hello! Ltd* [2001] QB 967, 1001 (Sedley LJ).

55 *Lenah Game Meats* (2001) 185 ALR 1, 36, citing *Restatement of the Law (Second): Torts*, above n 31, § 652A. See statement in [b] of the comment to § 652A.

56 *Lenah Game Meats* (2001) 185 ALR 1, 37, citing with approval the statement of Anthony D'Amato that '[p]rivacy to a corporation is only an intermediate good': Anthony D'Amato, 'Comment: Professor Posner's Lecture on Privacy' (1978) 12 *Georgia Law Review* 497, 499–500 (responding to Richard Posner, 'The Right of Privacy' (1978) 12 *Georgia Law Review* 393, 394). See also the judges' discussion of *Victoria Park Racing* (1937) 58 CLR 479: this case was wrongly argued as a case about privacy — rather the plaintiff in seeking to prevent the defendant viewing and broadcasting details of its races was 'seeking a protection which would enable [it] to sell the rights to a particular kind of publicity': William Morison, Parliament of New South Wales, *Report on the Law of Privacy*, Parl Paper No 170 (1973) [12].

57 *Lenah Game Meats* (2001) 185 ALR 1, 37–8 (Gummow and Hayne JJ), noting that this is also the US position with respect to its privacy tort; see generally, *Restatement of the Law (Second): Torts*, above n 31, § 652I ('personal character of right of privacy').

58 *Lenah Game Meats* (2001) 185 ALR 1, 38.

59 Earlier in their judgment, Gummow and Hayne JJ listed the following doctrines as offering protection against invasion of privacy — nuisance, breach of confidence, injurious falsehood,

interests of the individual in leading, to some reasonable extent, a secluded and private life'[60] — will 'be for the benefit of natural, not artificial, persons'.[61]

As already indicated, a difficulty with *Lenah Game Meats*,[62] viewed from a privacy perspective, is that the plaintiff did not argue its case for breach of confidence. If it had been maintained that the information about what went on in its abattoir was confidential, notwithstanding that some public access to the abattoir was permitted[63] — in the same way that information about the plaintiff's wedding was still regarded as confidential in *Douglas v Hello! Ltd*[64] despite the attendance of 250 guests[65] — the focus of the judgments might then properly have turned to the scope and limits of a privacy 'right' in information that because it is *private* warrants protection. In the process, the real and fundamental differences that, it will now be suggested, exist in the philosophical approaches of the High Court judges might more clearly have emerged as the key differences to be resolved in the future development of Australian information privacy law. As it is, further conclusions at this stage can only be tentatively drawn.

III Premises and Implications of a Privacy Right

In *Douglas v Hello! Ltd*[66] and *Lenah Game Meats*[67] a right to be 'let alone', a right to be free from 'unwarranted intrusion' into one's personal life, a right of seclusion from 'the prying eyes, ears and publications of others', were variously identified as the core of a right of privacy based on a general idea of personal

defamation, passing off, conspiracy, intentional infliction of harm to the individual, and 'what may be a developing tort of harassment': ibid 36.

60 (2001) 185 ALR 1, 38.

61 Ibid 38.

62 (2001) 185 ALR 1.

63 Callinan J came the closest to questioning the plaintiff's concession on confidentiality: see above n 53. But unfortunately no explanation is given of how the plaintiff's information might be confidential, and it is not clear why the right would be proprietary. On the other hand, Gleeson CJ's comment that the information was *not* confidential because the abattoir was open to inspectors and other visitors (see above n 45) can be criticised for giving undue weight to the plaintiff's failure to demonstrate precautions to prevent access, rather than focusing on the extent of access that had in fact occurred. Gleeson CJ's comment that 'there is a large area in between what is necessarily public and what is necessarily private' (ibid 13) is also a matter of concern in suggesting a strict confidentiality standard when privacy interests are claimed. In the end, however, the plaintiff's concession on confidentiality gives these judicial observations very limited authority, as the High Court has generally observed with respect to conceded arguments: see *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, 59.

64 [2001] QB 967.

65 See above n 37. Relative secrecy is the general standard of secrecy that applies under the equitable doctrine: see *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 213–15 (Lord Greene MR); *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 46–8 (Megarry J) (the question is whether the information is 'common knowledge'). See also *G v Day* [1982] 1 NSWLR 24, 40 (Yeldham J), where prior references to the plaintiff on television were sufficiently 'transitory and brief' for confidentiality not to be destroyed — an injunction preventing further publication could still be granted.

66 [2001] QB 967.

67 (2001) 185 ALR 1.

autonomy.[68] The discourse of rights is important in identifying personal autonomy as the basis of any privacy right and in suggesting, moreover, that the connection between the information and the person it concerns is what characterises this information as *private* information — as opposed, for instance, to a trade secret, the value of which lies in its commercial worth and tradable quality.[69] But it does not answer the deeper question of why personal autonomy is important and therefore why a privacy right should be recognised and legally protected. Nor is this an issue that has fully been resolved in the mainstream rights literature, beyond offering generalised (albeit intuitively compelling) statements that such rights are 'rooted in democratic concepts of popular sovereignty, government by consent, and equal rights of citizenship protected by law against what John Stuart Mill calls the "tyranny of the majority"'.[70]

In fact, there are various philosophical explanations as to why autonomy is important which have implications for the nature and scope of protection granted to privacy rights. For instance, there is the Kantian argument that freedom, or autonomy, derives from the nature of individuals as ends in themselves, meaning it is wrong to treat them as a means to others' ends.[71] Here, the idea of personal integrity — the entitlement enjoyed by virtue of human existence to be treated with respect — comes to the fore. It is this idea of personal autonomy that appears to have influenced United States[72] and (although to a lesser extent) continental European rights development.[73] Against this, John Stuart Mill's idea

68 See above nn 33 and 52ff. Cf Warren and Brandeis, above n 31, 207, who argue that the right to privacy is 'part of the more general right to the immunity of the person — the "right to one's personality"'.

69 Cf Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967, 1006, although his Honour suggested there is no 'bright line' between what is private and what is commercial. See generally Sir Brian Neill, 'Privacy: A Challenge for the Next Century' in Basil Markesinis (ed), *Protecting Privacy* (1999) 1, 22ff ('the freedom to preserve the privacy of information which is confidential' is the freedom or interest which the law of privacy should be concerned to protect).

70 See Anthony Lester and David Pannick (eds), *Human Rights Law and Practice* (1999) 1.

71 Immanuel Kant, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (Hugh Paton trans, 1948 ed) 90 [trans of: *Grundlegung zur Metaphysik der Sitten*]: 'Now I say that man, and in general every rational being, exists as an end in himself, not merely as a means for every arbitrary use by this or that will: he must in all his actions, whether they are directed at himself or other rational beings, always be viewed at the same time as an end'.

72 For US law, see *Boyd v United States*, 116 US 616, 630 (1885) and *Griswold v Connecticut*, 381 US 479, 485 (1965) (the US right to privacy derives in part from the *Constitution*'s right to person and property — cf Warren and Brandeis, above n 31); *NOC Inc v Schaefer*, 484 A 2d 729, 730–1 (1984) (the tort of invasion of privacy 'focuses on the humiliation and personal distress suffered by an individual as a result of intrusive behavior'); *Restatement of the Law (Second): Torts*, above n 31, § 652A and see statement in [b] of the comment to § 652A (focus of the US privacy tort is unreasonable intrusion on seclusion); and see generally Kim Lane Scheppele, *Legal Secrets* (1988), 126ff.

73 For the *Convention* as combining personal integrity and flourishing rationales (the second closer to Mill's arguments for personal autonomy, discussed further below), but with a particular emphasis on the first, see, eg, *Botta v Italy* (1998) I Eur Court HR 412, 422 ('private life' [for the purpose of the *Convention*] includes a person's physical and psychological integrity'); *Costello-Roberts v United Kingdom* (1995) 247 Eur Court HR (ser A) 47, 61 (referring to the 'physical or moral integrity of a person'); *Niemietz v Germany* (1993) 251 Eur Court HR (ser A) 23, 33 (right restricted to individuals although '[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings'); and see generally

that freedom's moral force derives from the notion of human flourishing grounded in the idea of 'man as a progressive being' brings together utilitarian and liberal rationales for freedom to be supported and enjoyed in a civilised society.[74] For, as Mill argued, '[i]n proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others.'[75] Thus '[m]ankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest', provided only that the interests of others are not harmed.[76] Mill's broader utilitarian rationale (that society is better off made up of free persons who are the better for having enriched their lives through the living of it on their own terms) is less easily adapted to a theory of rights than his liberal rationale (that persons are better off being free to enrich their lives through the living of it on their own terms — a different argument entirely from Kant's personal integrity argument). For, in truth, this utilitarian rationale has more to do with the reason why rights, once established on the liberal premise, may be legally recognised and enforced.[77] But both are important and both have been influential in the development of Anglo-Australian law, including its transition to something more closely approaching a rights-based legal system.

There are significant differences between these approaches. For one thing the Kantian approach is more individualistic and humanistic, founded as it is on the idea of personal integrity enjoyed *qua* human existence.[78] The Millian approach, being instrumental (identifying the individual and social good as the basis for protection), allows for collective enjoyment of rights and is not restricted to human persons, acknowledging that even corporations can flourish and that their

Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the* European Convention (2000), 268–70; Lester and Pannick, above n 70, 168–9.

For the centrality of human dignity in French privacy law, see Étienne Picard, 'The Right to Privacy in French Law' in Basil Markesinis (ed), *Protecting Privacy* (1999) 49, 73ff. For the role of human dignity and flourishing in German privacy law, see Hans Stoll, 'The General Right of Personality in German Law' in Markesinis, above n 69.

74 John Stuart Mill, 'On Liberty' in Mary Warnock (ed), *Utilitarianism, On Liberty, Essay on Bentham, Together with Selected Writings of Jeremy Bentham and John Austin* (1962) 126, 136. Note that Mill's notion of utility is very attenuated: 'I regard utility as the ultimate appeal on all ethical questions but it must be utility in the largest sense, grounded on the permanent interests of a man as a progressive being': at 136.

75 Ibid 192.

76 Ibid 138.

77 Although Mill himself was more than a utilitarian in his arguments for liberty, he addressed his arguments for social and legal support for his liberal principles to the utilitarian audience with which he was familiar (as one of the leading utilitarian political philosophers of his day). The result is perhaps some blurring of the distinction between utility and rights. But this feature of Mill's writing should give it a particular appeal to an Anglo-Australian legal audience, steeped in the 19th century utilitarian tradition.

78 There are implications for freedom of speech as well as for privacy: see further Chesterman, above n 3, ch 7 (questioning how arguments from human dignity could explain corporate free speech). But in fact it would seem that a more utilitarian approach to personal autonomy has been accepted with respect to freedom of speech in continental Europe (and to a lesser extent the US): see especially Eric Barendt, *Freedom of Speech* (1985) 23–8.

experience becomes a part of human experience.[79] Further, on Mill's approach, flourishing may be something that can be measured in monetary terms (the market is the ultimate test of success for a commercial agent or entity permitted the freedom to conduct itself in its own affairs) — even if the rights themselves may not be the subject of sale, at least without transforming themselves in the process.[80] For another thing, the Kantian approach is clear and uncompromising. Violation of a Kantian right of personal autonomy, once identified, is a wrong which the law as moral arbiter should address.[81] By contrast, the Millian approach can be turned to more pragmatic ends, under which rights of privacy and free speech may be balanced to determine which should have priority in the event that they come into conflict — in that case, a general utilitarian approach should prevail.[82] Also, rights may be balanced against utilitarian ends which have nothing to do with rights, leading some to observe that, on Mill's approach, 'rights' only have presumptive force.[83] And in general, Mill contended, rights should only be legally enforced when in the public interest. It is not just that a right exists but that there is a social benefit to legal enforcement that justifies the coercive involvement of the law, as opposed simply to the pressure of social opinion.[84]

What then of *rights* under Mill's approach? As Mill himself said, there are

> certain social utilities which are vastly more important, and therefore more absolute [although not completely absolute] and imperative than any others are as a class ... and which, therefore, ought to be, as well as naturally are, guarded by a sentiment not only different in degree, but also in kind; distinguished from the milder feelings which attach to the mere idea of promoting human pleasure or convenience, at once by the more definite nature of its commands, and by the sterner character of its sanctions.[85]

[79] See John Stuart Mill, 'On Liberty', above n 74, 244, noting with approval that '[w]ith individuals and voluntary associations ... there are varied experiments and endless diversity' which states should promote.

[80] The distinction outlined above has been blurred by some lawyer economists who have pushed the boundaries of what can be commodified and thus traded in the market for financial reward. See, eg, Posner, above n 56. In fact, Mill never suggests that a basic personal freedom is something to be bought and sold, rejecting the idea of a 'freedom' to sell oneself into slavery: above n 74, 235–6.

[81] That uncompromising nature of Kant's autonomy principle derives from his project in writing *The Groundwork of the Metaphysics of Morals* — to identify the moral rules which would satisfy the 'categorical imperative' of being capable of being universally accepted as law for all rational beings: above n 71, 67 ('I ought never to act except in such a way that I can also will that my maxim should become a universal law'). Kant was talking about moral 'law', not state law, here. But his other writings suggest he saw the state's role in fostering an ethical community as being 'to protect the external freedoms of individuals and maintain the general conditions of public order that make that protection possible': see Allen Wood, *Kant's Ethical Thought* (1999) 315.

[82] 'As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion': Mill, above n 74, 205–6.

[83] See David Lyons, 'Rights, Welfare, and Mill's Moral Theory' in David Lyons (ed), *Rights, Welfare and Mill's Moral Theory* (1994) 147, 170–1.

[84] This is especially clear in Mill's utilitarian writings. 'When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, *or by that of education and opinion*': Mill, above n 74, 309 (emphasis added).

[85] Ibid 321.

Certainly, Mill took rights seriously, arguing that, as experience of life under oppressive regimes has shown,[86] the freedom to enjoy a sphere of one's own — especially in matters that concern the self alone — is essential to the individual good and the social good. But, even for Mill, to talk of protection of rights from a utilitarian perspective is really to stress the special utility of their social and legal support.

That the Millian approach may be more congenial to the Anglo-Australian legal culture than a Kantian approach is shown by the treatment of privacy interests in practice under the doctrine of breach of confidence — a doctrine whose formative years coincided with the heyday of 19th century utilitarianism, for a long time the dominant legal philosophy in the British Commonwealth.

First, the development of the equitable wrong of breach of confidence (supplementing the torts of trespass to physical property and the person) has allowed the flexible protection of private and personal information — even without the benefit of an express privacy right — according to the demands of civilised society, as circumstances have required.[87]

Second, as new and intrusive practices have developed in the community, the focus of the doctrine's obligation has been flexible enough to change from protecting confidences disclosed within a pre-existing relationship of confidence to surreptitious obtaining (with the possibility that notice of confidence might itself be sufficient for an obligation to arise).[88] This is testament to the doctrine's ability to adapt in drawing the line between what is legally proscribed and what can simply be left to be dealt with as a matter of public opinion.

Third, commercial and even corporate privacy claimants have shared in the doctrine's protection with respect to their commercially sensitive secrets (sensitive in the sense that they would reveal something about their inner affairs that they would prefer the outside world not to know).[89] This has identified the doctrine as specifically concerned with flourishing as opposed to a narrower idea of personal integrity.

Fourth, the public interest exception to breach of confidence recognised in the United Kingdom and probably also in Australia — notwithstanding some pronouncements to the contrary[90] — has allowed the public interest in

[86] A contrast Mill often made in his writings on liberty: ibid 160ff (arguing that respect for liberty emerges from periods of great oppression).

[87] See the cases cited in Part II and see generally Megan Richardson, 'Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory versus Law' (1994) 19 *Melbourne University Law Review* 673.

[88] See *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109.

[89] See, eg, *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143 (confidential information revealing commercial position of a company under a takeover bid); *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 (confidential information concerning harmful effects of a drug the plaintiff had taken off the market); *Johns v Australian Securities Commission* (1993) 178 CLR 408 (claimed confidential information concerning management of the Tricontinental group of companies of which plaintiff was the managing director — although held insufficiently confidential to be protected); *Bolkiah v KPMG* [1999] 2 AC 222 (confidential information concerning plaintiff's financial affairs).

[90] For UK law see, eg, *A-G v Guardian Newspapers (No 2)* [1990] 1 AC, 281–2 (Lord Goff); *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, 476 (Laws J); *Douglas v Hello! Ltd* [2001] QB 967, 1001 (Sedley LJ).

confidentiality to be balanced against public interests in publication. This has provided for a pragmatic, essentially utilitarian approach.

IV FUTURE PRIVACY PROTECTION UNDER ANGLO-AUSTRALIAN LAW

In the United Kingdom,[91] the fact that the protection appears to be continuing along the above lines, notwithstanding the potentially more stringent and restrictive dictates of the *Convention*,[92] suggests a strong adherence to the virtues of Millian utilitarianism-cum-liberalism, rather than a stricter Kantian notion of rights. Thus, even express recognition of a 'right' to privacy has not forced a fundamental change in the UK courts' reliance on the doctrine of breach of confidence for the protection of privacy.

The Australian position is less clear. After *Lenah Game Meats*,[93] there appears to be a division emerging between those in the High Court who might continue to support a liberal-utilitarian approach to the protection of privacy and those who might espouse a narrower Kantian idea of the future for privacy law. The fact that three of the six judges (Gleeson CJ, Kirby and Callinan JJ) expressed no definite aversion to protecting corporate privacy interests,[94] referred in their judgments to the need to balance interests between privacy and publication if conflicts arise,[95] and at various times have also supported the public interest

For the position in Australia, see *Lenah Game Meats* (2001) 185 ALR 1, 11–12 (Gleeson CJ), 95 fn 465 (Callinan J); and cf *A-G (UK) v Heinemann Publishers Australia Pty Ltd* [1987] 10 NSWLR 86, 169 (Kirby P). Contrast *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 452–6 (Gummow J); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, 110–11 (Gummow J).

91 See above n 40.

92 Lord Woolf MR averted to the notion that UK law might provide stronger protection of corporate privacy interests than the *Convention* requires in *R v Broadcasting Standards Commission* [2001] QB 885, 893–4 (finding that the BBC breached its statutory obligation to respect a corporation's privacy by secretly filming its activities; the position under art 8 of the *Convention* was left open). But even the position under the *Convention* is not entirely settled: see Lord Anthony Lester and David Pannick, *Human Rights Law and Practice: Supplement to the First Edition* (2000) 43. Interestingly, it is already well accepted under the *Convention* that rights may be balanced under an essentially utilitarian approach: see Grosz, Beatson and Duffy, above n 73, 170–1. Cf Lester and Pannick, above n 70, 68–9. For a similar position reached in German and French courts adjudicating privacy cases, see respectively Stoll, above n 73, 41–3, 47; Picard, above n 73, 93–4, 103.

93 (2001) 185 ALR 1.

94 In *Lenah Game Meats* (2001) 185 ALR 1, Gleeson CJ suggested that 'internal commercial communications' might be treated as private, although his Honour expressed some doubt about relying on the foundation of 'human dignity' for this purpose — 'that may be incongruous when applied to a corporation': at 13. Kirby J pointed to the incongruity of corporations claiming the benefit of a 'right' to privacy, but also left the question open: at 55–6. Callinan J, to the contrary, saw no difficulty in protecting commercial corporate privacy interests under a privacy tort: at 93–4.

95 Gleeson CJ cited with approval a statement from *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473 (Laws J) regarding the public interest defence to breach of confidence and also suggested that the constitutional freedom of political communication should be taken into account: *Lenah Game Meats* (2001) 185 ALR 1, 11–12. More broadly, Kirby J concluded that, with respect to conflicting values — including those implicating the constitutional freedom of political communication — 'what is involved in each case is the weighing of competing interests': at 60–1. See also the judgment of Callinan J: at 95 fn 465, 105.

exception to breach of confidence,[96] is consistent with their Honours seeing the equitable doctrine as offering a utilitarian solution to the protection of privacy interests — or 'rights' (notwithstanding that the term was only explicitly endorsed by Callinan J[97]). By contrast, the other three judges (Gummow and Hayne JJ, Gaudron J concurring) appeared to contemplate, if not a new tort or equitable wrong of privacy, then at least a rethinking of the breach of confidence doctrine to support their different conception of how a privacy right should be framed and supported. In particular, their Honours' suggestion that a commercial corporation could not enjoy a right of privacy[98] leaves at large the position previously assumed under the breach of confidence doctrine that commercial corporations could enjoy privacy protection.[99] Further, their Honours made no suggestion that interests in privacy and public discussion can be balanced (and it is noteworthy that Gummow J has been among the strongest critics of the public interest exception in the past, preferring instead to define the right to claim confidentiality strictly as excluding protection to iniquitous information).[100] Their reasoning is consistent with the Kantian idea of privacy as a fundamental and absolute right deriving from a basic concern with human dignity.[101] But it also reveals the inherent difficulty with the Kantian approach, if applied rigorously (as the United States experience has shown)[102] — that is, the risk of a worryingly narrow protection being accorded to privacy interests under the aegis of a strictly framed privacy right.

V CONCLUSION

In summary, the recent privacy rights discourse in a number of United Kingdom and Australian cases has been valuable in emphasising that personal

96 *Lenah Game Meats* (2001) 185 ALR 1, 11–12 (Gleeson CJ), 95 fn 465 (Callinan J). See also *A-G (UK) v Heinemann Publishers Australia Pty Ltd* [1987] 10 NSWLR 86, 169 (Kirby P).

97 See above n 52 and accompanying text.

98 See above n 56ff.

99 See cases listed above n 89. The implication seems to be that such interests might be protected as trade secrets (notwithstanding their personal nature and the fact that some at least would never be the subject of any commercial transaction). See especially the discussion by these judges of *Victoria Park Racing* (1937) 58 CLR 479 as the archetypal case (endorsing the suggestion of Professor W L Morison that the racecourse proprietor's interest was in 'seeking a protection which would enable [it] to sell the right to a particular kind of publicity'): *Lenah Game Meats* (2001) 185 ALR 1, 31–2. Alternatively, there might be a claim for passing off (but this would depend on finding deceptive conduct).

100 See, eg, *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 452–6 (Gummow J); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, 110–11 (Gummow J).

101 See above nn 71, 73, 81. Cf also references by Gummow and Hayne JJ to privacy as a 'fundamental value of personal autonomy' whose violation engenders feelings of 'sensibilities, offence and injury': *Lenah Game Meats* (2001) 185 ALR 1, 37.

102 For this as the experience with respect to US privacy law, see David Anderson, 'The Failure of American Privacy Law' in Basil Markesinis (ed), *Protecting Privacy* (1999), 166–7 ('[t]o vindicate what it sees as the mandates of the First Amendment, the Supreme Court has all but disabled the [privacy] tort'), the difficulty with determining what is properly 'private' a particular reason (at 148ff). Another factor is the restricted protection of commercial and corporate interests (although as Anderson reports, individual interests in controlling commercial exploitation of personality have received surprising protection: at 146–8). For the apparently different European position, see above n 92.

autonomy is the basis of the protection to be granted. However, the precise reasons accepted for privacy protection and the implications of those reasons for the scope of protection permitted is still to be elucidated. The liberal-utilitarian idea that persons should be free to conduct themselves as they wish, in the hope that they will flourish into better persons (and, ideally, better members of society as well) leaves scope for broader claims for a 'right' to privacy coupled with a utilitarian balancing of interests in cases where privacy and freedom of speech collide. The Kantian liberal idea that rights derive from personal integrity and once defined are absolute runs the risk of offering very limited protection to privacy in a culture where there is already well-established public and legal support for freedom of speech, especially political speech. My preference for the first approach over the second derives from its greater consistency with our liberal-utilitarian tradition, a distrust of the narrow absolutes of Kantian law, and a sympathy for Mill's idea that people flourish best if given some scope to live their lives free of the watchful scrutiny and interferences of others.