

their enforcement are limited in the protection of the public interest in open political communication.

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1 ABA, *ABA Investigation Report – Political Matter broadcast by 3MP*, investigation No. 763, 2 August 2001 (3MP Report).

2 ABA, *Commercial Radio Inquiry, Final Report of the Australian Broadcasting Authority*, August 2000.

3 3MP Report, 6.

4 The obligation applies only to those political parties who are already represented in the relevant Parliament. See further Leonard, P et al, *Communications Law and Policy in Australia* (1987), paras 9300-10.

5 3MP Report, 33.

6 3MP Report, 32.

7 3MP Report, 32-33.

8 3MP Report, 34.

9 There were also advertisements for the Liberal Party candidate, Ms McLean.

10 3MP Report, 34.

11 *Ibid.*

12 Although the Commission was satisfied that outside of election periods, commercial television broadcasters should be free to determine the broadcasting of political matter, subject to the

principle of providing reasonable opportunities for the broadcasting of opposing views; during elections it considered that more precise rules were required, hence its recommendation of 'equal opportunities': *Royal Commission on Television 1954* (Parliamentary Paper 38 of 1954-55), paras 461-463. The Commission was only making recommendations for television, but the legislation subsequently introduced applied both to radio and television.

13 The most recent attempt was the Political Broadcasts and Disclosure Act 1991 which introduced into the Broadcasting Act 1942 new provisions concerning political and election broadcasts. These provisions were declared invalid by the High Court: *Australian Capital Television Pty Ltd v The Commonwealth of Australia (No 2)* (1992) 108 ALR 577 (the ACTV decision).

14 ACTV decision, 577, 594-595, per Mason CJ.
15 Barendt, EM, *Broadcasting Law A Comparative Study* (1995), 170.

16 Barendt, E, "Election Broadcasts in Australia" (1993) 109 LQR 168. See also Stone, A, "Rights, Personal Rights and Freedoms: the Nature of the Freedom of Political Communication" (2001) 25(2) MULR 374, 399.

17 3MP Report, 2.

18 Under Code 3.1 a licensee must not present advertisements as news programs or other programs.

19 Under the BSA, the ABA only has jurisdiction to deal with a code of practice breach if a complaint has been made first to the licensee. See BSA, s 148 for full procedure. In relation to code breaches, the ABA is more limited in the

enforcement action it can take.

20 See ABA, *Guidelines for the broadcasting of political matter* (1998), <<http://www.aba.gov.au/tv/content/political/index.htm>>.

21 3MP Report, 5.

22 *Ibid.* See also Schedule 2, clause 4(4).

23 3MP Report, 6-7.

24 *Ibid.*

25 3MP Report, 7.

26 The ABA treated each interview separately, having taken the view that the other parts of the programme, for example, music and weather reports did not fall within the arrangements between 3MP and the Liberal Party. This it believed was consistent with the understanding of the Liberal Party who had in a letter to 3MP stated: "Further to your advice we understand that the outside broadcast would not be exclusive to the Liberal Party" (quoted at 9): 3MP Report, 8-9.

27 3MP Report, 11-12.

28 3MP Report, 35. The ABA noted that 3MP now had in place compliance procedures.

29 Note 1 above, pages 55-56.

30 3MP Report, 35.

31 3MP Report, 38, 54 (interview with Denis Napthine) and 52.

32 See, for example, 3MP Report, 32. Such an announcement did not of course constitute the 'required particulars'.

33 3MP Report, 42, 45 and 54.

Where Possums Fear to Tread Invasion of Privacy and Information Obtained Illegally

Glen Sauer describes the implications of a recent High Court decision on broadcasters.

The High Court, in its recent decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (15 November 2001) has found that, in certain circumstances, media organisations can publish or broadcast material that has been obtained illegally by someone else. The High Court also alluded to the possible development of a new tort of invasion of privacy.

THE PROCEEDINGS

In this case, Lenah Game Meats Pty Ltd (Lenah) had applied for an interlocutory injunction to restrain the broadcasting by the ABC of a film made by Animal Liberation Limited of Lenah's operations at its "brush tail possum processing facility".

Lenah kills and processes Tasmanian brush tail possums for export at licensed abattoirs. A person or persons unknown broke into Lenah's premises and installed hidden cameras. The possum killing operations were filmed without the knowledge or consent of Lenah. The film was supplied to Animal Liberation Limited, which in turn supplied the film to the ABC with the intention that the ABC would broadcast it.

Lenah claimed that the broadcasting would cause it financial harm as the film was of the most gruesome parts of the possum processing operation, and showed possums being stunned then having their throats cut. Lenah did not claim that the film was confidential or that its broadcast involved any copyright infringement, and did not sue in defamation. Rather, it relied on broad principles which protect private property holders from unlawful

trespass and deprive media defendants of the fruits of such trespass. Lenah also asserted that the ABC would, by broadcasting the film, commit a tort (actionable wrongdoing) of invasion of privacy, despite the fact that Australian law has not yet recognised such a tort.

INFORMATION ILLEGALLY OBTAINED CAN BE USED BY AN INNOCENT PARTY

A majority of the High Court (Justices Gleeson CJ, Gaudron, Gummow and Hayne) held that the fact that the information which had been illegally obtained was not of itself reason to restrain an innocent party (the ABC) from publishing it. The mere fact that the ABC might act unconscionably in publishing the information was not a good enough reason for the High Court to grant an

injunction. If the ABC had been a party to the trespass the majority of the High Court would have granted an injunction.

Justice Kirby, while finding that the High Court should not grant an injunction against the ABC broadcasting the film, disagreed with the majority by holding that a court could restrain publication of material obtained through the "illegal, tortious, surreptitious or otherwise improper" conduct of others, even if the publisher was innocent of any wrongdoing, so long as publication in the circumstances would be unconscionable.

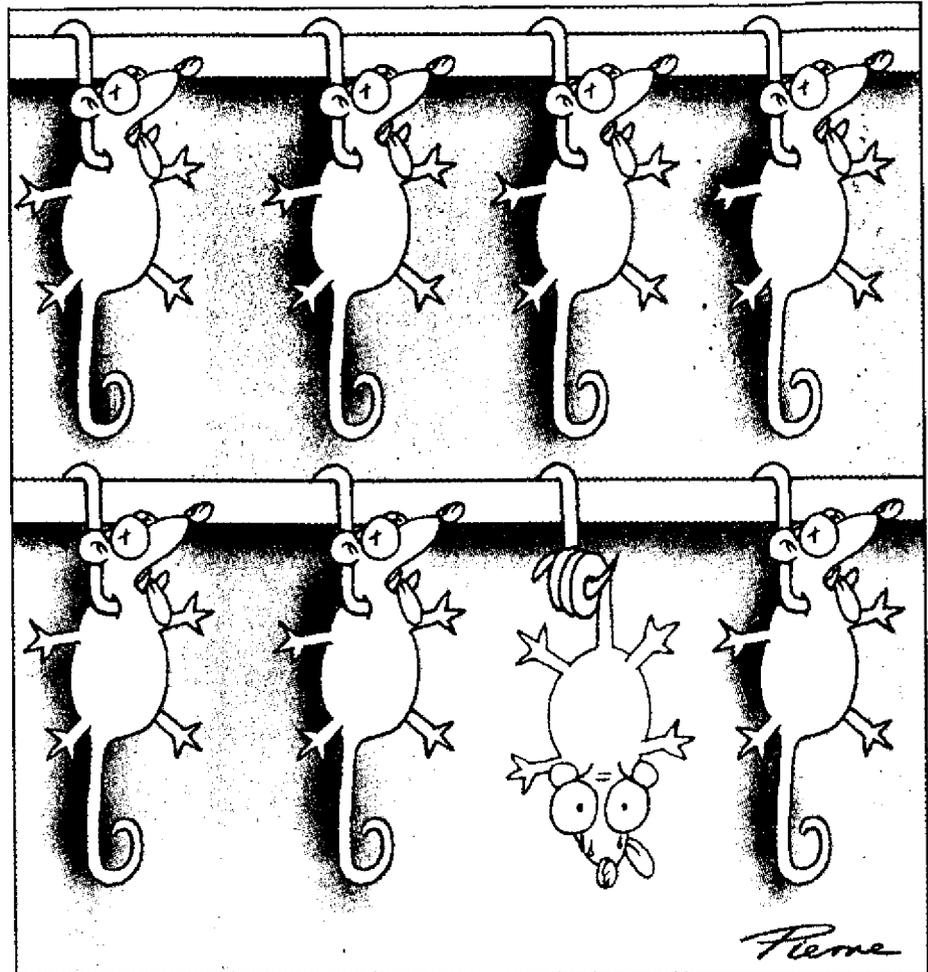
Justice Callinan dissented, holding that once the ABC came into possession of the illegally obtained film, it necessarily came into a relationship with the respondent, much like a receiver of stolen property, and so should not be allowed to broadcast the film.

A TORT OF INVASION OF PROPERTY?

Lenah attempted to argue that a tort of invasion of privacy is available to both individuals and corporations under Australian law. A tort of invasion of privacy is recognised by the courts in both New Zealand and the United States. The High Court did not give any firm indication as to the content of any developing tort of invasion of privacy, but referred to the tort as it applies in the United States with some approval. It therefore seems likely that a tort of invasion of privacy, if accepted by Australian law, would be available where:

- private facts about a person are publicly disclosed;
- the matter made public is highly offensive to a reasonable person; and
- there is insufficient public interest in having the information disclosed.

While no member of the High Court gave a final opinion as to whether such a tort exists in Australia, their decisions indicate that the High Court will in future be receptive to arguments that a tort of invasion of privacy should be recognised. It is worthwhile noting that the majority of the High Court was in agreement that it is unlikely that a corporation may be able to invoke the tort of invasion of privacy because rights of privacy, as distinct from rights of property, are founded on a concern about human dignity. While a corporation may have its reputation or business damaged as a



result of intrusive activity, it is not capable of emotional suffering.

THE SIGNIFICANCE OF THIS CASE TO MEDIA

Lenah was unsuccessful in preventing the publication of the information illegally obtained because it was an innocent party. However, it should be noted that, had the ABC been a party to the trespass, the ABC would be prevented by the law of breach of confidence from using or publishing the information. Accordingly media organisations should be aware that if they obtain information through an illegal or tortious act that the courts may prevent publication of that information through an injunction. Similarly, while the facts of this case would not enable Lenah to succeed in an action in defamation or breach of copyright, media organisations should be aware of these legal risks when using information obtained from any source.

It is interesting to note that two members of the High Court, Justice Kirby and Justice Callinan, both commented that the power of the modern media can sometimes be abused and that when this happens, the courts are the only

institutions with the power and will to provide protection to those who are harmed. This suggests that courts may be more willing than in the past to wield their injunctive powers to prevent a media organisation publishing or broadcasting information where they see good reason to do so.

The development of a tort of invasion of privacy would affect media organisations in that aggrieved parties would have another potential action available in addition to proceedings for defamation, breach of confidence and/or breach of copyright where circumstances allow.

Media organisations may well find themselves liable for publishing material which is accurate and is not defamatory but which in the view of a court intrudes unreasonably upon the privacy of an individual. It is to be hoped that the courts will be cautious in deciding whether to introduce a tort of invasion of privacy and if it does introduce such a tort, that the tort does not unduly compromise the ability of the media to obtain information which is in the public interest.

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