

ruled in another case that the original meaning of the words used in the Constitution had to be taken. The case to which he was referring was *Webster's case*. (In re Webster [1975] 49 ALJR 205) This case turned on the meaning of sub-section 44(v) which makes any person having 'any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth' incapable of being chosen or sitting as a member or senator (subject to some exceptions). Barwick CJ interpreted this section narrowly in holding that its scope was confined to the purpose of the 18th century statute from which it was derived. This purpose was to 'secure the freedom and independence of parliament from the Crown and its influence' (per Barwick CJ 208). The 17th century statute was not, according to Barwick CJ, intended to prevent a conflict of interest and duty on the part of members who had a pecuniary interest in a government contract. Barwick CJ came to this view despite the use of the words 'pecuniary interest' which did not appear in the 18th century statute, and the intention of the founding fathers gleaned from the convention debates that the sub-section was intended to prevent such a conflict. He stated that the provision 'however vestigial, must be enforced' and decided on the facts that Senator Webster should not be disqualified.

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telephone tapping

These words hereafter they tormentors be!

Shakespeare, *Richard II*

These are but wild and whirling words,
my lord.

Shakespeare, *Hamlet*

A recent issue of *Reform* carried a story about the recommendations of the Joint Select Committee of the Australian Parliament on the Telecommunications (Interceptions) Amendment Act 1986 ([1987] *Reform* 21). The Bill was assented to on 5 June 1987. Police phone-tapping powers will be extended considerably when the legislation is proclaimed.

new phone-tapping powers. The Bill makes provision for a phone tapping agency to be set up within the Australian Federal Police. It will act on behalf of the States, the New South Wales Drug Crime Commission and the National Crime Authority.

At present, interception of a telephone communication may only be carried out by the Australian Security Intelligence Organisation in relation to national security or by the Australian Federal Police in relation to a narcotics offence.

Under the Bill, the power to intercept is extended in relation to offences to include

- murder
- kidnapping
- a narcotics offence
- an offence for which the punishment is imprisonment for life or a maximum period not less than 7 years where the conduct of the offender constitutes

- a risk to life or serious personal injury
- serious property damage that includes a risk of personal injury or risk to personal safety
- trafficking in narcotics
- serious fraud
- serious loss to Commonwealth revenue

and in all cases the offence of being a party to such an offence. The safeguard of obtaining a warrant remains.

The Opposition's legal spokesman, Mr Spender, is reported to have said the telephone tapping Bill was welcome, but overdue. (*The Age*, 1 May 1987)

community attitudes. Community support for broader telephone tapping powers for law enforcement agencies is strong, but has not gone unchallenged.

In a recent editorial: 'Telephones and the Law' the *Australian* (4 May 1987) said:

If we ever hope to control crime then law-enforcement bodies must be allowed to tap telephones in an effort to gain evidence of those people they believe to be breaking the law!

A poll conducted in 1985 found overwhelming community support for State police powers to tap telephones in the fight against drug offences. The *Age* (24 June 1985) conducted an Australia-wide poll and found 67% of the community in favour of State police being given telephone tapping powers in relation to drug-related crimes. However this was subject to the proviso that prior judicial approval be obtained.

Not everyone sees the need for such a proviso. Commenting on NSW police tapes of telephone conversations

in 1985, Professor Colin Howard, Melbourne University law professor said:

There is little object in providing traffic police with fast cars if they had to get a warrant from a magistrate every time they needed to exceed the speed limit.

(*Sydney Morning Herald*, 19 June 1985)

A contrary opinion was expressed by former Royal Commissioner Frank Costigan QC who told a Joint Parliamentary Committee on the National Crime Authority that telephone tapping was less effective against organised crime than had previously been thought. He was against extending telephone tapping powers to State police (*Sydney Morning Herald*, 3 June 1985).

However the Stewart Royal Commission into alleged widespread illegal phone tapping by New South Wales Police between 1976 and 1984 found that the wealth of evidence produced about organised crime justified greatly extending powers for police to tap telephones (*Sydney Morning Herald* 2 May 1986).

The Stewart Commission reported

The Commission is satisfied that in a number of cases convictions would never have occurred if the use of unlawful telephone interceptions had not exposed the pending commission of an offence or revealed the identity of an offender.

(quoted in *The Age*, 1 July 1987)

The *Age* included the following paragraph in an edited extract of a recently released book on the so called 'Age tapes', — *Big Shots* edited by Bob Bottom (Sun Books)

The great tragedy of the illegal New South Wales police tapes and transcripts was that most of the originals

were destroyed. It is no exaggeration to suggest that more criminals might have been put behind bars if more of the material still existed.

the states. New South Wales Premier, Barrie Unsworth, and Police Ministers around Australia have expressed opposition to a single national interception agency within the Australian Federal Police. They have called for each State force to be granted independent phone-tapping powers (*SMH* 6 December 1986 and 8 April 1987).

Federal Opposition legal spokesman, Mr John Spender, also favours giving these powers to the State police. He is reported in the *Canberra Times* (21 November 1986) as having said centralisation of telephone-tapping powers is a 'cumbersome and unnecessary bureaucratic hazard'.

cryptic calls. Telephone tapping is a sensitive issue for politicians. A well publicised taped telephone conversation between Victorian Opposition Leader, Mr Kennett with federal Liberal MP, Mr Andrew Peacock in March has led to increased caution on the part of politicians, especially in the use of car phones.

One politician is reported to have said from now on all his personal calls will be kept 'a bit cryptic'. Another suggested anyone intercepting his phone calls would receive 'a gobful of teenage chat'.

mobile phones. The devices available for eavesdropping range from the simple and inexpensive to sophisticated models. Few countries endeavour to control the trade in devices. Mobile phones are particularly susceptible to eavesdropping. Telecom warns mobile phone users that they should exercise caution when using them because they

transmit a radio signal to receiving stations before the call enters the normal Telecom network.

A call to and from a mobile telephone is virtually a radio broadcast . . . The present mobile-telephone system uses 180 transmitting channels which are selected at random for each call by the system . . . Full security with mobile telephones is not expected until the 1990's when a digital system will be introduced.

(*Canberra Times*, 24 March 1987)

tapping in the U.S. Concern in the United States about telephone tapping culminated in President Reagan issuing a national security directive in 1984 ordering special protection for all important government communications

The National Security Agency (NSA) is responding with a new generation of telephone terminals that will provide secure point to point communications for less than \$2 000 per station . . . Under Mr Reagan's directive, the Pentagon, arms contractors and banks doing business with the Federal Reserve will have to adopt the NSA's security telephones and coding techniques.

(*The Economist*, 17 May 1986)

However the US Government wants similar protections for US industries. *The Economist* also reported the growing US trend for companies to encrypt telephone calls. This is done by digitising voice signals then rearranging the pattern of digits in random order using a computer.

the invasion of privacy. Speaking recently at the National Press Club in Canberra, the NSW Court of Appeal President, Justice Michael Kirby said

Few citizens in positions of responsibility today act on the assumption that

their telephones are not 'bugged' by public, or by private, snoops.

(*The Australian*, 25 June 1987)

Justice Kirby warned against increasing invasions of privacy. He said legal checks available to stop invasions of privacy were inadequate and there was no remedy to redress any intrusion (*The Australian*, 25 June 1987).

Justice Kirby's warnings about invasions of privacy go unheeded in some quarters. Commenting on the Telecommunications Interception legislation the *Australian* (4 May 1987) said

Although the legislation is sure to come under fire from some civil libertarians, it should not be toned down but rather be expanded to give the right to tap telephones to State police forces!

a right to privacy. The United Nations expressed concern for the right to privacy in the 1966 International Covenant on Civil and Political Rights. Article 17 provides a right to remain free from unlawful interference with one's 'privacy, family, home or correspondence'. Article 17 also states: 'everyone has the right to the protection of the law against such interference or attacks'. Australia ratified the covenant in 1980 but declared at the same time that it accepted the principles of Article 17 without prejudice to its right to make laws to protect national security, public safety, the economic well-being of the country, the protection of public health or morals or the protection of the rights and freedoms of others.

the alrc on privacy. In its report *Privacy* (ALRC 22) the Australian Law Reform Commission responded to the question: who should decide when a person's right to privacy is over-ruled

by the rights of the community to protect itself? It suggested a solution to the problem. A Privacy Commissioner should be appointed to the Equal Opportunity and Human Rights Commission. One of the functions of the Privacy Commissioner would be to conciliate and resolve disputes over conflicting interests where privacy was involved. The Privacy Commissioner would also monitor privacy invasive activity and technological advances that might interfere with privacy; fix standards and publish guidelines; educate the community about privacy; and advise government, industry and the professions. The ALRC recommendations are still under consideration by the government.

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the campaign trial

Democracy substitutes the election by the incompetent many for appointment by the corrupt and the few.

George Bernard Shaw
'Maxims for Revolutionists'

Law reform at the federal level was high on the agenda of the political parties during the recent election campaign.

Both the Liberal Party and the Labor Party published law and justice policies containing significant commitments to law reform. In addition, the Attorney-General, Mr Lionel Bowen MHR, made a number of statements indicating the government's intention, in its next term of office, to continue the ALRC as a significant component in the law reform scene.

product safety. During the election campaign, on 19 June 1987, Mr Bowen