From Lenah Game Meats to Farm Transparency: Cultures of Privacy and Surveillance in Australia

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Introduction

This paper begins with a puzzle. Why, given privacy is so touted in Australia,[1] are our privacy and surveillance devices laws in such a moribund state with promise of reform always just around the corner but (so far) failing to materialise in the hands of legislators and judges? I want to suggest, in partial answer, that we need to pay more attention to Australian cultures of privacy and surveillance. Here I draw inspiration from American comparative lawyer James Whitman,[2] who in a perceptive article in the 2004 *Yale Law Journal* argues that the American culture of privacy is historically based on an idea of liberty (I would say libertarianism) centred in the home and against the state, while the European culture of privacy is more broadly focussed on an idea of human dignity – and this fundamental cultural difference helps to explain the rather different shape and character of the privacy laws in these two western jurisdictions. In Australia's case, I argue, the dominant culture is largely utilitarian going back to settler society – and this helps to explain our ongoing pattern of weak or ambiguous legal support for the right to privacy especially in the face of arguments for the public benefits of surveillance. However, in today's world, utilitarian as well as dignitarian and liberal considerations increasingly favour a different approach.

Australia's Utilitarian Tradition

In the mid-1980s, political economist Hugh Collins writing on Australia in the American journal *Dædalus* argued that what we have here is a 'Benthamite Society', even more than Britain itself.[3] Collins put this down to the transfer of English Chartism with its social policies designed around spread of democracy and levelling up pushed in the Australian colonies, through key political figures like Henry Parkes of the Birmingham political union, long-serving Premier of New South Wales, and influential mover behind the Commonwealth Constitution which marked the federation of the formerly separate colonies into a single Australian colony from January 1901.[4] I would suggest that the tendency towards Benthamism also has to do with being historically part

[1] See, for instance, the Australian Community Attitudes to Privacy Survey 2023 (ACAPS), < https://www.oaic.gov.au/engage-with-us/research-and-training-resources/research/australian-community-attitudes-to-privacy-survey> (90% 'agree' or 'strongly agree' that they have a clear understanding of why they should protect their personal information; 88% rate as 'fair' to 'excellent' their knowledge of 'privacy and data rights'; 84% 'agree' or 'strongly agree' that they want more control and choice over the collection and use of their information).

[2] James Q Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 *Yale Law Journal* 1151-1221.

[3] Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society (1985) *Dædalus* 147.

[4] Commonwealth of Australia Constitution Act (1900).

of a British colonial empire that was dependant on a high degree of bureaucratic surveillance to achieve its promised benefits. Of course, this was a feature not only of Australia but of other British colonies. But that New South Wales along with Tasmania and Western Australia were significant sites of British convict transportation, with New South Wales especially housing some 80,000 transported convicts over the late 18th and early 19th centuries, created special pressures for bureaucratic colonial surveillance. Indeed, as Matthew Allen and David Roberts point out,[5] a political impetus for such practices as convict passes producible on demand, weekly musters, and regular night watches was the need to counter Bentham's relentless public critiques of the colony as failing to provide an effective system of 'frequent and regular inspection' and claims that his panopticon prison design was 'the only effective instrument of reformative management'.[6]

What happens then to privacy in a society that models itself on its view of Benthamite principles (ie laws and policies designed with the public benefit in mind, coupled with effective systems of surveillance to achieve reformative management for criminals and others at the edge of society)? Well, if the starting point is one of the overriding benefits of 'frequent and regular inspection' the space for privacy seems limited. Although Bentham was not averse to thinking of privacy as sometimes serving utilitarian ends, for instance in his panopticon writings noting that curtains could be employed for privacy of patients in panopticon hospitals,[7] there is a heavy burden on the one claiming the (utilitarian) benefits of privacy to make the case in the face of the more obvious utilitarian arguments for the public benefits of surveillance. Moreover, a Benthamite attuned to rights as 'nonsense upon stilts', as Bentham famously put it, may find it hard to see privacy as a right having particular significance and weight in a utilitarian calculus.[8] At times, Bentham was more subtle in his treatment of rights. Natural rights were 'nonsense' for Bentham,[9] but he could occasionally appreciate a dignitarian conception of rights especially if this could be aligned to his arguments from utility – for instance, declaring to France in 1793 that it should emancipate its colonies: for 'if the happiness of mankind is your object, and the declaration of rights your guide, you will set them free'.[10] At this point, Bentham seems not that far removed from his erstwhile protegee John Stuart Mill, who in his 1859 essay 'On Liberty' suggests there is much to be gained from thinking of dignity and freedom contributing to human flourishing and social progress and thus to the general welfare of society.[11] But such progressive utilitarian reasoning did not find a place in the Australian colonies at or around the time of federation. Thus, a proposal for adding a

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[5] See Matthw Allen and David Andrew Roberts, '"Inspection the Only Effective Instrument of Reformative Management": Bentham, Surveillance and Convict Management in Early New South Wales', in Tim Causer, Margot Finn and Philip Schofield (eds*), Jeremy Bentham and Australia: Convicts, Utility and Empire*, London: UCL Press, 2022, 137, 148.

[6] Jeremy Bentham, 'Letter to Lord Pelham Giving a Comparative View of the System of Penal Colonization in New South Wales, and the Home Penitentiary System' (1802), in Tim Causer and Philip Schofield (eds), *Panopticon versus New South Wales and Other Writings on Australia /Jeremy Bentham*, London: UCL Press, 2022, 71, 77.

[7] Jeremy Bentham, 'Panopticon; Or, The Inspection House' (1787), in John Bowring (ed), *Collected Works of Jeremy Bentham*, vol IV, Edinburgh: William Tait, 1843, 37, 61; Jeremy Bentham, *The Panopticon Writings*, London: Verso, 1995, 82-83.

[8] Collins, 'Political Ideology in Australia' 149-150.

[99] Jeremy Bentham, 'Nonsense Upon Stilts' (1796), in Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires (eds), *The Collected Works of Jeremy Bentham: Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, Oxford: Oxford University Press, 2002, 317, 330.

[10] Jeremy Bentham, 'Emancipate Your Colonies!' (1793), in Schofield, Pease-Watkin, and Blamires (eds), *The Collected Works of Jeremy Bentham: Rights, Representation, and Reform*, 289, 312-313.

[11] John Stuart Mill, 'On Liberty' (1859), in Mary Warnock (ed), *John Stuart Mill: Utilitarianism, On liberty, Essay on Bentham*, London: Collins, 1962, 126. See also at 205 (considered as 'rights').

bill of rights to the Australian Constitution (from Tasmanian Attorney-General Andrew Inglis Clark) was rejected on the ground that the cause of federation should not be set back, always bearing in mind 'the recent appearance [and apprehended intentions] … of major European powers in the Pacific'.[12] Nor unlike in the United States, for instance, was one added in subsequent years.

Mid-Century Conservatism

Some of those who argued against a bill of rights in Australia at the time of federation,[13] thought that such matters were better left to be protected under the development of 'unwritten law' including here political conventions and the common law.[14] Parkes seemed to be of this school, arguing that 'the [unwritten] rules of political conduct' which guided British lawmakers here work better than 'any principles of government laid down by … Bentham'.[15] Parkes also approved of the pragmatist Mill, denoting him as 'among the finest, if not the greatest, thinkers of our time'.[16] And Mill saw a role for common law adapting 'to the growth of civilised society', albeit operating 'chiefly by stealth'.[17] Support might also be found in Samuel Warren and Louis Brandeis's advocacy for 'the right to privacy' shaping the future development tort law in the 1890 *Harvard Law Review*,[18] by which they meant a common law right to privacy (although later as a justice of the Supreme Court Brandeis was to advocate for a constitutional right to privacy as shaping the Fourth Amendment right against unreasonable searches and seizures, citing his earlier article with Warren).[19] Whitman suggests that in this early article Warren and Brandeis were rather European in their invocation of a dignitarian right to privacy as a right of 'inviolate personality'.[20] But there is a rather British flavour to their arguments as well, in particular in their framing of the right to privacy in quite Millian terms of dignity and liberty combining with human and social progress, and their citation of 19th century British breach of confidence and property rights cases where a sphere of private life was more or less supported.[21] Even so, we see little by way of legal support for development of a common law right to privacy in Australia in the decades following federation.

Consider, for instance, the case of *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* in 1937,[22] where the majority judges rejected the idea of 'a general right to privacy' under Australian law as supporting an expansive approach to the tort of nuisance to address surveillance of the

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[12] J A La Nauze, *The Making of the Australian Constitution*, Carlton, Vic: Melbourne University Press, 1972, 2, 230-231; John M Williams, *The Australian Constitution: A Documentary History*, Carlton, Vic: Melbourne University Press 2005, 705-710.
[13] See, for instance, Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43 *Federal Law Review* 53; Stephen Gageler and Will Bateman, 'Comparative Constitutional Law', in Cheryl Saunders and Adrienne Stone, eds, *The Oxford Handbook of the Australian Constitution*, Oxford UK: Oxford University Press, 2018, 261.
[14] See James Bryce, *The American Commonwealth*, London: Macmillan, vol 1, 1888, Introduction and ch XXII1; Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, London: Macmillan, 1889, Introduction; James Bryce, *Constitutions*, New York: Oxford University Press, 1908, essay VIII (Constitution of the Commonwealth of Australia).
[15] Henry Parkes, *Fifty Years in the Making of Australian History*, London: Longmans, Green & Co, 1892, vol 1, 253-254.
[16] Ibid, 241.
[17] John Stuart Mill, 'Bentham' (1938), in Warnock (ed), *John Stuart Mill: Utilitarianism, On liberty, Essay on Bentham*, 78, 108.
[18] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.
[19] *Olmstead v United States*, 277 US 438 (1928), Associate Justice Brandeis (dissenting).
[20] Whitman, 'The Two Western Cultures of Privacy', Part VIII.
[21] For instance, as in the mid-century case of *Prince Albert v Strange* (1849) 1 H & Tw 1 where Lord Cottenham LC even talks about the 'right' to privacy (although later authorities were not so robust in the language). And see Megan Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea*, Cambridge UK: Cambridge University Press, 2017, ch 2.
[22] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

plaintiff's raceground by defendant radio broadcaster whose man was posted on a high viewing platform on a neighbouring property and used this vantage point to broadcast details of the races.[23] Evatt J in dissent was sympathetic to the idea that a neighbour's overlooking could breach the privacy of those being observed, at least in some instances, and that the law of nuisance should develop to offer a degree of protection. Conversely, Dixon J in the majority seemed content to rely on a legalistic view that the law was and should be treated as what legal authorities stated it to be.[24] Further, according to Nicholas J at first instance, whose judgment appears to have influenced Latham CJ who gave one of the leading judgments in the High Court, there was no good policy reason for development of the law in this case of surveillance of activities on a racecourse for broadcasting purposes.[25] Interestingly, it was accepted even by this utilitarian-minded judge that that some types of surveillance, for instance of a 'peeping tom' keeping watch over women in their house, offered legitimate grounds for legal restraint, as otherwise the watching 'might interfere with the female inhabitants in the reasonable enjoyment of a house'.[26] Nevertheless, Nicholas J, and Latham CJ on appeal, suggested that a distinction should be drawn here where a plaintiff had (in their view) a weak case for loss of reasonable enjoyment on the part of people attending a race ground suffered as a result of the defendant's overlooking.[27] And, on the other side, there were the appreciable commercial and social benefits to be gained from the defendant's practice of broadcasting on the races for the enjoyment of its listening audience across Australia.[28] In sum, reading these judgments in *Victoria Park Racing v Taylor*, we have a sense that for these rather conservative judges the value of privacy, especially where framed in rather vague and tentative terms, may be easily outweighed by the (perceived to be) public benefit of surveillance.

1980s Reform Movement

By the 1980s, we come to the 1983 *Privacy* report of the Australian Law Reform Commission, chaired by the Hon Justice Michael Kirby, which led to the *Privacy Act 1988* for the first time subjecting Australian government agencies to a uniform set of privacy principles.[29] There is much in this report that connects Australia to international thinking about the value of privacy – including the right to privacy in art 12 of the Universal Declaration of Human Rights 1948 (where Herbert Vere Evatt, by then a minister in the Australian Labor government, presided over the UN General Assembly);[30] art 8 of the European Convention on Human Rights 1950;[31] art 17 of the UN's International Covenant on Civil and Political Rights of 1966 (which Australia signed in 1972 and which came into force in Australia in 1980);[32] and the data protection standards spelt out in

[23] Ibid, Latham CJ, 494-6.
[24] Ibid, Dixon J, 507-8. Query whether this legalism was Benthamite: as to Bentham's utilitarian view of ideal common law development, see Gerald Postema, *Bentham and the Common Law Tradition*, Oxford: Oxford University Press, 2d ed, 2019.
[25] *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1936) 7 SR (NSW) 322, Nicholas J, 341.
[26] Ibid.
[27] Contrast the recent USK Supreme Court decision in *Fearn v Board of Trustees of the Tate Gallery* [2023] 2 WLR 339 (granting a remedy in nuisance against the provision of a high viewing platform permitting overlooking of neighbours).
[28] See Megan Richardson and Marc Trabsky, 'Radio and the Technology of the Common Law in 1930s Australia: *Victoria Park Racing v Taylor Revisited*' (2011) 20 *Griffith Law Review* 1020.
[29] Australian Law Reform Commission, *Privacy*, Report 22, Canberra: Australian Government Printer, 1983.
[30] Universal Declaration of Human Rights, United Nations General Assembly, 10 Dec 1948.
[31] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov 1950.
[32] International Covenant on Civil and Political Rights (UN 1966), Australian Treaty Series Number [1980] ATS 23, signed by Australia 12/18/1972, entry into force for Australia 11/13/1980 (Article 41 entry into force for Australia 01/28/1993).

OECD guidelines for the protection of privacy and trans-border data flows of 1980 (where Kirby chaired the OECD expert group).[33] The UDHR, ECHR, ICCPR and OECD Guidelines are referenced in the ALRC report as part of 'An Emerging Pattern of Laws Protecting Privacy',[34] and the latter two are also referenced in the Preamble to the 1988 Act. At the same time, there is much in the ALRC report that is focussed on domestic conditions, and here the arguments are put in distinctively Australian terms. The report posits that: 'Whether a basis for a "right to privacy" is found in natural law, religious doctrine, utilitarian equations, cultural imperatives or political theory, there is an increasing expectation that privacy interests should be better recognised by the legal system';[35] and suggests that 'interests' in privacy should be understood to include 'the interest in freedom from surveillance and from interception of one's communications': what the ALRC called 'communications and surveillance privacy'.[36] Even so, the report acknowledges that surveillance is deeply engrained in the fabric of Australian society, being embedded in the systems, technologies and practices of policing and security and other public government functions and proliferating through private business and employment often in conjunction with government.[37]

With surveillance embedded in the Australian governance ethos and practice in the ways described in the ALRC's *Privacy* report, coupled with rather ambiguous support for the 'right' to privacy (as also exposed and discussed in the report), we can see the political difficulty of setting significant statutory limits on surveillance practices in aid of those made subject to these practices with the radical imposition of privacy principles applying to federal agencies. It was a bold step to propose and then to pass the federal *Privacy Act* in 1988. In years after, most state and territory agencies gained their own regimes modelled to an extent on the federal regime.[38] And by just over a decade the federal *Privacy Act* was expanded to encompass the private sector in 2000, albeit with substantial carve-outs for journalism, small business and employee records, and with existing carve-outs for policing and security enlarged.[39] Even so, and despite these efforts, much of what may be termed privacy regulation in Australia was – and remains - left to a patchwork of other laws such as telecommunications laws, state and territory surveillance devices regimes,[40]

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[33] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, adopted as a Recommendation of the Council of the OECD, 23 Sept 1980, Paris: OECD, 1981.
[34] ALRC, *Privacy*, vol 1, ch 1, [24]-[25], and generally ch 5.
[35] Ibid, [81].
[36] Ibid, [46].
[37] Ibid, ch 2, [93] ff (surveillance technologies]; ch 3, [238] ff (private sector); ch 4, [309] ff (employment).
[38] See eg *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2000* (Vic*)* (superseded by the *Privacy and Data Protection Act 2014* (Vic))*; Information Privacy Act 2009* (Qld) (currently under amendment: see *Information Privacy and Other Legislation Amendment Bill 2023*).
[39] *Privacy Amendment (Private Sector) Act 2000* (Cth), extending the *Privacy Act* to the private sector but adding ss 6C-D (small business exemption), 7B (journalism, employee records exemptions) and 7(1A) (disclosures to intelligence bodies). See further NPP 2.1(g) (secondary use or disclosure 'required or authorised by or under law') and NPP 1.3(e) (collection 'required by law'); cf the older Information Privacy Principles (applicable to government) IPPs 2(d) and 10(c). Cf also the current *Privacy Act*, after a further round of amendments in 2012 substituting the NPPs and IPPs with a common set of Australian Privacy Principles, APP 3.4(a), 6.2(b). And note further s 16A of the Act as inserted by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* ('permitted general situations' including 'where an entity has reason to suspect … unlawful activity, or misconduct of a serious nature … ', and 'the entity reasonably believes the collection, use or disclosure is necessary …').
[40] See eg *Telecommunications (Interception and Access) Act* 1979 (Cth) as amended by the *Telecommunications and other Legislation Amendment (Assistance and Access) Act* 2018; *Telecommunications Act 1997* (Cth) Pt 13; *Invasion of Privacy Act 1971* (Qld); *Surveillance Devices Act 1999* (Vic); *Workplace Surveillance Act 2005* (NSW) and *Surveillance Devices Act 2007* (NSW). Consultation continues over proposals for reform of the *Invasion of Privacy Act* in Queensland: see Queensland Law Reform Commission, Review of Queensland's Laws relating to Civil Surveillance and the Protection of Privacy in the Context of Current and Emerging Technologies, Report no 77, Feb 2020, <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0003/653322/QLRC-Report-77-online.pdf>.

legal powers to conduct searches and seizures,[41] provisions about unfair or deceptive trading in trade practices statutes,[42] and the common law which, as Mill said in the 19th century, may adapt to fit the needs of modern society but in ways that are not necessarily transparent or fully fashioned. And here again surveillance appears as a significant feature of the leading cases of this period.

A leading example is the 2001 case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[43] where animal rights activists surreptitiously filmed a Tasmanian game meat abattoir and passed on the footage to the broadcaster via an intermediary to be aired on the 7.30 Report. The abattoir argued that its activities were 'private'. However, the court (with Callinan J dissenting) rejected the plaintiff's invitation to come up with a new privacy tort – unlike the UK and New Zealand courts around this time (in the UK under the impetus of the Human Rights Act 1998 giving effect to the ECHR,[44] and in New Zealand following the US model inspired by Warren and Brandeis of courts developing torts in keeping with the times).[45] The possibility of the High Court developing a privacy tort was not ruled out in Australia for some suitable future case.[46] But among the reasons offered by Gleeson CJ and Gummow and Hayne JJ for not taking the step in this case were the difficulty of defining 'privacy' and the lack of an Australian tradition of rights (according to Gleeson CJ – although going on to highlight the dignitarian value of privacy), the unsuitability of fashioning a privacy tort for this plaintiff given its ostensibly commercial interests (a point made forcefully by Gummow and Hayne JJ), and a general preference in the High Court for developing traditional doctrines incrementally to meet new situations and circumstances (as talked about especially by Gummow and Hayne JJ).[47] As Gleeson CJ put it (with Gummow and Hayne not disagreeing on this point), breach of confidence would have been sufficient in this case had the information being confidential.[48] It was a significant statement of the flexibility of this ancient doctrine to address modern privacy concerns. But the plaintiff here conceded that the scenes filmed were not confidential, and the concession was rightly made according to Gleeson CJ, given the possibility of lawful access to the site for instance via government inspections.[49] So that was the end of it. In the result, the surveillance footage revealing the behind-the-scenes treatment of possums at the abattoir could be shown for the illumination of the Australian viewing public without the need to rely on a public interest (or other) defence to breach of confidence or to consider the relevance and effect of the implied constitutional freedom of political communication which the High Court in earlier cases had found in the democratic principles of the Constitution.[50]

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[41] Eg under the *Crimes Act 1914* (Cth) and further the *Telecommunications (Interception and Access) Act* 1979.
[42] See eg s 18ff Australian Consumer Law (ACL), Sched 2 *Competition and Consumer Act 2010*s (Cth), superseding s 52 ff *Trade Practices Act 1974* (Cth).
[43] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
[44] See, foreshadowing the development of the UK misuse of private information tort, *Campbell v MGN Ltd* [2004] 2 AC 457, Lord Nicholls (dissenting).
[45] See, for instance, *Hosking v Runting* [2003] 3 NZLR 385 (public disclosure of private facts tort) and *C v Holland* [2012] 3 NZLR 672 (intrusion on seclusion tort). These cases offer another example of divergence between the Australian and New Zealand jurisdictions: see Stephen Kós and Diana Qiu, 'Parallel Universes' [2023] *NZ Law Review* 61.
[46] *Australian Broadcasting Corporation v Lenah Game Meats*, Gummow and Hayne JJ [106]-[110].
[47] Ibid, Gleeson CJ [30]-[43]; Gummow and Hayne JJ [[108]-[111] and [123]-[135]. Note how Gleeson CJ talks about privacy in terms of 'human dignity' ([43]) while Gummow and Hayne JJ stress 'the fundamental value of personal autonomy' ([126]).
[48] Ibid, Gleeson CJ [39].
[49] Ibid, [25]. Although query what the result would have been had the issue been argued.
[50] See ibid [35], Gleeson CJ noting the potential relevance of the implied freedom; and further Kirby J [192]-[221].

Legacies

Fast-forward now to 2023. We have a new *Privacy Act Review* report from the Attorney-General's Department,[51] which proposes a range of useful reforms to including (and most relevantly for present purposes) possible changes to the Act's journalism, small business and employee records exemptions,[52] a right to claim damages for breach of the Act (the so-called direct right of action), and a new statutory privacy tort as earlier recommended by the Australian Law Reform Commission in its 2014 Report on *Serious Invasions of Privacy in the Digital Era*. The government in its formal response has agreed (or agreed 'in principle') to these proposals, in a number of instances subject to further consultation and reflection.[53] It has also agreed to the report's further proposal that the public interest in privacy should be acknowledged in the Act, allowing potentially for a more explicit acknowledgment of the (progressive) utilitarian value of privacy and better balancing with other public interests.[54] We are still waiting to see what legislative reforms will follow all the further consultation and reflection. In the meantime, further reform efforts are ongoing, including a National Indigenous Australians Agency project on developing an Australian Public Service Wide Framework for Indigenous Data and Governance which in its emphasis on group and collective privacy highlights how (in this context, as in others) privacy should be regarded as more than a matter of individual concern.[55] The Information Commissioner has also stepped up efforts to enforce the Act's current provisions with a range of investigations and determinations, including against AI surveillance technology company Clearview AI and its Australian Federal Police client,[56] and bringing proceedings against Facebook in the wake of the Cambridge Analytica profiling scandal.[57] We also have calls for reform of surveillance devices regimes, and reports with thoughtful proposals for reform.[58] The common law also continues to be relied on although, as in the past, developments here are still quite tentative and uncertain.[59]

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[51] Attorney-General's Department, *Privacy Act Review*, Report (2022), made publicly available 16 February 2023, <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>.

[52] Ibid, proposals 26 (direct right of action) and 27 (statutory tort for serious invasion of privacy). See also proposals 6, 7 and 9 re reform of the journalism, small business and employee records exemptions, subject to further consultation .

[53] Government Response to the Privacy Act Review Report: Achieving a Just and Secure Society, September 2023, <https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report>.

[54] Privacy Act Review report, proposal 3.2 and Government Response 6 (and also noting a Parliamentary Joint Committee on Human Rights investigating whether Australia should enact a federal Human Rights Act, which is due to report in 2024).

[55] National Indigenous Australians Agency (NIAA), APS-wide Framework for Indigenous Data and Governance, <https://www.niaa.gov.au/indigenous-affairs/closing-gap/implementation-measures/aps-wide-framework-indigenous-data-and-governance>. See in a like vein, under breach of confidence, *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71.

[56] *Commissioner initiated investigation into Clearview AI, Inc (Privacy) [2021*] AICmr 54; *Commissioner Initiated Investigation into the Australian Federal Police (Privacy) [2021]* AICmr 74 And see (as to the Act's jurisdiction over Clearview AI) *Clearview AI Inc and Australian Information Commissioner* [2023] AATA 1069 (8 May 2023).

[57] See (for preliminary proceedings) *Facebook Inc v Australian Information Commissioner* (2022) 289 FCR 217.

[58] See especially recently Queensland Law Reform Commission, *Review of Queensland's Laws Relating to Civil Surveillance and the Protection of Privacy in the Context of Current and Emerging Technologies*, Report 77, February 2020.

[59] See eg, relying *inter alia* on breach of confidence, *Evans v Health Administration Corporation* [2019] NSWSC 1781 (settled), and further class actions emerging in the wake of the 2022 Optus and Medibank breaches; and Michael Rivette, 'Privacy Class Actions' (2020) 94 *Australian Law Journal* 791. Likewise, in more conventional privacy cases claims like equitable breach of confidence continue to be relied on in lieu of developing a common law privacy tort: see *Giller v Procopets* (2008) 24 VR 1; *Wilson v Ferguson* [2015] WASC 15. But see also, suggesting a range of claims including privacy torts, earlier case of *Grosse v Purvis* [2003] QDC 151 (Skoien DJ) and *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (Hampel J). Cf the UK misuse of private information tort (with its focus on intrusion) see *PJS v News Group Newspapers Ltd* [2016] AC 1081.

So, in *Smethurst v Commissioner of Police*,[60] journalist Annika Smethurst and Nationwide News engaged in a dangerous game of surveillance of government surveillance with their attempted exposé of the government's plan to extend the surveillance powers of its Signals Directorate, and Smethurst was subjected to her own surveillance in the form of a police search and seizure extending from her home to her telephone. The case was argued successfully as one of trespass, with the warrant found to have breached s 3E of the Crimes Act in failing to state properly the offence charged. But clearly this was viewed as a case about privacy as well as about property, with Kiefel CJ, Bell and Keane JJ noting that 'a person's interest in privacy is recognised in all modern bills of rights and it has achieved a status in international human rights law'.[61] Comparison was also made with the 18th century English case of *Entick v Carrington* (which, among other things, served as an inspiration for the US Fourth Amendment) where an illegal search and seizure of the journalist's John Entick's premises resulted in a successful claim for trespass in court, with Lord Camden treating this as a case not only about the sanctity of property but also about the importance of privacy.[62] Yet Smethurst was unsuccessful in regaining her information on the basis of the trespass, with a privacy tort not argued by these media plaintiffs (and nor was breach of confidence). Nor was there any argument for a privacy tort (or breach of confidence) in the more recent case of *Farm Transparency International Ltd v New South Wales*,[63] where activists' entered farm properties in New South Wales to film behind-the-scenes animal management practices. Rather the activists were subjected to proceedings under the NSW *Surveillance Devices Act 2007*, and despite the plaintiffs' efforts to argue otherwise, the court held that the interests in privacy, property and freedom of political communication were sufficiently balanced in the framing of the Act's provisions to satisfy the constitutional implied freedom of political communication.[64]

In conclusion, privacy is evidently becoming more valued by Australia's policymakers and judges along with publics more generally in this country – and not only on its own terms (per Kiefel CJ *et al* in *Smethurst* to be viewed as a special 'interest' as recognised in modern bills of rights and carrying its 'own status': *viz* as an interest akin to a right?), but in relation to a complex of other rights and freedoms such as property and free speech. However, so it seems is surveillance, with this now being deployed by more actors and in more novel ways – including not just government and business actors but civil society groups and media who are embracing the idea that latitude for surveillance can benefit their investigative reporting activities geared to their free speech and (other) public good ends. This presents some interesting challenges in years ahead.

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[60] *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177.
[61] Ibid, Kiefel CJ, Bell and Keane JJ [24].
[62] *Entick v Carrington* (1765) 2 Wils KB 275, Lord Camden. See also *Coco v The Queen* (1994) 179 CLR 427 (also cited in *Smethurst*), Mason CJ, Brennan, Gaudron, McHugh JJ [8] on the need for clear and direct language being required for the issue of a warrant under s 43 of the *Invasion of Privacy Act 1971* (Qld) abrogating the 'the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right'.
[63] *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655.
[64] Ibid, Kiefel CJ and Keane J [13], [36]-56]; cf Edelman J [223]-[264].