THE DAWN OF THE AGE OF THE DRONES: AN AUSTRALIAN PRIVACY LAW PERSPECTIVE

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I INTRODUCTION

Suppose a homeowner habitually enjoys sunbathing in his or her backyard, protected by a high fence from prying eyes, including those of an adolescent neighbour. In times past such homeowners could be assured that they might go about their activities without a threat to their privacy. However, recent years have seen technological advances in the development of unmanned aerial vehicles ('UAVs'), also known colloquially as drones, that have allowed them to become reduced in size, complexity and price. UAVs today include models retailing to the public for less than $350 and with an ease of operation that enables them to serve as mobile platforms for miniature cameras.[1] These machines now mean that for individuals like the posited homeowner's adolescent neighbour, barriers such as high fences no longer constitute insuperable obstacles to their voyeuristic endeavours. Moreover, ease of access to the internet and video sharing websites provides a ready means of sharing any recordings made with such cameras with a wide audience. Persons in the homeowner's position might understandably seek some form of redress for such egregious invasions of their privacy. Other than some form of self-help,[2] what alternative measures may be available?

Under Australian law this problem yields no easy answer. In this country, a fractured landscape of common law, Commonwealth and state/territory legislation provides piecemeal protection against invasions of privacy by cameras

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1 Asher Moses, 'Privacy Fears as Drones Move into Mainstream', *The Sydney Morning Herald* (online), 18 February 2013 <http://www.smh.com.au/technology/technology-news/privacy-fears-as-drones-move-into-mainstream-20130217-2elcj.html>. See also Renee Viellaris, 'Unmanned Aircraft Bought Online Being Deployed to Monitor Private and Public Property', *Courier Mail* (online), 31 August 2013 <http://www.couriermail.com.au/news/queensland/unmanned-aircraft-bought-online-being-deployed-to-monitor-private-and-public-property/story-fnihsrf2-1226707858451>.

2 Such as may be encouraged by bounties for shooting down drones, as at least one American town has been reported as considering: Keith Coffman, 'Don't Like Drones? Folks in Deer Trail, Colorado Mull Paying Citizens to Shoot Them Down', *The Sydney Morning Herald* (online), 18 July 2013 <http://www.smh.com.au/technology/technology-news/dont-like-drones-folks-in-deer-trail-colorado-mull-paying-citizens-to-shoot-them-down-20130718-2q5rd.html#ixzz2ZMSXOsCH>.

mounted on UAVs. It is timely, at what may be regarded as the early days of the drone age, to consider these laws and to identify deficiencies that may need to be addressed lest, to quote words that are as apt today as they were when written over 120 years ago, 'modern enterprise and invention … through invasions upon [their] privacy, [subject victims] to mental pain and distress, far greater than could be inflicted by mere bodily injury.'[3]

II UNMANNED AERIAL VEHICLES

A Uses

A UAV may be regarded as any aircraft that operates without a human in direct contact with it.[4] The first use of a UAV in modern times was when the United States Navy commissioned the design of an 'aerial torpedo' for use against German U-boats during World War I.[5] The Curtiss Aeroplane Company produced the *Speed-Scout*, a UAV designed to be launched from naval vessels carrying a 1000lb bomb. The first successful flight of a *Speed-Scout* was on 6 March 1918.[6]

In more recent times, UAVs have entered the public consciousness through their use in military operations in countries such as Afghanistan.[7] The qualities that make UAVs valuable for such deployments include:

- their wide range of applications (including surveillance and as a weapons platform);
- their efficiency in terms of accuracy of surveillance and weaponry;[8]
- the cost saving in not requiring a pilot and reducing the need for conflict on the ground;
- their long range and reach; and

3 Samuel D Warren and Louis D Brandeis, 'A Right to Privacy' (1890) 4 *Harvard Law Review* 193, 196.

4 Brendan Gogarty and Meredith Hagger, 'The Laws of Man over Vehicles Unmanned: the Legal Response to Robotic Revolution on Sea, Land and Air' (2008) 19 *Journal of Law, Information and Science* 73, 74.

5 Roland E Weibel and R John Hansman, 'Safety Considerations for Operation of Unmanned Aerial Vehicles in the National Airspace System' (Report No ICAT-2005-1, International Centre for Air Transportation, Massachusetts Institute of Technology, March 2005) 19.

6 Laurence R Newcome, *Unmanned Aviation: A Brief History of Unmanned Aerial Vehicles* (American Institute of Aeronautics and Astronautics, 2004), cited in Weibel and Hansman, above n 5, 19.

7 Gogarty and Hagger, above n 4, 82–5. The authors provide an interesting examination of the use of UAVs by the military as well as the emerging uses of UAVs in civilian life.

8 Although this may not always have been the case. See, eg, Justin Elliott, 'Washington's Silence Creates Doubt on Deaths', *The Sydney Morning Herald* (online), 23 June 2012 <http://www.smh.com.au/world/washingtons-silence-creates-doubt-on-deaths-20120622-20tjy.html>.

- their acceptance by the public as preferable to conflict on the ground with the corresponding risk to friendly troops.[9]

As Weibel and Hansman have observed, the success of military UAV deployments and desire on the part of UAV manufacturers for expanded markets has led to an increasing interest for UAVs to perform a variety of roles in civilian life.[10] The broad range of potential civil and commercial applications includes:[11]

- *Remote sensing* including pipeline and power line monitoring, volcanic sensing, mapping,[12] meteorology, and geological, agricultural, vegetation[13] and wildlife[14] surveying;
- *Disaster response* such as flood and geological disaster monitoring;[15]
- *Surveillance* for law enforcement, traffic monitoring,[16] coastal/maritime patrol and border patrol;[17]
- *Search and rescue* of individuals lost or stranded on land or at sea;[18]
- *Transport* of food, medicine and other cargoes;[19]
- *Communications relay* of the internet and mobile phone service;[20]

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9 See, eg, Brendan Gogarty and Isabel Robinson, 'Unmanned Vehicles: A (Rebooted) History, Background and Current State of Art' (2012) 21 *Journal of Law, Information and Science* 1; Mary Ellen O'Connell, 'Seductive Drones: Learning from a Decade of Lethal Operations' (2012) 21 *Journal of Law, Information and Science* 116, 136.

10 Weibel and Hansman, above n 5, 21.

11 Ibid 22. See also Federal Aviation Administration, 'Integration of Civil Unmanned Aircraft Systems (UAS) in the National Airspace System (NAS) Roadmap' (Report, Department of Transport (United States), 7 November 2013) <http://www.faa.gov/about/initiatives/uas/media/UAS_Roadmap_2013.pdf>.

12 See, eg, Li Changchun et al, 'The Research on Unmanned Aerial Vehicle Remote Sensing and its Applications' (Paper presented at 2nd International Conference on Advanced Computer Control, Shenyang, China, 27–29 March 2010) 644–7.

13 See, eg, Jose A J Berni et al, 'Thermal and Narrowband Multispectral Remote Sensing for Vegetation Monitoring from an Unmanned Aerial Vehicle' (2009) 47 *IEEE Transactions on Geoscience and Remote Sensing* 722.

14 See, eg, George Pierce Jones IV, Leonard G Pearlstine and H Franklin Percival, 'An Assessment of Small Unmanned Aerial Vehicles for Wildlife Research' (2006) 34 *Wildlife Society Bulletin* 750.

15 See, eg, Changchun et al, above n 12.

16 See, eg, B Coifman et al, 'Roadway Traffic Monitoring from an Unmanned Aerial Vehicle' (2006) 153 *IEEE Intelligent Transport Systems* 11.

17 See, eg, Matthew DeGarmo and Gregory M Nelson, 'Prospective Unmanned Aerial Vehicle Operations in the Future National Airspace System' (Paper presented at 4th Aviation Technology, Integration and Operations Forum, Chicago, United States, 20–22 September 2004) 4–5.

18 See, eg, Patrick Doherty and Piotr Rudol, 'A UAV Search and Rescue Scenario with Human Body Detection and Geolocalization' (Paper presented at 20th Australian Joint Conference on Artificial Intelligence, Gold Coast, Australia, 2–6 December 2007).

19 See, eg, Aleksandra Faust et al, 'Aerial Suspended Cargo Delivery through Reinforcement Learning' (Technical Report No TR13-001, Adaptive Motion Planning Research Group, University of New Mexico, 7 August 2013). <https://www.cs.unm.edu/amprg/Publications/afaustTR13-001.pdf>; Jay Price McClatchy, 'Unmanned Cargo Helicopters Prove Worth in Afghanistan, Leading Way to Civilian Uses', *Miami Herald* (online), 6 May 2013 <http://www.miamiherald.com/2013/05/06/3378859_drone-cargo-helicopters-prove.html>.

20 See, eg, DeGarmo and Nelson, above n 17, 3–4.

- *Delivery* for diverse purposes such as fire-fighting and crop dusting;
- *Entertainment* including cinematography and advertising; and
- *Broadcasting* by television and radio organisations.[21]

This list is not exhaustive. For example, UAVs may also be used for purely recreational purposes. However, the list serves to highlight some important points. UAVs may be used in a civilian sphere by government agencies, corporations or individuals. For example, a government department may use a UAV in lieu of more costly fixed-wing aircraft or helicopters to monitor areas in flood or drought, as well as to detect and/or fight bushfires or in police tactical operations. Television and radio stations may use UAVs in lieu of helicopters for traffic reports and other reporting purposes, and film and advertising companies may use UAVs for filming aerial shots for their productions. By contrast, individuals may use UAVs simply for recreational purposes – model aircraft flying in a local park or reserve is not an uncommon sight.

While a UAV may be intentionally deployed on one of the above applications, it may also in the course of that deployment unintentionally capture images of individuals involved in activities that they would prefer not to be seen by others, whether legal (but embarrassing) or illegal. Thus, for example, a UAV scanning bushland for a lost bushwalker, monitoring crops or filming landscapes for a television or movie production might inadvertently capture images of a couple having sexual relations or someone urinating amongst the foliage. Alternatively, it might capture images of a person or persons involved in the cultivation of illegal drugs. By the same token, a UAV used for recreational purposes might include a person seeking to satisfy their voyeuristic urges such as the posited adolescent intentionally spying on someone sunbathing in his or her backyard or on a public beach. Such accidental or deliberate invasions of privacy may raise difficult questions in terms of current Australian privacy laws, and provide a useful setting for exploring the nuances and inconsistencies in the law, and to identify those areas that may be in need of reform.

B Regulation of UAVs

The use of civilian air space is regulated by the *Civil Aviation Safety Regulations 1998* (Cth). These regulations provide rules for users of all aircraft and also aim to maintain the safety of those on the ground. In 2002 a new part 101 was inserted enacting rules governing the use of UAVs, the first time in the world that such regulations had been enacted.

These provisions are primarily concerned with the safe operation of UAVs. There is a general prohibition on unsafe operation, that is, operation of an unmanned aircraft in a way that creates a hazard to another aircraft, person or

21 Ibid 6–7.

property.[22] This is supported by more specific provisions that apply to unmanned aircraft generally, including stipulations that:

- unmanned aircraft cannot be operated higher than 400 feet above ground level within three nautical miles of an aerodrome unless permission is given;[23]
- the maximum operating height of an unmanned aircraft is 400 feet above ground level unless approved;[24]
- a person cannot cause a thing to be dropped or discharged from an unmanned aircraft in a way that creates a hazard to another aircraft, a person or property;[25] and
- an unmanned aircraft can only be operated in clear weather.[26]

Divisions 101.F.1–4 separates UAVs into large UAVs (defined as inter alia an unmanned aeroplane with a launch mass greater than 150 kilograms or an unmanned rotorcraft with a launch mass greater than 100 kilograms),[27] micro UAVs (defined as a UAV with a gross weight of 100 grams or less)[28] and small UAVs (defined as a UAV that is neither large nor micro).[29] These divisions only apply to the operation of large UAVs and small UAVs which are operated for purposes other than sport or recreation. It does not apply to a UAV while it is being operated by a person who keeps it in sight nor to micro UAVs.[30] To give these definitions some context, the UAVs of a similar size to those used by the United States in military actions (such as the eight-metre long *Predator* drone)[31] would constitute large UAVs while most UAVs available for purchase from stores or online by members of the public for use as a camera platform, or those used by television stations to cover sports like cricket and football, would be considered to be small UAVs.

Under these regulations, a UAV cannot be legally operated within 30 metres of a person who is not involved in the operation of the UAV[32] and must not be operated over populous areas[33] (which means areas which have a sufficient density of population for some aspect of the operation, or some event that might happen during the operation – in particular, a fault in, or failure of, the aircraft – to pose an unreasonable risk to the life, safety or property of somebody who is in

22 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.055(1).
23 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.075.
24 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.085.
25 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.090.
26 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.095.
27 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.240 (definition of 'large UAV').
28 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.240 (definition of 'micro UAV').
29 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.240 (definition of 'small UAV').
30 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.235.
31 See Gogarty and Robinson, above n 9, 9.
32 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.245.
33 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.280.

the area but is not connected with the operation).[34] Further, a small UAV can only operate in areas outside those approved by the Civil Aviation Safety Authority ('CASA') if, where the UAV has operated more than 400 feet above ground level, the operator has CASA's approval to do so and the UAV stays clear of populous areas.[35] This offence is one of strict liability. Large UAVs require airworthiness certification and may only be operated with CASA's approval.[36]

The Deputy Director of CASA, Terry Farquharson, has acknowledged the formidable challenges that the agency is facing in trying to regulate UAVs. In a speech in July 2013,[37] he noted that there were 30 holders of operator's certificates for large UAVs, double the number in the previous year, and that the number of model aircraft being used was impossible to estimate as they were easily accessible in the open market and their operation required no training or certification. It was further estimated that over 90 per cent of UAVs operating in Australia weighed less than seven kilograms and were becoming impossible to regulate.[38] In an earlier speech,[39] the Director of CASA, John McCormick, outlined plans to introduce a new part 102 into the *Civil Aviation Safety Regulations 1998* (Cth) to bring the regulations concerning UAVs (which would be renamed Remotely Piloted Aircraft ('RPA')) in line with other regulatory

34 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.025.

35 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.250.

36 *Civil Aviation Safety Regulations 1998* (Cth) reg 101.275.

37 Terry Farquharson, 'RPAs (Drones) in Civil Airspace and Challenges for CASA' (Speech delivered at the Sir Richard Williams Foundation, National Gallery of Australia, 3 July 2013) <http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD:1380917481:pc=PC_101593>.

38 A recent illustration of the challenges posed by UAVs was an incident in 2010 in which a Pacific Blue 737-800 passenger jet at Perth airport had a near miss with a UAV operated by a person or persons unknown which had taken off from a nearby park and fortunately was caught in the jet's wash rather than being sucked into one of the jet's engines: ibid. More recently, a UAV known as a quad-copter with a camera mounted to its underside crashed into the Sydney Harbour Bridge before the start of the International Navy Fleet Review: Belinda Kontominas, 'Mystery Drone Collides with Sydney Harbour Bridge', *The Sydney Morning Herald* (online), 4 October 2013 <http://www.smh.com.au/nsw/mystery-drone-collides-with-sydney-harbour-bridge-20131004-2uzks.html>. It was consequently discovered that it was being operated by an enthusiast who was testing new equipment on his UAV at night when he lost control of the UAV, which hit the bridge, flew over traffic and crashed in front of a train: Colin Cosier, 'Crashed Drone's Extraordinary Journey', *The Sydney Morning Herald* (online), 26 November 2013 <http://media.smh.com.au/featured/crashed-drones-extraordinary-journey-4955165.html>. In the United States, a quad-copter operated by ABC7 New York was being flown above busy Manhattan streets when it clipped a building and crashed onto the footpath, narrowly missing passers-by: 'Small Drone Crashes into New York City Sidewalk', *Huffington Post* (online), 2 October 2013 <http://www.huffingtonpost.com/2013/10/02/drone-crash-new-york-city_n_4033566.html>.

39 John McCormick, 'Development of UAS in Civil Airspace and Challenges for CASA' (Speech delivered at the Association for Unmanned Vehicle Systems Australia, Melbourne, 25 February 2013) <http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_101374>.

bodies such as the United States Federal Aviation Administration.[40] While CASA has acknowledged that privacy concerns go hand in hand with civil use of UAVs, it has taken the attitude that that is an issue for the Privacy Commissioner rather than for CASA, which is instead focused on safety issues.

III PRIVACY LAW IN AUSTRALIA: AN ADEQUATE RESPONSE?

Privacy law in Australia is a patchwork of common law and statute at both Commonwealth and state/territory levels. There have also been recommendations for a legislative response made by two law reform commissions that, if ever enacted, would have application to invasions of privacy facilitated by cameras mounted on UAVs.

A Personal Privacy and the Australian Common Law

For many decades it was believed that Australian common law provided no protection for personal privacy per se, based on obiter in the High Court case *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*.[41] In this respect, the Australian common law mirrored a longstanding position in the United Kingdom.[42] However, in 2001 the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[43] had an opportunity to reconsider the position and declared that the common understanding of the *Victoria Park* obiter was erroneous and that there was no impediment to Australian common law evolving to recognise an independent cause of action for invasions of privacy. Justices Gummow and Hayne (with whom Gaudron J agreed) approved the analysis offered by Professor W L Morison:

> The plaintiff in the case was a racecourse proprietor [which] was not seeking privacy for [its] race meetings as such, [it] was seeking a protection which would enable [it] to sell the rights to a particular kind of publicity. [Its] sensitivity was 'pocket book' sensitivity … The independent questions of the rights of a plaintiff who is genuinely seeking seclusion from surveillance and communication of what surveillance reveals, it may be argued, should be regarded as open to review in future cases even by courts bound by the High Court decision.[44]

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40 In the United States, the Federal Aviation Administration has granted approval for certain uses of civilian UAVs but has resisted approving the use of self-flying vehicles: Federal Aviation Administration, above n 11. The report addresses privacy concerns to the extent of a proposal to declare six testing sites for drones, with each site required to develop and make public a privacy policy. While these test sites' policies are 'not intended to predetermine the long-term policy and regulatory framework' they will 'help inform the dialogue': at 12.

41 (1937) 58 CLR 479, 496 (Latham CJ), 521 (Evatt J) ('*Victoria Park*').

42 *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372 (Megarry V-C); *Kaye v Robertson* (1990) 19 IPR 147, 150 (Glidewell LJ), 154 (Bingham LJ), 155 (Leggatt LJ).

43 (2001) 208 CLR 199 ('*Lenah Game Meats*').

44 Ibid 249 [108], citing W L Morison, 'Report on the Law of Privacy' (Paper No 170, Parliamentary Library, Parliament of New South Wales, 1973) [12].

In response to the submission that Australian courts had not developed 'an enforceable right to privacy' because of what generally was taken to follow from the failure of the plaintiff's appeal in *Victoria Park*, their Honours declared that '*Victoria Park* does not stand in the path of the development of such a cause of action.'[45] Similarly, Callinan J concluded that:

> It seems to me that, having regard to current conditions in this country, and developments of the law in other common law jurisdictions, the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made.[46]

His Honour cautioned, however, that '[a]ny principles for an Australian tort of privacy would need to be worked out on a case by case basis in a distinctly Australian context.'[47]

Justices Gummow and Hayne (with Gaudron J agreeing) and Callinan referred to the experience in the United States, where it has been recognised that privacy is protected by four separate torts, which were described by William Prosser as 'tied together by the common name, but otherwise [having] almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone"':[48]

1. Intrusion upon the plaintiff's seclusion or solitude, or into his [or her] private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[49]

However, it has been suggested that both portrayal in a false light and appropriation represent 'a questionable application of "privacy" to circumstances that have only the most tenuous relationship to the concept'.[50]

Further, as Callinan J warned:

> Australian courts need to be wary about applying any decisions of the courts of the United States in which any asserted right to publication is involved, as the question on the merits will usually be bound up with an assertion of constitutional rights under the First Amendment.[51]

The 'distinctly Australian context'[52] referred to by Callinan J would include an Australian tort of invasion of privacy being subject to the constitutional

45 *Lenah Game Meats* (2001) 208 CLR 199, 248 [106].
46 Ibid 328 [335] (citations omitted).
47 Ibid 328 [332].
48 William Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 389.
49 Ibid. See also *Time Inc v Hill,* 385 US 374, 383 n 7 (1967); *Cox Broadcasting Corporation v Cohn,* 420 US 469, 488 (1975); American Law Institute, *Restatement (Second) of Torts* (1977) § 652A.
50 Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford University Press, 1989) 35–6.
51 *Lenah Game Meats* (2001) 208 CLR 199, 328 [331].
52 Ibid 328 [332].

guarantee of freedom of communication on government or political matters.[53] In addition, any common law protection of personal privacy would need to preserve coherency in the law by not encroaching upon the established domain of an established cause of action.[54]

As Justices Gummow and Hayne (with whom Gaudron J agreed) pointed out:

> [I]n Australia, one or more of the four invasions of privacy, to which reference has been made, in many instances would be actionable at general law under recognised causes of action. Injurious falsehood, defamation (particularly in those jurisdictions where, by statute, truth of itself is not a complete defence), confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the plaintiff, and the activities of eavesdroppers and the like), passing-off (as extended to include false representations of sponsorship or endorsement), the tort of conspiracy, the intentional infliction of harm to the individual based in *Wilkinson v Downton* and what may be a developing tort of harassment, and the action on the case for nuisance constituted by watching or besetting the plaintiff's premises, come to mind.[55]

Chief Justice Gleeson described the interest providing the foundation for a tort protecting privacy as human dignity.[56] By contrast, Gummow and Hayne JJ (Gaudron J agreeing) thought that the 'fundamental value of personal autonomy' provided the relevant basis.[57] Their Honours further opined that of the torts recognised in the United States, unreasonable intrusion upon seclusion and disclosure of private facts come closest to reflecting a concern for this privacy interest.[58] Those categories provide a useful framework for examining invasions of privacy by use of cameras mounted on UAVs.

B Unreasonable Intrusions

A UAV may be used for intentional invasions of privacy such as where a camera is mounted on a UAV for the deliberate purpose of spying on a neighbour or engaging in some other voyeuristic activity. However, UAVs may also lead to unintentional intrusions such as where the purpose of the UAV is to monitor traffic, crops or wildlife, or to search for a lost bushwalker but accidentally captures images of an individual or individuals engaging in activities that they would prefer not be revealed to others.

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53 See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Lenah Game Meats* (2001) 208 CLR 199, 224 [35] (Gleeson CJ).

54 See, eg, *Sullivan v Moody* (2001) 207 CLR 562, 581 [55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame v New South Wales* (2002) 211 CLR 317, 335 [28] (Gleeson CJ).

55 *Lenah Game Meats* (2001) 208 CLR 199, 255 [123] (citations omitted). These comments predated the adoption of truth alone as a defence in all jurisdictions: *Civil Laws (Wrongs) Act 2002* (ACT) s 135; *Defamation Act 2005* (NSW) s 25; *Defamation Act 2006* (NT) s 22; *Defamation Act 2005* (Qld) s 25; *Defamation Act 2005* (SA) s 23; *Defamation Act 2005* (Tas) s 25; *Defamation Act 2005* (Vic) s 25; *Defamation Act 2005* (WA) s 25.

56 *Lenah Game Meats* (2001) 208 CLR 199, 226 [43].

57 Ibid 256 [125], citing *Douglas v Hello! Ltd* [2001] QB 967, 1001 [126] (Sedley LJ).

58 *Lenah Game Meats* (2001) 208 CLR 199, 256 [125].

Depending on the circumstances, intrusion on a person's privacy by use of a UAV may give rise to a number of established causes of action such as trespass to land and private nuisance. However, neither of these provides a panacea for such an intrusion. A brief examination of these established causes of action and their respective limitations is warranted, together with a consideration of a potential distinct intrusion tort that may protect privacy in the circumstances.

It has long been established that the right to sue for trespass to land is not limited to interferences on the surface of the land alone but extends to infractions of the air space above the land.[59] However, that right does not extend to the heavens (as suggested by the old Latin maxim *cuius est solum ejus est usque ad coelum et ad inferos*)[60] but instead is limited to the height of reasonable usage. Thus, in *Bernstein*, Griffiths J remarked:

> The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land … and declaring that above that height he has no greater rights in the air space than any other member of the public.[61]

Accordingly, no trespass was committed by a Cessna aircraft flying over the plaintiff's property to take an aerial photograph of it. The court was unmoved by the plaintiff's arguments concerning the exploitative nature of the defendant's conduct, nor the possibility that the photographs might fall into the wrong hands.

As noted, UAVs operate at a height that is lower than normal aviation. At the same time they may reach a height above that which would be necessary for the ordinary use and enjoyment of land, and therefore fly in airspace in which a landowner has no greater rights than any other member of the public, including the operator of the UAV. Moreover, trespass to land has a number of other deficiencies making it unsuitable as a means of addressing the risk of invasion of privacy by use of a UAV. From the outset, a plaintiff may not bring a claim unless he or she has the requisite title to sue, which is not limited to ownership but includes exclusive possession of the land.[62] Thus, while it might help the backyard sunbather if he or she owned or leased the premises, it would not be available to a person who was not able to exercise control over the property such as a guest or other visitor staying on the premises. Nor, as Griffiths J recognised in *Bernstein*, would it assist even the owner or tenant if the aircraft stayed in the airspace above an adjoining property.[63]

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59 *Bernstein v Skyviews & General Ltd* [1978] QB 479 ('*Bernstein*').
60 *Bury v Pope* (1586) Cro Eliz 118; 78 ER 375.
61 Ibid 488.
62 *Newington v Windeyer* (1985) 3 NSWLR 555, 563 (McHugh JA).
63 *Bernstein* [1978] QB 479, 488.

Naturally, trespass to land also offers no avenue for redress by a person who is subjected to surveillance by a camera mounted on a UAV while that person is in a public place, such as a public beach or street or in bushland.

In *Bernstein*, Griffiths J suggested that constant surveillance of the plaintiff's land by air flights over the land may be actionable as private nuisance.[64] Violation of a person's human dignity or personal autonomy by watching or filming him or her by means of a camera mounted on a UAV may constitute an unreasonable interference with the use or enjoyment of land, although it has been held that 'besetting' alone may not be sufficient.[65] However, 'besetting' combined with noise or some other objectionable behaviour may be sufficient.[66] The reasonableness of such an interference is a question that depends upon the circumstances of the individual case. If, for example, the extent of the backyard sunbather's complaint was that he or she was disturbed by a combination of being filmed and the noise made by his or her neighbour's UAV while it was being flown in the airspace above the adjoining property or in airspace above a height of reasonable usage for the purposes of trespass to land, then factors such as the locality, duration, time of day, frequency and extent of the interference would be taken into account when balancing the sunbather's property rights against the desire of the neighbour to fly the UAV. It is a question of degree: a significant interference for a short period of time may be judged to be unreasonable, as may be a slight interference for a considerable period of time.[67]

Like trespass, however, an action on the case for nuisance would be unavailable without the requisite interest in the land (possession or an immediate right to possession) providing title to sue.[68] It would therefore offer no recourse to a person who was only visiting the property or in a public place like a beach or bushland.

One lower court has ventured towards recognising a distinct cause of action for an unreasonable intrusion[69] but there has as yet been no appellate court decision to accept the invitation extended by the High Court in *Lenah Game Meats*. In *Grosse v Purvis*,[70] the plaintiff sued the defendant, her former lover who had been stalking her, on a number of grounds including invasion of privacy. Senior Judge Skoien of the District Court of Queensland referred to the American tort of unreasonable intrusion[71] and took what his Honour described as

64 Ibid 489.

65 *Ward, Lock & Co Ltd v Operative Printers' Assistants' Society* (1906) 22 TLR 327, 329 (Vaughan Williams LJ).

66 *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760, 767 (Mason JA); *Hubbard v Pitt* [1976] 1 QB 142, 175 (Lord Denning MR).

67 *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683, 691 (Veale J).

68 *Malone v Laskey* [1907] 2 KB 141, 151 (Barnes P), 154 (Fletcher Moulton LJ).

69 *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706.

70 (2003) Aust Torts Reports ¶81-706.

71 See American Law Institute, *Restatement (Second) of Torts* (1977) § 652B.

the 'bold step … the first step in the country'[72] of recognising a claim where the following elements were established:

(a) a willed act by the defendant,

(b) which intrudes upon the privacy or seclusion of the plaintiff,

(c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,

(d) and which causes the plaintiff detriment in the form of mental physiological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.[73]

Subsequent decisions have been less willing to embrace such a tort.[74]

In *Grosse v Purvis*, Skoien SJ saw an unreasonable intrusion tort as a counterpart to the criminal offence of stalking under section 359B of the *Criminal Code* (Qld). His Honour decided that it was unnecessary to decide whether there could be liability in the case of negligent acts since in the circumstances he was considering, the defendant had intended his various acts.[75] Similarly, while he considered that the defence of public interest should be available in an appropriate case, this was not an issue he needed to decide since there was no such possibility involved in that case. An appeal was lodged against his Honour's ruling but the case was settled before the appeal was heard.

Senior Judge Skoien purported to base his formulation on the American tort of unreasonable intrusion, but there are differences between the two. The *Restatement (Second) of Torts* describes the American tort in these terms:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another person or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[76]

This tort is committed where there is an intention to engage in conduct to achieve a particular outcome, namely the intrusion upon solitude or seclusion of another. Accordingly, an individual may be liable where he or she uses a camera with the intention of capturing particular images.[77] No liability arises, however, where a camera *accidentally* captures an image since such an outcome would amount to an *unintentional* intrusion.

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72 *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706, 64 187 [442].

73 Ibid 64 187 [444]. Senior Judge Skoien supported the judgment by holding that while other torts that had been committed, including trespass to person, trespass to land and intentional infliction of harm based on *Wilkinson v Downton* [1897] 2 QB 57, none of these covered the entirety of the defendant's behaviour in the same way that the tort of privacy would.

74 See, eg, *Kalaba v Commonwealth* [2004] FCA 763, [6] (Heerey J); *Chan v Sellwood* [2009] NSWSC 1335, [37] (Davies J); *Giller v Procopets* (2008) 24 VR 1, 35–6 [167]–[168] (Ashley JA), 106–7 [447]–[450] (Neave JA). Cf *Gee v Burger* [2009] NSWSC 149, [53] where McLaughlin AsJ described an unreasonable intrusion tort as 'arguable.'

75 *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706, 64 187 [446].

76 American Law Institute, *Restatement (Second) of Torts* (1977) § 652B.

77 *Koeppel v Speirs*, 808 NW 2d 177 (Iowa Sup Ct, 2011) (covert camera in unisex toilet).

By contrast, in his Honour's formulation, Skoien SJ separated intention and intrusion into two separate elements, namely: (a) a willed act by the defendant (b) which intrudes upon the privacy or seclusion of the plaintiff. In other words, unlike the American tort, the defendant must only willingly do an act, rather than willingly intrude upon privacy or seclusion. The significance may be illustrated by reference to images captured by a camera mounted on a UAV. The hypothetical adolescent neighbour flying his UAV in order to capture images of the sunbathing householder would incur liability in terms of both section 652B of the *Restatement (Second) of Torts* (since it would be an intentional intrusion upon the solitude or seclusion of the householder) and Senior Judge Skoien's formulation (since it would be a willed act which intruded upon privacy or seclusion of the householder). On the other hand, it could be argued that where a UAV operated by a television station for the purposes of conducting traffic reports flew over the householder's property and accidentally broadcast to its viewers video of the householder sunbathing, there may be liability under Senior Judge Skoien's formulation. This would be because the operation of the UAV would constitute the willed act (satisfying the first element), which would have the consequence of intruding upon the householder's privacy or seclusion (satisfying the second element). However, as already noted, no liability would arise for the purposes of the American tort in such a case since such an accidental capture would amount to an unintentional intrusion upon the householder's solitude or seclusion.

If, instead, Australian courts preferred to adopt a formulation of an unreasonable intrusion tort that is more closely aligned with the American tort, a question may still remain as to what constitutes an 'intentional intrusion'. As Peter Cane has remarked, intention is a concept that is known to both tort and criminal law, although the meaning assigned to the term is not necessarily the same.[78] This is because the focus of criminal law is on the agent of the crime whereas tort law tends to focus on the interests of the victim as much as the conduct of the tortfeasor.[79] Consequently, tort law often regards intention as including recklessness, in the sense of a conscious indifference to the risk of the outcome occurring.[80] Cane suggested that this is because 'the person who intends that their conduct should produce a particular consequence, and the person who is reckless as to whether their conduct will produce a particular consequence, both engage in the conduct deliberately.'[81]

According to Cane, it is the distinction between deliberate and non-deliberate behaviour that has the prime significance for tort law. The question would therefore be, in the example posed of the television station operating the UAV that accidentally streams to its viewers video of the sunbathing householder,

78 Peter Cane, '*Mens Rea* in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533, 534.
79 Ibid 553.
80 Ibid 545.
81 Ibid 536.

whether the station would be regarded as having been reckless in the sense of being consciously indifferent to the risk of such an event occurring. It may be relevant to such question if some reasonable precaution would have prevented the event, such as delaying the broadcasting of video to viewers until the camera was over its intended object (namely the traffic situation) or recording video instead of live streaming so that any images of private activities may be removed before broadcast.

Senior Judge Skoien's third element may be thought similar to a requirement in the American tort. It is also similar to the test of private matters suggested by Gleeson CJ in *Lenah Game Meats*:

> An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. *The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private*.[82]

Accordingly, the mere fact that a householder might be sunbathing in his or her backyard does not necessarily mean that that act is private if that backyard is open to view from taller buildings that surround it. Similarly, if the person were sunbathing on a public beach, that activity may not be regarded as private. The circumstances of the location must be taken into account in determining whether a reasonable person, applying contemporary standards, would understand that the activities were meant to be unobserved. However, there may be a point of distinction with Senior Judge Skoien's formulation, which refers to an intrusion '*in a manner* which would considered highly offensive to a reasonable person of ordinary sensibilities'.[83] In other words, on this formulation it is the *manner* of the intrusion that is to be offensive as contrasted with the intrusion itself, as suggested by the American tort. It may be possible to argue that even if activities in the backyard were visible from other buildings or if a person was sunbathing on a public beach and open to view with the naked eye, being filmed by a camera, and possibly recorded for playback, is an entirely different thing.[84] In this sense the manner of the intrusion that is being filmed by camera as opposed to being seen by the naked eye, might be regarded as highly offensive to a reasonable person of ordinary sensibilities.

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82 *Lenah Game Meats* (2001) 208 CLR 199, 226 [42] (emphasis added). Cf *Schifano v Greene County Greyhound Park Inc*, 624 So 2d 178 (Ala Sup Ct, 1993) (photograph used in a promotional brochure without reference to or written permission of the subjects was not an invasion of privacy where the photo was not offensive and the subjects did not provide 'unique value').

83 *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706, 64 187 [444] (emphasis added).

84 Cf *Peck v United Kingdom* (2003) 36 EHRR 41.

The fourth element in Senior Judge Skoien's formulation is also problematic. His Honour saw a plaintiff's suffering of embarrassment, hurt, distress and, a fortiori, post-traumatic stress disorder as an actionable detriment.[85] However, an unreasonable intrusion is in the nature of a direct, intentional event: the plaintiff's dignity is affronted as soon as the intrusion takes place. Under current Australian thinking, this would suggest that an invasion of privacy by unreasonable intrusion is more akin to a trespass rather than an action on the case. Consequently, it should be actionable per se rather than requiring a plaintiff to prove damage of any kind.[86]

The American tort recognises a defence of public interest in the case of an unreasonable intrusion. The possibility of such defence was acknowledged by Skoien SJ. Such a defence would seem appropriate where a camera mounted on a UAV filmed a nefarious activity, such as drug cultivation in a forest or perhaps drug dealing inside a home, presuming it would be possible for such activities to be regarded as being private in the first place.

C Disclosure of Private Facts

While an intrusion may affront a person's dignity or encroach upon that person's autonomy, it is possible that even greater damage may be inflicted by a disclosure of private facts to a wider audience.

Section 652D of the *Restatement (Second) of Torts* outlines how the American tort provides a remedy for such conduct in these terms: 'one person gives publicity to a matter concerning the private life of another which is matter of a kind that (a) would be highly offensive to a reasonable person and (b) is not a legitimate concern to the public.'[87]

Some American jurisdictions apply an alternative formulation in the form of: (1) a public rather than private disclosure; (2) of private rather than public facts; (3) which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; and (4) which is not outweighed by a sufficient legitimate public interest in disclosure.[88]

Courts in both the United Kingdom and New Zealand have now recognised a cause of action for public disclosure, although different routes were taken to achieve that outcome. The New Zealand Court of Appeal in *Hosking v Runting*[89] cited advances in technology, changing societal attitudes and a greater focus on human rights at an international level as providing a strong impetus for such a development. The Court considered the appropriate response was to develop the common law to recognise a tort in terms similar to the American disclosure tort.

85 *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706, 64 187 [445].
86 See *Platt v Nutt* (1988) 12 NSWLR 231.
87 American Law Institute, *Restatement (Second) of Torts* (1977) § 652D.
88 See William Prosser et al (eds), *Prosser and Keeton on Torts* (West Publishing, 5th ed, 1984) 856–7.
89 [2005] 1 NZLR 1.

This development now seems to have the approval of at least a majority of the Supreme Court of New Zealand.[90]

By contrast, in the United Kingdom, under the influence of the *Human Rights Act 1998* (UK) c 42, the action for breach of confidence has evolved into an action which may be described as one for 'misuse of private information',[91] one manifestation of which may protect an individual's privacy.[92] The *Human Rights Act 1998* (UK) c 42 obliges English courts to strike a balance between two rights guaranteed under the *European Convention on Human Rights*:[93] the right to privacy (article 8) and the right to free expression (article 10). Many of the cases have considered this balance in the context of breaches of privacy by the media. In that context the balancing exercise has been expressed in terms of a two stage enquiry:

(1) a determination of whether the person publishing the information knows or ought to know that there is a reasonable expectation the information in question will be kept confidential;[94] and

(2) once that threshold was reached, balancing, as a matter of fact and degree, the interest of the recipients in publishing the information, giving full recognition to the importance of free expression and with a measure of latitude shown for the practical exigencies of journalism such as the fact that editorial decisions must often be made in the context of tight deadlines.[95]

If they were to extend a comparable protection against disclosure of private facts, Australian courts would likewise face a choice between developing the common law in an approach akin to that taken in New Zealand, perhaps by reference to the American tort, or applying and/or developing an existing cause of action in a similar fashion to the approach taken in the United Kingdom.

In *Doe v Australian Broadcasting Corporation*,[96] a case involving a media defendant publishing the name and other identifying particulars of a rape victim, Hampel J of the Victorian County Court acknowledged that she was also taking a 'bold step' by adopting the former approach and recognising for the first time in

90 *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277, 296 [48] (Blanchard J), 300 [63] (Tipping J), 309 [104]–[105] (McGrath J).

91 *Campbell v MGN Ltd* [2004] 2 AC 457, 464–5 [14] (Lord Nicholls).

92 *Douglas v Hello! Ltd* [2008] 1 AC 1, 72 [255] (Lord Nicholls).

93 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

94 *Campbell v MGN Ltd* [2004] 2 AC 457, 466 [21] (Lord Nicholls), 480 [85] (Lord Hope), 495 [134] (Baroness Hale), citing *A v B plc* [2003] QB 195, 202 [4], 207 [11] (Lord Woolf CJ). See *Venables v News Group Newspapers Ltd* [2001] Fam 430, 462 [81] (Butler-Sloss P).

95 *Campbell v MGN Ltd* [2004] 2 AC 247, 475 [62] (Lord Hoffman), 491 [120] (Lord Hope), 505 [169] (Lord Carswell).

96 [2007] VCC 281.

Australia a distinct tort protecting against public disclosure. Her Honour did not think that the absence of previous authority was a bar to such a development because otherwise the capacity of the common law to develop to reflect contemporary values would be 'stultified'.[97] Her Honour also did not think it necessary to state an exhaustive definition of the cause of action and instead considered it sufficient to hold that an action could lie where there was an unjustified publication of information that the plaintiff had a reasonable expectation would remain private.

As noted, Gummow and Hayne JJ in *Lenah Game Meats*[98] thought that 'confidential information … (in particular, as extended to information respecting the personal affairs and private life of the plaintiff, and the activities of eavesdroppers and the like)' may provide sufficient redress for some instances of invasion of privacy. Chief Justice Gleeson similarly expressed support for this view.[99] Subsequently, the Victorian Court of Appeal in *Giller v Procopets* held that a generalised tort of unjustified invasion of privacy should not be recognised where there was an existing cause of action that could be developed and adapted to meet new circumstances.[100] Such a position accords with the need to preserve coherency in the law, a requirement of Australian law noted above.

The traditional formulation of the cause of action for breach of confidence has three essential elements:

(a) the information must have the necessary quality of confidence;
(b) the information must be communicated in circumstances importing an obligation of confidence; and
(c) there must be an unauthorised use of that information to the detriment of the communicator.[101]

Information which is recognised as satisfying the first element was originally in the nature of business or trade secrets[102] but was subsequently extended to embrace protection for personal secrets, such as domestic confidences passing between a husband and wife during marriage,[103] sexual affairs,[104] sexual activities[105] and, in an appropriate case, the identity of persons.[106] These latter matters are of a kind that may also satisfy Chief Justice Gleeson's test of private matters as 'kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be

97 Ibid [161].
98 (2001) 208 CLR 199, 255 [123].
99 Ibid 224 [34].
100 (2008) 24 VR 1, 35–6 [167]–[168] (Ashley JA), 107 [450]–[452] (Neave JA).
101 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47–8 (Megarry J).
102 See, eg, *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513.
103 See, eg, *Argyll v Argyll* [1967] Ch 302.
104 See, eg, *Stephens v Avery* [1988] Ch 449; *A v B Plc* [2003] QB 195.
105 See, eg, *Giller v Procopets* (2008) 24 VR 1.
106 See, eg, *G v Day* [1982] 1 NSWLR 24 (identity of a police informant); *Australian Football League v The Age Co Ltd* (2006) 15 VR 419 (identity of AFL players alleged to have failed drug tests).

unobserved … [the disclosure of which would be] highly offensive to a reasonable person of ordinary sensibilities.'[107] Thus private matters may also have the necessary quality of confidence.[108] In the context of images captured by a camera mounted on a UAV, there are a wide range of matters that may be regarded as falling within the ambit of this definition. Prima facie, this includes persons engaging in an intimate activity such as nude or topless sunbathing, sexual encounters or surreptitiously urinating in the bush.

Whether that information has been obtained in circumstances imparting an obligation of confidence will depend upon whether the circumstances are such that any reasonable person standing in the shoes of the recipient should have realised on reasonable grounds that the information was obtained in confidence.[109] In *Lenah Game Meats*,[110] Gleeson CJ approved the following statement by Laws J in *Hellewell v Chief Constable of Derbyshire*:

> 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. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence.[111]

The Chief Justice also added that:

> If the activities filmed were private, then the law of breach of confidence is adequate to cover the case. I would regard images and sounds of private activities, recorded by the methods employed in the present case, as confidential. *There would be an obligation of confidence upon the persons who obtained them, and upon those into whose possession they came,* if they knew, or ought to have known, the manner in which they were obtained.[112]

It would seem that when applied in the context of private matters, his Honour would support a degree of conflation of the first two elements of the cause of action. In other words, where an activity is private not only does it have a quality of confidence, any images captured of that activity give rise to the requisite obligation of confidence. In the context of cameras mounted on UAVs, any images of private activities captured would on this reasoning satisfy the first two requirements for an action for breach of confidence. The action would therefore be established if there were an actual or threatened disclosure, irrespective of

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107 *Lenah Game Meats* (2001) 208 CLR 199, 226 [42].

108 Ibid 225 [39].

109 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 48 (Megarry J); *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215–6 (Lord Greene MR).

110 (2001) 208 CLR 199, 224 [34].

111 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807. There have been other English cases which have held that photographs or video obtained by surreptitious means should be regarded as having been received in circumstances importing an obligation of confidence: *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134; *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1; *Douglas v Hello! Ltd* [2001] QB 967, 1011–13 [164]–[171] (Keene LJ).

112 *Lenah Game Meats* (2001) 208 CLR 199, 225 [39] (emphasis added).

whether that disclosure was intentional or unintentional. Thus, the action would lie against, for example, the adolescent neighbour deliberately sharing with others any images captured of the sunbathing homeowner. It might equally extend to images of the same householder accidentally captured by a traffic report UAV broadcasting live to a television news audience or images of an amorous couple having a sexual encounter in the bush unintentionally captured by a search and rescue UAV broadcast live to its audience. As in the case of intrusion, the crucial question would therefore be what constitutes 'private activities' for these purposes. In other words, in terms suggested by Gleeson CJ, 'kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved … disclosure [of which] would be highly offensive to a reasonable person of ordinary sensibilities'.[113]

In the United States the disclosure tort has a defence based on public interest. The similar defence was adopted for the tort in New Zealand, and under the influences of article 10 of the *European Convention on Human Rights*[114] a claim for misuse of private information in the United Kingdom must be balanced against the public interest in free expression. Prior to this development English courts recognised a public interest defence to breaches of confidentiality, particularly in the case of personal secrets.[115] By contrast, while there have been isolated suggestions in Australian courts that a public interest defence to a breach of confidence should be recognised in this country,[116] the weight of authority still favours a narrower 'iniquity' defence.[117] This defence was originally conceived in terms of crimes.[118] It has more recently been variously described in terms of either a crime, a civil wrong or serious misdeed of public importance of a character of public importance, in the sense that what is being disclosed affects the community as a whole or affects the public welfare;[119] matters the disclosure of which would 'protect the community from destruction, damage or harm';[120] or of 'matters, carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the

113 *Lenah Game Meats* (2001) 208 CLR 199, 226 [42].

114 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009).

115 See, eg, *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171; *Woodward v Hutchins* [1977] 2 All ER 751; *Khashoggi v Smith* (1980) 124 Sol J 149; *W v Edgell* [1990] Ch 359.

116 See, eg, *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 169 (Kirby P); *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513, 525–6 (Powell J).

117 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434; *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73; *Sullivan v Sclanders* (2000) 77 SASR 419, 427 [45] (Gray J); *Australian Football League v The Age Co Ltd* (2006) 15 VR 419, 440 [83] (Kellam J).

118 *Gartside v Outram* (1856) 26 LJ Ch 113, 114 (Wood VC).

119 *Australian Football League v The Age Co Ltd* (2006) 15 VR 419, 436–7 [70]–[71] (Kellam J).

120 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 57 (Mason J).

country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.'[121] Thus, in Australia while there may be a defence for the disclosure of images of, for example, drug cultivation or some other nefarious activity which may be captured by a camera mounted on a UAV (assuming those activities may be regarded as private), in other cases the iniquity defence is likely to be of little assistance to the operator of a UAV.

In *Lenah Game Meats*, Gleeson CJ observed that if the action for breach of confidence were applied in a privacy context it would be necessary to give effect to the constitutional freedom of government or political communication.[122] As first recognised in *Lange v Australian Broadcasting Corporation*,[123] the *Australian Constitution* protects the freedom of communication between the people concerning political or government matters, which enables them to exercise a free and informed choice as electors. 'Political or government matters' on a narrow interpretation extends to discussion concerning the suitability of an individual for public office[124] and those seeking public office[125] and the public conduct of persons who are engaged in activities that have become the subject of political debate, including trade union leaders, Aboriginal political leaders, and perhaps political and economic commentators.[126] On a wide interpretation it could embrace 'social and economic features of Australian society' since they are matters potentially within the purview of government.[127] Thus, in order for an action for breach of confidence to be appropriate and adapted to serve the system of government prescribed by the *Australian Constitution* it would be necessary to recognise, in addition to an iniquity defence, a defence allowing free communication concerning government or political matters. Accordingly, if a camera mounted on a UAV were to capture images of, for example, a politician, candidate or other political figure engaging in a private activity, which contradicts that person's public platform or otherwise compromises them in the execution of their public duties, then disclosure of those images may be protected by the constitutional freedom of communication regarding government or political matters.

However, the need to preserve coherency in the law adds another layer of complexity to this issue. Preserving coherency requires that Australian courts not recognise a novel claim where to do so would encroach upon an established

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121 *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 260 (Ungoed-Thomas J), cited with approval in *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31, 55 (Rath J). See also *Church of Scientology of California v Kaufman* [1973] RPC 635, 648–9 (Goff J).

122 (2001) 208 CLR 199, 224 [35].

123 (1997) 189 CLR 520.

124 See, eg, *Peterson v Advertiser Newspapers Ltd* (1995) 64 SASR 152; *Brander v Ryan* (2000) 78 SASR 234.

125 *Brander v Ryan* (2000) 78 SASR 234, 249 [110] (Lander J).

126 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ).

127 *Hogan v Hinch* (2011) 243 CLR 506, 544 [49] (French CJ).

cause of action.[128] Thus a breach of confidence that in the course of invading a person's privacy also conveys innuendo about the subject may more properly be the province of the law of defamation, with its careful balance between reputation and free speech, including defences such as truth, the extended common law qualified privilege[129] and statutory qualified privilege.[130] The second and third of these include a requirement that the publisher's conduct be reasonable in the circumstances, judged by a set of guidelines that include the extent to which the published matter is in the public interest and whether the matter published concerns the performance of the public functions or activities of the person.[131]

The English case *Mosley v News Group Newspapers Ltd*,[132] demonstrates that disclosures of private activities may take different forms. In that case, the head of world Formula 1 motor racing and son of the wartime fascist leader Oswald Mosley sued a newspaper for reporting that he had participated in a 'Nazi orgy', which Mosley instead insisted was sadomasochistic activities between consenting adults. Mosley successfully sued for breach of privacy, Eady J deciding that the only possible public interest in the circumstances that could have outweighed the plaintiff's 'fairly obvious' right to privacy was the alleged Nazi role-play and mockery of Holocaust victims by a person in such an influential position but that there was no evidence that such elements formed part of the event.[133] His Honour thought that when determining whether the public interest in free expression outweighed the reasonable expectation of privacy in the context of a newspaper publication which disclosed the plaintiff's private activities, a requirement of 'responsible journalism' determined in accordance with the guidelines propounded by Lord Nicholls in *Reynolds v Times Newspapers Ltd*[134] was appropriate.[135] Had the case arisen in Australia, the disclosure of the sadomasochistic activities combined with the assertions of Nazi overtones, or some other innuendo, would have been a reflection on the plaintiff's reputation and therefore more properly been the province of defamation law rather than an action for breach of confidence or a distinct disclosure tort.

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128 *Sullivan v Moody* (2001) 207 CLR 562, 581 [55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

129 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571–4 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, and Kirby JJ).

130 *Civil Laws (Wrongs) Act 2002* (ACT) s 139A; *Defamation Act 2005* (NSW) s 30; *Defamation Act 2006* (NT) s 27; *Defamation Act 2005* (Qld) s 30; *Defamation Act 2005* (SA) s 28; *Defamation Act 2005* (Tas) s 30; *Defamation Act 2005* (Vic) s 30; *Defamation Act 2005* (WA) s 30.

131 *Civil Laws (Wrongs) Act 2002* (ACT) s 139A(3)(a)–(b); *Defamation Act 2005* (NSW) s 30(3)(a)–(b); *Defamation Act 2006* (NT) s 27(3)(a)–(b); *Defamation Act 2005* (Qld) s 30(3)(a)–(b); *Defamation Act 2005* (SA) s 28(3)(a)–(b); *Defamation Act 2005* (Tas) s 30(3)(a)–(b); *Defamation Act 2005* (Vic) s 30(3)(a)–(b); *Defamation Act 2005* (WA) s 30(3)(a)–(b).

132 [2008] EMLR 20.

133 Ibid 713 [122]–[123].

134 [2001] 2 AC 127, 205; see also *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359.

135 *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, 718 [140].

Images captured by a camera mounted on a UAV may be disclosed to others deliberately (whether motivated by a desire to expose hypocrisy, cause mischief or some other reason) or by accident. Where that disclosure is accompanied by innuendo reflecting on the reputation of the person filmed, such a case should attract the tort of defamation. This may be thought of as more likely in the case of deliberate disclosures but need not be so. Where the disclosure is accidental it is still possible for that publication to convey innuendo. It is worth bearing in mind in this context that the publisher's intention or motive is irrelevant to the question of whether published material is defamatory or not.[136] Only where no innuendo is conveyed would the matter fall to be determined as an invasion of privacy, whether by means of an action of breach of confidence or by a distinct disclosure tort. In the case of the former cause of action, it has now been held that damages are available for mere distress.[137]

In the case of deliberate disclosure where no innuendo is conveyed, which might occur where, for example, an adolescent neighbour films a sunbather and then uploads the captured images to the internet, it may be that an action based on *Wilkinson v Downton*[138] will provide a remedy for some invasions of privacy. As noted, the possibility of such an action applying was recognised by Gummow and Hayne JJ in *Lenah Game Meats*.[139] In *Wilkinson*, a case involving Mr Downton telling Mrs Wilkinson as a prank that her husband had been in an accident and that she should go to him, Wright J held that the defendant was liable for having 'wilfully done an act calculated to cause physical harm to the plaintiff', since the defendant's act was 'so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant'.[140] It was immaterial that more harm was done than was expected or anticipated since 'that is commonly the case with all wrongs.'[141]

Wilkinson led to an extensive body of case law in the United States, where the action is styled as an intentional infliction of emotional distress but balanced by a requirement that the defendant must have engaged in 'extreme and outrageous behaviour.'[142] However, the cause of action has had less of an impact in Anglo-Australian law, perhaps due to the insistence upon damage in the form of longer lasting psychiatric harm rather than mere distress.[143] Indeed, in *Wainwright v Home Office*,[144] Lord Hoffmann (with whom the other Law Lords agreed) suggested that in cases of psychiatric injury there was no point in seeking to rely on intention when negligence will do just as well.[145] *Wilkinson* was

136 *Lee v Wilson* (1934) 51 CLR 276, 288 (Dixon J).
137 *Giller v Procopets* (2008) 24 VR 1, 34 [159] (Ashley JA), 100 [424] (Neave JA).
138 [1897] 2 QB 57 ('*Wilkinson*').
139 (2001) 208 CLR 255 [123].
140 [1897] 2 QB 57, 58–9.
141 Ibid 59.
142 American Law Institute, *Restatement (Second) of Torts* (1977) § 46.
143 See, eg, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 394 (Windeyer J).
144 [2004] 2 AC 406 ('*Wainwright*').
145 Ibid 425 [40].

therefore left with 'no leading role in the modern law.'[146] He noted that the case was decided at a time when the Privy Council decision in *Victorian Railway Commissioners v Coultas*[147] was authority for the view that nervous shock was too remote a consequence of a negligent act to be a recoverable head of damage. His Lordship thought that it was evident that the decision in *Wilkinson*, by being based on intention, was an attempt to evade *Coultas*. However, its reliance on intention was dubious since Mr Downton, in telling Mrs Wilkinson as a prank that her husband had been in an accident, in fact only intended to cause Mrs Wilkinson to suffer a fright, not any resulting illness. When the rule in *Wilkinson* was next considered,[148] *Coultas* was no longer good authority and *Wilkinson* was able to be comfortably accommodated by the law concerning nervous shock caused by negligence. Lord Hoffmann thought that while it was true that a tort of intention would not involve the policy considerations which gave rise to the limits on claims for negligence, the defendant must actually have acted in a way which he or she knew to be unjustifiable and intended to cause harm or at least acted without caring whether he or she caused harm or not.[149] In his view, the kind of imputed intention verging on negligence held to be sufficient in *Wilkinson* itself would not do.[150]

In Australia, intentional harm was first considered in *Bunyan v Jordan.*[151] This case involved a defendant who announced that he was going to kill himself and who then discharged a firearm in a nearby office, thereby causing a co-worker to suffer a shock. Chief Justice Latham thought that if a person 'deliberately does an act of a kind calculated to cause physical injury ... and in fact causes physical injury to that other person, he is liable in damages.'[152] The word 'calculated' was held to mean objectively likely to happen.[153] Subsequently, in *Northern Territory v Mengel*[154] it was said that *Wilkinson* illustrated 'acts which are calculated in the ordinary course to cause harm ... or which are done with reckless indifference to the harm that is likely to ensue'.[155] As such the cause of action would seem to be an instance where, as Peter Cane suggested, intention includes recklessness in the sense of a conscious indifference to the risk of the outcome occurring since in either case the person engaging in the conduct will have done so deliberately.[156]

146 Ibid 425 [41].
147 (1888) 13 App Cas 222 ('*Coultas*').
148 *Janvier v Sweeney* [1919] 2 KB 316.
149 *Wainwright* [2004] 2 AC 406, 426 [45].
150 [2004] 2 AC 406, 425 [44].
151 (1937) 57 CLR 1.
152 Ibid, 10 (citations omitted).
153 Ibid 10–11 (Latham CJ), 17 (Dixon J).
154 (1995) 185 CLR 307.
155 Ibid 347 (Mason CJ, Dawson, Tooehy, Gaudron and McHugh JJ).
156 Cane, above n 78, 545.

By contrast, in *Carrier v Bonham*[157] McPherson JA (with whom McMurdo P and Moynihan J agreed) viewed *Wilkinson* as an instance of an intentional act which had reasonably foreseeable consequences that were apparently not in fact foreseen by the defendant in all their severity. This was, in his Honour's view, no different from most everyday acts that are called actionable negligence and which are in fact wholly or partly a product of intentional conduct, such as intentionally driving a motor vehicle at high speed through a residential area, even if injuring people or property on the way was not a result actually intended. His Honour thought that it no longer mattered whether the act was done intentionally or negligently, or partly one and partly the other, since what matters is whether the consequences of conduct, whether foreseen or not, are reasonably foreseeable and are such as should be averted or avoided. There was only one tort for a failure to use reasonable care which caused damage.[158] On this analysis, like that of the House of Lords in *Wainwright*, the cause of action recognised in *Wilkinson* should be regarded as having been subsumed into negligence, and should therefore be subject to limits such as the need to show a recognisable psychiatric illness[159] and, in some jurisdictions, for it to be reasonably foreseeable that the plaintiff's reaction was that of a person of normal fortitude.[160]

Accordingly, if an action based on *Wilkinson* is still available in Australia,[161] a person whose image was captured by a camera mounted on a UAV and then widely disclosed may have a claim not only if that disclosure was done with an intention to cause harm but also if there is reckless indifference to the likely harm, as may occur where the disclosure is part of a prank. On the contrary analysis represented by the judgments in *Wainwright* and *Carrier*, the appropriate cause of action is now negligence. The person whose image has been captured through use of a UAV would be required to show a duty of care in the circumstances and damage resulting from a breach of that duty in the form of recognisable psychiatric illness, as opposed to reactions such as mere humiliation, embarrassment or emotional stress.

D Privacy and Statute

Both the Australian Law Reform Commission ('ALRC') and New South Wales Law Reform Commission ('NSWLRC') have recommended the

157 [2002] 1 Qd R 474, 484 ('*Carrier*').

158 Ibid.

159 *Tame v New South Wales* (2002) 211 CLR 317, 382 [193] (Gummow and Kirby JJ). See also *Civil Law (Wrongs) Act 2002* (ACT) s 35(1); *Civil Liability Act 2002* (NSW) s 31; *Civil Liability Act 1936* (SA) s 53(2); *Civil Liability Act 2002* (Tas) s 33*; Wrongs Act 1958* (Vic) s 72(1); *Civil Liability Act 2002* (WA) s 5T which have instead adopted 'recognised psychiatric illness'.

160 *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 2002* (NSW) s 32(1); *Civil Liability Act 1936* (SA) s 33(1); *Civil Liability Act 2002* (Tas) s 34(1); *Wrongs Act 1958* (Vic) s 72(1); *Civil Liability Act 2002* (WA) s 5S(1).

161 See also Scott Wotherspoon, 'Resuscitating the *Wilkinson v Downton* Tort in Australia' (2011) 85 *Australian Law Journal* 37; Penelope Watson, 'Searching the Overfull and Cluttered Shelves: *Wilkinson v Downton* Rediscovered' (2004) 23 *University of Tasmania Law Review* 264.

enactment of a statutory cause of action protecting personal privacy.[162] In the ALRC formulation, such a cause of action would arise in circumstances where it can be said that there was a reasonable expectation of privacy and the act or conduct complained of would be highly offensive to a reasonable person of ordinary sensibilities.[163] Such an expectation, if established, would be balanced against other public interests, such as the interest of the public in being informed about matters of public concern or the public interest in allowing freedom of expression.[164] A statutory cause of action in this form may be apt to provide a remedy in cases of intrusion and/or disclosure involving images captured by a camera mounted on a UAV. Until such a cause of action is enacted, there are three types of statute that may be relevant to these types of invasion of privacy.

1 Surveillance Devices Statutes

Only New South Wales, Victoria, Western Australia and the Northern Territory have replaced their listening devices statutes with legislation governing optical surveillance devices and the communication or publication of recordings made by such devices.[165] However, the approaches taken in these statutes are not uniform. These differences may have significance in the circumstances of images captured by a camera mounted on a UAV.

(a) New South Wales

In New South Wales, the *Surveillance Devices Act 2007* (NSW) section 8(1) provides that

> a person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves:
>
> (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or

162 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 88 ('*For Your Information Report*'); New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) 4–5 [1.5] ('*Invasion of Privacy Report*').

163 *For Your Information Report*, above n 162, 2568–9 [74.134]–[74.135].

164 Ibid 2575 [74.157]. By contrast, the NSWLRC recommended a cause of action where there was conduct that invaded the privacy that an individual was reasonably entitled to expect in all the circumstances having regard to any public interest: *Invasion of Privacy Report*, above n 162, 22–3 [5.1]–[5.3]. Thus, rather than first establishing a prima facie right to privacy and then weighing that against any countervailing public interest under the ALRC model, the NSWLRC model would require the public interest to be taken into account when determining whether there was a right to privacy in the first place. The difference in approach affects the onus of proof in relation to the public interest. Under the ALRC model it rests with the defendant whereas under the NSWLRC model it resides with the plaintiff: *Invasion of Privacy Report*, above n 162, 28 [5.17].

165 *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 2007* (NT); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 1998* (WA).

> (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object.

'Premises' are defined as including land[166] while 'vehicle' includes an aircraft.[167]

The application of these provisions to a case involving a UAV is not without difficulty. The requirement of a 'knowing' installation or use to record the carrying on of an activity will mean that the section does not apply where, for example, a UAV operated for search and rescue purposes over land with the owner's consent were to unintentionally capture images of a couple engaging in intimate activities instead of the lost person. The section will therefore only apply to the deliberate use of a UAV to invade another's privacy.

It could be said that mounting a camera on a UAV amounts to installation or use of an optical surveillance device 'on … a vehicle'.[168] However, mounting a camera on one's own UAV does not involve 'entry onto or into the … vehicle without the express or implied consent of the owner'[169] or 'interference with the vehicle … without the express or implied consent of the person having lawful possession or lawful control of the vehicle'.[170] Accordingly, that aspect of the section may be appropriate for, for example, surveillance devices installed in a motor vehicle but not one mounted on a UAV.

On the other hand, in a case such as the adolescent neighbour mounting a camera on a UAV to spy on the sunbathing homeowner there may be a use of an optical surveillance device 'on or within premises … to record visually or observe the carrying on of an activity'.[171] If the adolescent neighbour were to fly the UAV over the homeowner's premises then there may be an 'entry onto or into premises without the express or implied consent of the owner or occupier'.[172] However, if the adolescent neighbour were to hover the UAV over his or her own side of the fence in order to record visually or observe the activities on the other side, this section would not be breached even though the invasion of privacy may have no less occurred.

(b) Victoria

In Victoria, the S*urveillance Devices Act 1999* (Vic) section 7(1) provides that

> a person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity.

166 *Surveillance Devices Act 2007* (NSW) s 4 (definition of 'premises').
167 *Surveillance Devices Act 2007* (NSW) s 4 (definition of 'vehicle').
168 *Surveillance Devices Act 2007* (NSW) s 8(1).
169 *Surveillance Devices Act 2007* (NSW) s 8(1)(a).
170 *Surveillance Devices Act 2007* (NSW) s 8(1)(b).
171 *Surveillance Devices Act 2007* (NSW) s 8(1).
172 *Surveillance Devices Act 2007* (NSW) s 8(1)(a).

A 'private activity' is defined as

> an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include:
>
> (a) an activity carried on outside a building; or
>
> (b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.[173]

Thus, the section would apply if, for example, the adolescent neighbour flew the UAV on either side of the fence in order to record or observe activities occurring inside the house next door, provided those activities were not occurring in plain sight from outside so that the parties to it 'ought reasonably to expect that it may be observed'.[174] However, in the posited case of a homeowner sunbathing in his or her backyard behind a high fence, or for that matter, an individual filmed while he or she was involved in an intimate activity in bushland, those activities would be 'carried on outside a building'[175] and therefore not fall within the ambit of the section.

(c) Northern Territory and Western Australia

In the Northern Territory the prohibition is similar to that in Victoria. *Surveillance Devices Act* (NT) section 12(1) provides that

> a person is guilty of an offence if the person:
>
> (a) installs, uses or maintains an optical surveillance device to monitor, record visually or observe a private activity to which the person is not a party; and
>
> (b) knows the device is installed, used or maintained without the express or implied consent of each party to the activity.

By contrast, *Surveillance Devices Act 1998* (WA) section 6(1) is worded differently. It provides that

> a person shall not install, use, or maintain, or cause to be installed, used, or maintained, an optical surveillance device –
>
> (a) to record visually or observe a private activity to which that person is not a party or
>
> (b) to record visually or observe a private activity to which that person is a party.

However, both statutes define 'private activity' as

> an activity carried on in circumstances that may reasonably be taken to indicate the parties to the activity desire it to be observed only by themselves, but does not include an activity carried on in circumstances in which the parties to the activity ought reasonably to expect the activity may be observed by someone else.[176]

This definition may therefore be contrasted with that in Victoria and may embrace private activities occurring outdoors, such as sunbathing in a backyard

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173 S*urveillance Devices Act 1999* (Vic) s 3 (definition of 'private activity').

174 S*urveillance Devices Act 1999* (Vic) s 3 (definition of 'private activity') para (b).

175 S*urveillance Devices Act 1999* (Vic) s 3 (definition of 'private activity') para (a).

176 *Surveillance Devices Act 2007* (NT) s 4 (definition of 'private act'). The WA legislation is substantially similar: *Surveillance Devices Act 1998* (WA) s 3 (definition of 'private act').

or on a private beach or engaging in intimate activities in the bush where those activities were carried on in an area where they 'ought reasonably to expect the activity may be observed by someone else'.[177]

In both jurisdictions the prohibition against the use of an optical surveillance device to record or observe a private activity is supported by a prohibition against communication or publication of a record of that activity.[178] However, there are a number of exceptions to this prohibition, including communications or publications reasonably necessary in the public interest or in the course of legal proceedings.[179] Such exemptions might apply where, for example, there is a disclosure of illegal activities, such as drug cultivation in the bush or drug dealing inside a home, which is captured by camera mounted on a UAV.

2 Protection of Personal Information

Images captured by a camera mounted on a UAV may also be subject to regimes governing the collection, use or disclosure of personal information. The relevant regime depends upon whether the user of the UAV is a private organisation or a Commonwealth or state/territory government agency. None of the regimes apply where the operator of the UAV is a private individual.

Australia is a signatory to the *International Covenant on Civil and Political Rights*,[180] which requires contracting states to ensure that their domestic legal systems provide adequate protection against interference with privacy. This obligation was given effect by the enactment of the *Privacy Act 1988* (Cth) ('*Privacy Act*'), which established the office of Privacy Commissioner, and provided a code for the protection of privacy of information which originally consisted of 11 Information Privacy Principles ('IPPs') governing, inter alia, the collection, use and disclosure of 'personal information'. These principles applied to Commonwealth and ACT government agencies. The IPPs have also been enacted by the Northern Territory[181] and most of the states[182] with the exception of South Australia, where they are applied by way of a government administrative order,[183] and Western Australia, which currently has no legislative privacy regime governing its public sector.[184] These regimes apply to their

177 *Surveillance Devices Act 2007* (NT) s 4 (definition of 'private act'); *Surveillance Devices Act 1998* (WA) s 3 (definition of 'private act').

178 *Surveillance Devices Act 2007* (NT) s 15; *Surveillance Devices Act 1998* (WA) s 9.

179 *Surveillance Devices Act 2007* (NT) ss 15(2)(b)–(c); *Surveillance Devices Act 1998* (WA) s 9(3)(a).

180 *International Covenant of Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1).

181 *Information Act 2002* (NT).

182 *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2009* (Qld); *Personal Information Protection Act 2004* (Tas); *Information Privacy Act 2000* (Vic).

183 Department of Premier and Cabinet (SA), *Cabinet Administrative Instruction 1/89*, 5 August 2013.

184 Some aspects of the IPPs are included in the *Freedom of Information Act 1992* (WA): see, eg, s 10 (access to documents), s 45 (amendment of documents). The Information Privacy Bill 2007 (WA) was introduced into the WA Parliament in 28 March 2007. If eventually passed it will enact a set of Information Privacy Principles.

respective state or territory government agencies. Subsequently it was recognised that government agencies were not the only organisations that collected private information. Accordingly, the Commonwealth government amended the *Privacy Act* to enact a different set of principles, called the National Privacy Principles ('NPPs'), which were based on the IPPs and in some cases used the same wording but contained a number of inconsistencies and did not even use the same numbering.[185] These principles applied solely to private organisations. After a recommendation by the ALRC, the Commonwealth government sought to address the inconsistencies between the IPPs and NPPs in the *Privacy Act* by replacing both with a new set of principles, called the Australian Privacy Principles ('APPs'), which apply equally to Commonwealth and ACT government agencies and private organisations,[186] although most small business organisations with a turnover of $3 million or less[187] and journalists[188] are exempt. These principles came into effect on 12 March 2014.

These regimes generally define 'personal information' as meaning information or opinion, whether true or false, about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.[189] It has been held that a photograph or video of an individual constitutes 'personal information' about that individual.[190] Accordingly, a government agency or private organisation which operates a UAV on which a camera is mounted and which captures images of individuals will be obliged to comply with the relevant personal information regime in relation to, for example, the collection, use and disclosure of those images.

All personal information regimes limit the circumstances in which that information may be collected. However, those limits are expressed differently. The Commonwealth APP, New South Wales and Queensland regimes provide that personal information must not be collected unless for a purpose that is a lawful purpose directly related to a function or activity of the agency and the collection of the information is necessary for or directly related to that purpose.[191] By contrast, in Tasmania, the Northern Territory and Victoria an agency must not collect personal information unless the information is necessary for one or more of its functions or activities.[192] The South Australian administrative instruction

185 *Privacy Amendment Act 2000* (Cth), amending *Privacy Act*.
186 Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth).
187 *Privacy Act* s 6(1) (definition of 'APP entity'), s 6D (definition of 'small business').
188 *Privacy Act* s 7B(4).
189 See, eg, *Privacy Act* s 6(1) (definition of 'personal information').
190 See, eg, *SW v Forests NSW* [2006] NSWADT 74, [31] (Member Handley) (photograph of complainant at work retreat); *Ng v Department of Education* [2005] VCAT 1054, [39] (Deputy President McNamara) (surveillance video of complainant teacher in computer classroom).
191 *Privacy Act* sch 1 pt 2 sub-cls 3.1–3.2; *Privacy and Personal Information Protection Act 1998* (NSW) s 8(1); *Information Privacy Act 2009* (Qld) sch 3 s 3(3).
192 *Information Act 2002* (NT) sch 2 sub-cl 1.1; *Personal Information Protection Act 2004* (Tas) sch 1 cl 1(1); *Information Privacy Act 2000* (Vic) sch 1 sub-cl 1.1.

states that personal information should not be collected 'unnecessarily'.[193] These various regimes further require that personal information must not be collected by unlawful[194] or unlawful or unfair means;[195] be collected only by lawful and fair means and not in an unreasonably intrusive way,[196] be collected only by lawful and fair means[197] or be collected by lawful means.[198]

Depending on the circumstances it may be difficult to show that images inadvertently captured by a camera mounted on a UAV were 'directly related to a function or activity of the agency' or 'necessary for one or more of its functions or activities'. In the case of a UAV monitoring vegetation, the activities of persons venturing into that vegetation and impacting upon it in some way may be related to that purpose, even where those activities were intimate or of a kind they would prefer not be observed. However, in other cases, such as UAVs involved in film-making or search and rescue operations, it may be more difficult. In addition, it has been seen that *Civil Aviation Safety Regulations 1998* (Cth) provide that a UAV cannot be legally operated within 30 metres of a person who is not involved the operation of the UAV and must not be operated over populous areas.[199] Further, a small UAV can only operate in areas outside those approved by the CASA if, where the UAV operates greater than 400 feet above ground level, the operator has CASA's approval to do so and the UAV stays clear of populous areas.[200] Accordingly, any images captured by a camera mounted on a UAV which has been operated contrary to these regulations arguably will have been collected by means which are not lawful. In addition, it may be argued that filming an individual from the air without that person's knowledge or warning may mean that that information has not been collected by fair means.

The Commonwealth APP regime has also introduced a new concept of 'unsolicited personal information'. Where an agency or organisation receives unsolicited information, and it is information that could not be validly collected if it had been solicited, there is an obligation to destroy the information or ensure that the information is de-identified if it is lawful and reasonable to do so.[201] The application of these provisions to images captured by a camera mounted on a UAV is not without difficulty. It may be possible to argue that images captured by a camera mounted on a UAV operated by a private organisation or Commonwealth or ACT agency should instead be regarded as 'unsolicited' in the sense of being unintended or accidentally acquired. However, if 'unsolicited'

193 Department of Premier and Cabinet (SA), *Cabinet Administrative Instruction 1/89*, 5 August 2013 para 4(1).
194 *Privacy and Personal Information Protection Act 1998* (NSW) s 8(2).
195 *Information Privacy Act 2009* (Qld), sch 3 s 1(2).
196 *Information Act 2002* (NT) sch 2 sub-cl 1.2; *Information Privacy Act 2000* (Vic) sch 1 sub-cl 1.2.
197 *Privacy Act* sch 1 pt 2 sub-cl 3.5.
198 *Personal Information Protection Act 2004* (Tas) sch 1 cl 1(2).
199 *Civil Aviation Safety Regulations 1998* (Cth) regs 101.245, 101.280.
200 *Civil Aviation Safety Regulations 1998* (Cth) regs 101.245, 101.250.
201 *Privacy Act* sch 1 pt 2 cl 4.

instead denotes a passive role, essentially being given something that was not asked for, it would not appear to embrace the operation of a UAV for the purpose of observing and/or recording activities on the ground.

Further, in some jurisdictions where an agency or organisation collects personal information from an individual it must take such steps 'as are reasonable in the circumstances' to ensure that, before the information is collected or as soon as practicable after collection, the individual to whom the information relates is made aware of various matters including the fact that the information is being collected, the purposes for the collection, the intended recipients of the information, the existence of any right of access to the information, and the agency that is holding the information.[202] However, where the images captured by a camera mounted on a UAV involve subjects who are unaware that they are being filmed,[203] the images cannot be said to have been collected *from* them. In any event, unless the individual who has been filmed from the air is a person who is known to the operator or is otherwise readily identifiable it may not be possible to track that person down in order to advise him or her that his or her image has been collected.

While all jurisdictions place limits on agencies or organisations disclosing personal information that they have collected, there are also exceptions where disclosure is permitted. Once again there are differences between the regimes. However, most regimes allow disclosure where, for example, the agency or organisation reasonably believes that it is reasonably necessary for the prevention, detection, investigation, prosecution or publish of criminal offences or breaches of a law imposing a penalty or sanction.[204] For example, if a camera mounted on a UAV operated by a country fire service for the purposes of monitoring firebreaks or tracking bushfires were to inadvertently capture images of clandestine drug cultivation, the disclosure of those images to police or other legal authorities for the purposes of investigation or prosecution would be exempted under the legislation. Similarly, footage of a traffic offence captured by a camera mounted on a UAV operated by a film company for a television or movie production could be disclosed to police or other authorities for the same purposes. Exemptions in some regimes also allow disclosure where the agency or organisation reasonably believes that the disclosure is necessary to lessen or prevent a serious and imminent threat to an individual's life, health, safety or

202 Privacy Act sch 1 pt 2 cl 5; *Privacy and Personal Information Protection Act 1998* (NSW) s 10; *Information Act 2002* (NT) sch 2 sub-cl 1.3; *Personal Information Protection Act 2004* (Tas) sch 1 cl 1(3); *Information Privacy Act 2000* (Vic) sch 1 sub-cl 1.3. See also Department of Premier and Cabinet (SA), Cabinet Administrative Instruction 1/89, 5 August 2013 para 4(2).

203 Cf *SW v Forests NSW* [2006] NSWADT 74 (complainant was aware that she was being photographed at a work retreat while she was smoking on a veranda in her pyjamas).

204 See *Privacy Act* s 16A(1) item 2, sch 1 pt 3 sub-cls 6.1, 6.2(c); *Privacy and Personal Information Protection Act 1998* (NSW) s 23(5); *Information Act 2002* (NT) sch 2 sub-cl 2.1(g); *Information Privacy Act 2009* (Qld) sch 3 s 11(1)(e); *Personal Information Protection Act 2004* (Tas) sch 1 cl 2(1)(g); *Information Privacy Act 2000* (Vic) sch 1 sub-cl 2.1(g). See also Department of Premier and Cabinet (SA), Cabinet Administrative Instruction 1/89, 5 August 2013 para 4(10)(d).

welfare; or a serious threat to public health, public safety, or public welfare.[205] The exemptions in other jurisdictions are limited to lessening or preventing serious and imminent threat to life or health only.[206]

There are generally no exemptions in any of the regimes that would permit disclosures of images of individuals engaging in more innocent behaviour such as engaging in intimate activities or sunbathing in a backyard or on a beach. However, the Commonwealth APP regime has introduced new exemptions for use or disclosure that is reasonably necessary to assist in the location of a person who has been reported as missing; the establishment, exercise or defence of a legal or equitable claim; or for the purposes of a confidential alternative dispute resolution process.[207] Accordingly if, for example, an individual filmed engaging in intimate activities was a person who had been reported missing, or if those intimate activities consisted of a sexual liaison that was relevant to a legal or equitable claim or confidential alternative dispute resolution, disclosure may be permitted.

3 Filming and Voyeurism Offences

Concerns about the misuse of technology to 'upskirt', that is surreptitiously take photographs underneath clothing, and recognition that such devices might be used surreptitiously to take photographs in public change rooms and swimming pools prompted discussion by the Standing Committee of Attorneys-General with a view to developing uniform laws to address such behaviour.[208] Several jurisdictions took steps to outlaw such conduct, some casting their legislation in terms wide enough to apply to other conduct as well, including some cases involving images captured by camera is mounted on UAVs.[209] The legislation in Queensland, South Australia and New South Wales in particular warrant examination.

(a) Queensland

Queensland amended its *Criminal Code 1899* (Qld) by inserting section 227A(1), which prohibits a person from observing or visually recording another person 'in circumstances where a reasonable adult would expect to be afforded privacy' without the other person's consent and when the other person

(a) is in a private place, or

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205 *Privacy Act* s 16A(1) item 1, sch 1 pt 3 sub-cls 6.1, 6.2 para (c); *Information Act 2002* (NT) sch 2 sub-cl 2.1(d); *Information Privacy Act 2009* (Qld) sch 3 s 11(1)(c); *Personal Information Protection Act 2004* (Tas) sch 1 cl 2(1)(d); *Information Privacy Act 2000* (Vic) sch 1 sub-cl 2.1(d).

206 *Privacy and Personal Information Protection Act 1998* (NSW) s 18(1)(c). See also Department of Premier and Cabinet (SA), *Cabinet Administrative Instruction 1/89*, 5 August 2013 para 4(10)(b).

207 *Privacy Act* s 16A(1) items 3–5, sch 1 pt 3 sub-cls 6.1, 6.2 para (c).

208 See Standing Committee of Attorneys-General, 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues' (Discussion Paper, Standing Committee of Attorneys-General, August 2005).

209 See, eg, *Summary Offences Act 1966* (Vic) div 4A (observation or visual capturing of genital or anal region).

(b) is engaging in a private act and the observation or visual recording is made for the purpose of observing or visually recording a private act.[210]

Section 227A is supported by section 227B, which prohibits the 'distribution' (which includes communication of transmission) of a prohibited visual recording of another person without his or her consent.

The Queensland Attorney-General Linda Lavarch, in the second reading speech of the amendment bill noted that '[t]he motivation of the observer will be irrelevant – that is, whether the observer's motives are for sexual gratification, to harass the person observed, or for a commercial purpose.'[211] The section provides as examples of 'circumstances where a reasonable adult would expect to be afforded privacy' persons using a communal change room at a swimming pool and persons who need help to dress or use a toilet. However, examples that are provided in legislation are not definitive interpretation of that legislation.[212] Section 227A(1)(b) is limited to intentional observing or recording a private act in circumstances where a reasonable adult would expect to be afforded privacy, such as the voyeuristic adolescent using a UAV to film the neighbour sunbathing next door, and would therefore not apply to accidental recordings such as those made by a camera mounted on a UAV being operated for other purposes such as traffic reports, search and rescue or crop monitoring. However, there is no such limitation on section 227A(1)(a). In particular, 'private place' may not be limited to, for example, a place indoors. Accordingly, even accidental filming of persons engaging in intimate activities such as sexual encounters or urination in a private place outdoors, such as a place in bushland, in circumstances where they would expect to be afforded privacy, may breach the section. The coverage of the section is therefore potentially wide.

(b) South Australia

In May 2013 South Australia amended its *Summary Offences Act 1953* (SA) to introduce a new part 5A concerning filming offences.[213] Section 26D(1) provides that '[a] person must not engage in indecent filming', which is defined in section 26A to mean filming of either:

(a) another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy; or

(b) another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or

(c) another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed.

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210 The section also provides for an offence where a person observes or visually records another person's genital or anal region without the other person's consent: *Criminal Code 1899* (Qld) s 227A(2). This offence will catch conduct in the nature of upskirting.

211 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 November 2005, 3745 (Linda Lavarch, Attorney-General).

212 *Acts Interpretation Act 1954* (Qld) s 14D.

213 *Summary Offences (Filming Offences) Amendment Act 2013* (SA).

'Private act' is further defined by the section to mean:

(a) a sexual act of a kind not ordinarily done in public; or

(b) using a toilet.

It is a defence if the filming occurred with the consent of the person being filmed or if it was undertaken by licensed investigation agent in the course of obtaining evidence in connection with a claim for compensation, damages, payment under a contract or some other benefit.[214]

This is supported by section 26D(3) which provides that '[a] person must not distribute a moving or still image obtained by indecent filming.' A person will have a defence to this offence where the person filmed consented to the distribution, the defendant did not know and could not reasonably be expected to know that the indecent filming was without person's consent, or the filming was undertaken by a licensed investigation agent.[215]

These offences may therefore be relevant to where, for example, a UAV is used to spy on a neighbour sunbathing in the presumed privacy of his or her backyard or engaging in sexual activities (indoors or outdoors in circumstances in which a reasonable person would expect privacy). It could also conceivably extend to filming of persons in public places such as bushland where that person is in a state of undress or engaging in sexual activity in circumstances in which a reasonable person would expect to be afforded privacy. It would therefore not apply in the case of a person in a state of undress or engaging in a sexual activity in a public region open to public view, such as a beach or bushland adjacent to a public thoroughfare.

Additional protection is provided by section 26C, which prohibits a person from distributing an 'invasive image' of another person

knowing or having reason to believe that the other person–

(a) does not consent to that particular distribution of the image; or

(b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally.

'Invasive image' is defined in section 26A to mean:

a moving or still image of a person–

(a) engaged in a private act; or

(b) in a state of undress such that the person's bare genital or anal region is visible.

but does not include an image of a person under, or apparently under, the age of 16 years[216] or an image of a person who is in a public place.

Unlike the offence in section 26D(3), due to this exclusion in the definition of 'invasive image' the section will not apply to images of a person in any public place, including those places where a reasonable person may still expect to be

214 *Summary Offences (Filming Offences) Amendment Act 2013* (SA) s 2D(2).

215 *Summary Offences (Filming Offences) Amendment Act 2013* (SA) s 2D(4).

216 Filming children under or apparently under the age of 17 years is prohibited under the Child Pornography provisions of the *Criminal Law Consolidation Act 1935* (SA) ss 62–63C.

afforded privacy, such as where a person engages in a sexual activity in bushland well away from normal public view.

(c) New South Wales

Initially New South Wales inserted laws designed to address upskirting and the other surreptitious filming into the *Summary Offences Act 1988* (NSW).[217] These provisions have now been replaced by new provisions in the *Crimes Act 1900* (NSW) division 15B dealing with 'voyeurism' and other related offences. Section 91K prohibits a person filming another person who is engaged in a 'private act', which is defined by section 91I to mean where:

> (a) the person is in a state of undress, using the toilet, showering or bathing, engaged in a sexual act of a kind not ordinarily done in public, or engaged in any other activity, and
>
> (b) the circumstances are such that a reasonable person would reasonably expect to be afforded privacy.

While there are therefore similarities with the Queensland and South Australian provisions, the New South Wales provision is more limited in that it requires it to be shown that the filming was done for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification. It therefore would not apply to accidental filming or even some intentional filming where it cannot be proven to the requisite degree to have been done for that purpose.

IV CONCLUSION

We are currently witnessing the dawn of the age of the drones. The Federal Aviation Administration in the United States has estimated that in that country 15 000 civil and commercial drones could be flying by 2020, and as many as 30 000 by 2030.[218] A 2013 marketing study by a United States-based consulting firm has predicted that spending on UAVs in civil and defence will more than double over the next decade from current worldwide expenditures of US$5.2 billion annually to US$11.6 billion, or over US$89 billion over the next decade.[219] The Deputy Director of CASA has relayed speculation by retailers that about 100 new multi-rotors and fixed wing UAVs are now taking to Australian skies each week, most flown by 'hobbyists' who are not required to undertake training or register their aircraft.[220] Precise records of numbers are impossible to keep since UAVs are often assembled locally from components ordered online from overseas. At the same time videos shot using cameras mounted on UAVs are also becoming

217 See *Summary Offences Act 1988* (NSW) ss 21G (filming for indecent purposes), 21H (installing device to facilitate filming for indecent purposes), both of which have now been repealed.

218 Farquharson, above n 37.

219 Ibid.

220 Ibid.

increasingly popular on video sharing websites such as YouTube.[221] The potential for an increase in invasions of privacy using this technology is, as the Deputy Director acknowledged, a controversial issue that 'has to be dealt with.'[222]

At the same time, the current Australian legal landscape regarding personal privacy is an uneven patchwork of common law and statute at both Commonwealth and state/territory levels. It is not until this landscape of laws is viewed through the prism of a specific context, such as the potential for invasions of privacy by using cameras mounted on UAVs, that the many nuances of these laws can be made apparent and deficiencies laid bare. These deficiencies include a smattering of existing common law causes of action that may offer hope for reparation for aggrieved persons in particular circumstances, but which have limitations that leave undesirable lacunae in their utility. It also includes a disparate collection of statutes that, to a greater or lesser extent, apply to such conduct, in some cases more as a result of the terms in which they have been drafted rather than as their main objectives. Here there are many inconsistencies. Some jurisdictions have retained listening devices Acts more suited to more limited technological times now decades past, while some jurisdictions have advanced to surveillances devices legislation, albeit not in uniformity. Of the latter group, the surveillance devices statutes in the Northern Territory and Western Australia are best designed to address the spectre of technological invasions of privacy from the air. The other jurisdictions – including those that have already adopted more limited surveillance devices statutes – would do well to look to the legislation in these two jurisdictions as models for potential reform of their own legislation in order to address the changing times. A further deficiency in the legislation generally is that, in many or most cases, it only prohibits the relevant conduct. While in a democratic society the state may have an interest in preserving the autonomy of its citizens from invasions of their privacy, the value of such prohibitions may depend upon the willingness of the relevant authorities to prosecute transgressions. In any event, it is the individual who has his or her dignity or autonomy affronted that has the greater interest in preventing or redressing the wrong. Any appropriate legislative response should therefore make provision for reparation for individuals who have been aggrieved by invasions of their privacy. The mooted statutory cause of action currently being considered by the ALRC would be the best means of addressing not only the limitations of the common laws but also those of the various statutes that have relevance in this area.

Justice Victor Windeyer of the High Court once described the law in the context of liability for psychiatric injury as 'marching with medicine but in the rear and limping a little'.[223] A similar observation might be made about the relationship between law and technology, although in some places and in some

221 Ibid.
222 Ibid.
223 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395.

respects the law may not so much be marching with a limp as dragging its heels. The dawn of the age of the drones and the potential it holds for bad as well as good provides a new challenge where the law needs to catch up in a quick and orderly fashion.