FROM THE ARCHIVE | Australians are likely to get a statutory right of privacy. Though it needs careful crafting, it’s high time, writes Jock Given

Above: The tower outside the Sydney’s Victoria Park racecourse where Cyril Angles called the races for radio station 2UW and tested Australia’s media laws in the 1930s.

Photo: Cyril Angles Papers, MSS 3703, Mitchell Library, State Library of New South Wales

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For Your Information: Australian Privacy Law and Practice

Australian Law Reform Commission

Blown to Bits: Your Life, Liberty and Happiness after the Digital Explosion

By Hal Abelson, Ken Ledeen and Harry Lewis

Addison-Wesley | $29.95

The Spy in the Coffee Machine: The End of Privacy as We Know It

By Kieron O’Hara and Nigel Shadbolt

Oneworld | $24.95

Privacy: A Manifesto

By Wolfgang Sofsky

Princeton University Press | $29.95

CYRIL ANGLES was good. With mere words, he could talk up a picture and make it move. “Unfalteringly, thrillingly, he brings the whole picture before our eyes,” enthused Radio Pictorial of Australia magazine in 1938.

As he covered the wrestling at Sydney Stadium for radio station 2UW, listeners might have imagined Angles was “standing tiptoe with excitement, every nerve alert, every muscle taut, his face working violently in the unfolding of the drama.” But at most, Angles merely smiled. “No matter what he was thinking, no matter what terrific emotions were wringing his soul, Cyril’s face would reveal nothing… Perched uncomfortably in his little iron grating above the ring… his kindly face with its little blue eyes twinklingly alive, his top-notch of curly black hair and his mouth going turkey-gobblers,” Angles was “the personification of commentatorial efficiency.”

Angles saw and spoke. Audiences for the new medium of radio broadcasting listened, and imagined the scenes he was watching, distant intruders on the spectacle. Sydney’s racecourses, however, did not welcome Angles’s gaze. When the practice of broadcasting from the track began to affect race-day crowd numbers, the clubs printed new tickets. These were contracts, prohibiting everyone paying the price of admission from communicating descriptions or results to anyone off-course until five minutes after the last race. Any infringers were immediately deemed trespassers.

Angles and others responded by investing in more elaborate infrastructure outside the tracks, where they could
still get good views of the action with binoculars. Connected by telephone to the 2UW studio, there was a Moreton Bay fig at Warwick Farm, a chair on a table on the back of a truck at Rosehill and, across the road from the Victoria Park racecourse, a five-metre wooden tower constructed on George Taylor’s land in Dowling Street, North Kensington. It was the view from this tower that got lawyers around the world watching and listening.

In mid-1936, Victoria Park commenced legal action against Taylor, Angles and 2UW. Although these defendants had committed no trespass, Victoria Park argued they had still affected the use and enjoyment of its land, infringing the law of nuisance.

Smith’s Weekly called it “a struggle between every sporting organisation in the world and every broadcasting station in the world,” a “novel test of the adaptability of the common law of England to meet the changing circumstances which speed progress and prevent stagnation in the community.”

The case was dismissed, first in the Supreme Court of New South Wales and then on appeal by a narrow majority in the High Court of Australia. Chief justice John Latham thought Taylor, Angles and 2UW had not undermined the Victoria Park racing club’s ability to use and enjoy its land. The racecourse was “as suitable as ever it was for use as a racecourse.” Any person was entitled to look over the fence to see what went on. If Victoria Park was unhappy, it could build a higher fence. “The law cannot… erect fences which the plaintiff is not prepared to provide.”

No wrong was done, either, by describing to others what went on, even to as wide an audience as possible. Latham dismissed the idea that the club had some kind of quasi-property right in the spectacles it organised. This would prevent people “from opening their eyes and seeing something and then describing what they see.”

Justice George Rich disagreed. There was, he thought, “a limit to this right of looking over.” He was influenced by the looming arrival of a new kind of broadcasting: television. Just two months after the High Court’s decision, the BBC commenced a regular public television service in London, although it was twenty years before Australians got permanent services. “The prospects of television,” Rich said, “make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognise that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life.”

Only one other judge, Herbert Vere Evatt, shared this view. Latham, however, had two supporters, Owen Dixon and Edward McTiernan. It was their view that prevailed. The law would not prevent Australians “from opening their eyes and seeing something and then describing what they see.”

ABC boss Charles Moses reported to the BBC that the matter was “almost certain to go to the Privy Council and quite likely to be reversed.” He was right on the first point but not the second. A few months after the Privy Council refused an application to hear an appeal, Angles and other 2UW stars were bigger than ever, broadcasting not just from Victoria Park and Warwick Farm, but live from the tigers’ cage at Wirths Circus.

GENERATIONS of Australian lawyers brought up on Victoria Park v Taylor and Others thought Australians had no enforceable general right of privacy. They may have been wrong in 1937 and they are even more likely to be wrong today, though not completely.

When a Tasmanian abattoir tried to stop the ABC’s 7.30 Report broadcasting unauthorised footage of its operations in 1999, a majority of High Court judges gave a Victoria Park-like answer. Images and sounds of the processes employed to turn brush-tailed possums into exportable pet food had been obtained by someone other than the ABC and passed on to the broadcaster by Animal Liberation. The pictures were not pretty.

Unlike Victoria Park, the installation of cameras and audio recording equipment clearly involved trespass, though not by the broadcaster. The abattoir could have succeeded in an action for trespass against whoever took the footage, had their identity been known, but a majority of judges would not prevent the ABC transmitting what the unauthorised cameras caught.

Some of the judges, however, said that those who thought Australians had no enforceable, general right of privacy might have taken too much from Victoria Park. The racecourse proprietor was not a person wanting
privacy but a corporation seeking “the rights to a particular kind of publicity.” Its sensitivity was “pocketbook sensitivity.” Similarly, the abattoir operator was not an individual defending some concept of personal privacy but a business worried about the commercial consequences of public exposure of its controversial, though entirely legal, killing processes. A person “genuinely seeking seclusion from surveillance and communication of what surveillance reveals” – in the chief justice’s example, “a film of a man in his underpants in his bedroom” – might find the courts more sympathetic. Since then, judges in Queensland and Victoria have regarded these comments from what is now Australia’s highest court as clear enough for cases to be decided in favour of plaintiffs claiming a right of privacy. These lower courts acted as if an enforceable right of privacy was part of Australian law.

In its review of Australian privacy law, For Your Information, published in May 2008, the Australian Law Reform Commission argued it was time to remove any lingering uncertainty. George Rich’s moment had come.

Protection against the complete exposure of the doings of the individual has become a right indispensable to the enjoyment of life. In the last of its seventy-four chapters, the ALRC recommended that a cause of action for a “serious invasion of privacy” should be introduced. Federal law should erect a fence higher than those that people provide for themselves.

SOME think it is too late for such construction. “For most people, privacy will end in 2013, or a little beyond that,” according to Alex Fuss, a researcher at global IT services company CSC. “Privacy will be available, but only to those who can afford to pay for it.” If he is right, there are three ways of responding: get over it, get on with it or get out of it. “Get over it! You have zero privacy anyway” is the approach famously attributed to Sun Microsystems boss Scott McNealy over a decade ago. Village societies always knew everything about everybody. What privacy there was accrued only to those wealthy enough to afford walls and rooms of their own.

The authors of Blown to Bits and The Spy in the Coffee Machine are get-on-with-it types. If there was ever a time to turn off the array of intrusive technologies and practices that are so much a part of daily life in developed countries, it has passed.

These books are about the opportunities and threats this presents. On balance, the authors are more enthusiastic about the opportunities than troubled by the threats. They want to get on with developing new solutions to the privacy problems posed, rather than suggest, as do the get-over-its, that they don’t exist or, like the get-out-of-its, that efforts to erect impenetrable fences around individuals need to be redoubled.

Blown to Bits is about the whole digital transformation, not just privacy. Its chapter on the subject asks, Why We Lost Our Privacy or Gave It Away? The authors think it happened “because we judge, perhaps without thinking about it very much, that the benefits outweigh the costs.” We pay for things with credit cards and loyalty cards, send email, search for information online, use mobile phones and GPS devices, swipe our way into buildings and bleep our etags along toll roads. All these leave digital footprints that add up to an increasingly detailed picture of our actions and movements, our lives and ourselves.

Why do we do it? Because it saves time or money. You avoid retyping personal details and you get a discount for customer loyalty. Companies tell you more about products that are likely to interest you and less about ones that are not. Call it a privacy tax. If you want to withhold information about who you are, you pay a little more or get a little less. Or we do it because it is almost impossible to function in contemporary society without using the tools that leave such footprints.

We also create documents, images and sound recordings and send them to others or make them available online to individuals, chosen social networks or total strangers. It can sometimes be fun or productive to present aspects of ourselves or our work for public view.

Sometimes we do very little. Information about us is publicly accessible from electoral rolls and registers of political donations; registers of births, deaths and marriages; lists of company shareholders and directors and other sources. When these were physical lists held in different places, it was time-consuming to put together information from each. Now that at least some of this information is accessible online, and tools for gathering and analysing it have become much cheaper and more widely available, wholly new pictures can be drawn by people and organisations wholly unknown to the subjects.
“The digital explosion doesn’t just blow things apart, it blows things together as well,” write the authors of *Blown to Bits*. “Gather up the details, connect the dots, assemble the parts of the puzzle and a clear picture will emerge.” The authors say 87 per cent of the US population can be uniquely identified by combining three pieces of information: gender, date of birth and zip code. So supposedly anonymised health, financial or other records that contain these three elements can be tracked to most individuals.

As more objects are given tags that can supply useful information – dumb ones, such as supermarket barcodes, writeable ones such as magnetic strips or those with a power source of their own that can transmit data – the nature and quality of the pictures that can be drawn increases dramatically. This is the spy in the coffee machine of O’Hara and Shadbolt’s title, the gossipy techno-barista that knows you made two coffees this morning rather than one, or none at all. It’s the printer that leaves a unique marker on every page it prints, so your hand in creating a document is almost as plain as if you had signed it with an autographic flourish.

The startling detail of the personal portraits that can be drawn by aggregating data from different sources about our spending, searching and moving did not happen overnight. There was no single technological leap that defeated anonymity and turned private activities into public ones, just “a steady advance on several technological fronts that ultimately passed a tipping point,” according to the authors of *Blown to Bits*. People spent more time doing more things online, phones went mobile, then got cheap enough for almost anyone to afford one, acquired still cameras then video cameras, and got connected to the internet.

Users are not always aware of the nature or extent of the information gathered, the period for which it is retained, the forms of aggregation and analysis undertaken or the third parties to whom it is distributed. But when asked, many users are relaxed about the implications and even support some forms of surveillance. Sixty per cent of US internet users said they were not worried about how much information is available about them online, according to a 2007 Pew Internet Project report. A YouGov–Daily Telegraph poll in Britain in November 2006 found strong support (85–97 per cent of respondents) for closed-circuit television cameras in banks and building societies, on trains and buses, outside pubs and in high streets but less than majority support for a comprehensive national DNA database.

O’Hara and Shadbolt summarise the findings of the British study, suggesting techniques are more popular when they counter specific, quantifiable risks, are relatively unobtrusive and do not impinge on the normal actions of daily life, operate in public milieux where one would not ordinarily expect to indulge in highly private or intimate behaviour, and capture events or images of particular events or situations, as opposed to creating a permanent and traceable record of identifying features.

Research undertaken by the ALRC in 2006 found just 4 per cent of Australian respondents thought surveillance in public places was a major concern. In contrast, 73 per cent thought telemarketing was a major concern; 19 per cent thought the same of the handling of personal information by the private sector.

People have learned that surveillance can get them out of trouble as well as into it, prove that they could not have been at the scene of the crime, for example. Believing themselves less likely to be troublemakers than trouble-takers, most accept the watching.

WOLFGANG SOFSKY does not. He is a get-out-of-it. We have allowed our privacy to be sacrificed to spurious promises of security and bureaucratic efficiency. Privacy, he argues in *Privacy: A Manifesto*, is the individual’s fortress. It is an area free of domination, the only one under the individual’s control. The private comprises what is no one else’s concern. It is neither public nor manifest. The private is not for other eyes, ears or hands; it is not shared with others and is not accessible to them.

Since even majority-rule democracy is a form of domination, “the defence of privacy is the individual’s most effective objection to the fatal universality of power.” Sofsky does not think efforts to erect walls around individuals are forlorn. On the contrary, they are essential. Behind a wall individuals can lay down the weapons with which they customarily defend themselves against the demands of the public. A wall guarantees personal freedom. Inside the wall lie family, friendship and leisure time, outside it “the pressures of society, vocational obligations, the demands of community and state dominate.” This “right to be left alone,” a famous formulation of privacy by American jurists Samuel Warren and Louis Brandeis in 1890, is not feasible, appropriate or sufficient.
for the authors of *Blown to Bits*. Privacy, to them, is not a right to be separated from society, but one that makes society work. People need room to experiment, to deviate from accepted social norms, because there are no universally and permanently satisfactory ones. They also need to develop and rehearse independent thought before its public exposure, and be able to keep adolescent misjudgments and personal conflicts to themselves, provided these are not of lasting significance to their position in society.

*Blown to Bits*, *The Spy in the Coffee Machine* and even *Privacy: A Manifesto* are works of analysis and description about how things are and might be, rather than manuals for what to do about it. For that, you have to dip into the ALRC’s mighty tome.

Before it reaches its closing recommendation for a new cause of action for serious invasion of privacy, it proposes an overhaul of the federal *Privacy Act*. This legislation sets out principles for government and business to comply with when handling personal information. Although only twenty years old, it predates much that is commonplace in contemporary privacy debates: supercomputers, the internet, mobile phones, digital cameras, e-commerce, sophisticated surveillance devices and social networking websites.

The ALRC wants more consistency, clarity and simplicity in the legislation and fewer exemptions. It would remove the exemptions for small businesses (annual turnover of not more than $3 million), political parties and employee records. It would keep, though reword, the exemption for “journalism,” which currently makes media organisations that are publicly committed to privacy standards exempt from the operation of the act.

Journalism would not have a blanket exemption from the proposed new cause of action for a serious invasion of privacy. Instead, the courts would be required to balance the public interest in any claimants’ privacy against competing public interests, particularly those that matter to the media, such as free expression and the publication of information about matters of public concern.

Some guidance is proposed about the kinds of situations that would fall within the new cause of action. These include interference with someone’s home, family life or correspondence, unauthorised surveillance and disclosure of sensitive facts about an individual’s private life.

The great challenge for a sea change in the law on this scale is that we are only beginning to learn how we feel about the kinds of privacy intrusions that are now routine.

As the authors of *Blown to Bits* put it, “The technology revolution is outstripping society’s capacity to adjust to the changes in what can be taken for granted.” In Angles’s day, racetracks were worried that broadcasting was undermining their business model. They were right to worry. But not only did they find a new business model, they found it in the very practices that ate their old one: broadcasting and off-course betting. So important did live coverage of sporting events become to the audiences of radio and television that broadcasters were prepared to pay vast sums for the exclusive right to bring their microphones and cameras inside the venues the sporting bodies controlled. The games, and especially the salaries of those who play them, are now unimaginable without the trading of rights to broadcast, narrowcast, stream, download or whatever we will come to call it.

It’s time Australia’s legislators caught up with its courts on an enforceable right of action for serious invasion of privacy. But that right needs to come with the ALRC’s recommended case-by-case balancing against other rights to free expression and the publication of information about matters of public concern.

We differ and change in how we respond to those who come too close. Some build walls to discourage the sharp eyes, cupped ears and long noses of surveillance, or try to turn off the always-on connectedness of communications technology. Others strike out against the invasions, ninjas in their own defence. But even each individual can differ in how we feel about different encroachments at different times. Wandering, watching, listening, rummaging about in other people’s business is part of what makes us human. Our private selves crave dark, quiet spaces but our social selves wrestle to be part of whatever is going on. •