

## Regulation of Election and Political Broadcasting

**Lesley Hitchins examines the regulation of election and political broadcasting.**

In August 2001, the Australian Broadcasting Authority (ABA) released a report of its investigation into commercial radio licensee, Malbend Pty Ltd, operating radio station 3MP, which broadcasts to an area within Victoria.<sup>1</sup> The investigation concerned alleged breaches of the *Broadcasting Services Act 1992 (BSA)* Schedule 2 clauses 3 and 4, which form part of the licence conditions applicable to commercial radio licensees (clause 8(1)(i)). Given the revelations of the ABA's Commercial Radio Inquiry<sup>2</sup> which so dominated broadcasting affairs in 1999 and 2000, the circumstances of the 3MP investigation provide further evidence that commercial radio licensees seem to have a tentative grasp of their responsibilities. Although the broadcast under investigation predated the outcome of the Commercial Radio Inquiry, it is interesting to note that the broadcast and the arrangements for it took place after the ABA had announced that it would investigate commercial radio station 2UE and several other commercial radio stations regarding their commercial arrangements. The allegations concerning those radio stations at that time do not appear to have had an impact on 3MP. Apart from concerns about licensee responsibility, the 3MP investigation also highlights the lack of a cohesive government policy on political and election broadcasting.

### THE FACTS

The 3MP broadcast was a live broadcast from a shopping centre situated within the Frankston East electorate, which at the time of the broadcast was subject to a supplementary Victorian state election. The broadcast took place on 13 October

1999, just prior to the election scheduled for 16 October. The supplementary election was necessary because the sitting member for Frankston East had died on the day of the Victorian state election. Neither the Labor Party nor the Liberal Party had emerged from the state election with a clear majority. The outcome of the supplementary election was important because it would determine whether Labor had any chance of forming a government with the aid of the three independent members (something it wouldn't be able to do if it didn't win the supplementary election).

The broadcast lasted for five hours, four of which were paid for by the Liberal Party Victorian Division (the Liberal Party). The broadcast included a standard mix of music, news, weather, and paid advertisements but, more particularly, it included interviews with the Caretaker Premier, Jeff Kennett, the Liberal party candidate for Frankston East, Cherie McLean, and five other Liberal Party members of Parliament. The selection of the interviewees and the order for the

interviews were arranged by the Liberal Party, whilst 'lead-ins,' or discussion points, were also provided to 3MP by the Liberal Party in relation to each of the interviewees (with the exception of Mr Kennett). The ABA took the view that the documents relating to the arrangements for the broadcast established "...that the Liberal Party was responsible for making the arrangements for the series of interviews which occurred during the outside broadcast as part of a paid media package".<sup>3</sup> As a result of complaints received from the Victorian Branch of the Australian Labor Party (the Labor Party), the ABA investigated whether the broadcast had been in breach of the licence conditions set out in the BSA, Schedule 2, clauses 3 and 4.

### THE BROADCASTING OF ELECTION MATTER

Licence condition clause 3 applies during an election period. Under clause 3(2) a broadcaster, who broadcasts election

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matter during an election period, "must give reasonable opportunities for the broadcasting of election matter to all political parties contesting the election".<sup>4</sup> However, a broadcaster is not required to broadcast such election matter without charge (clause 3(3)). The Labor Party argued that 3MP had breached this condition because 3MP had not informed it of the broadcast or provided it with an opportunity to respond. The ABA rejected Labor's submission that it had been offered no opportunity to respond. Although 3MP had not approached the Labor Party, the Labor Party, on learning of the broadcast, appears to have approached 3MP. 3MP was willing to grant a response but only "if the Labor Party was willing to approach 3MP with a similar proposal".<sup>5</sup> The reference to 'similar proposal' would seem to be a reference to the commercial terms.

Whilst the wording of clause 3(2), particularly the phrase "must give reasonable opportunities", might appear to require some positive action on the part of the broadcaster, in the ABA's view this was not so. Indeed, very little of a proactive nature is expected of the broadcaster. According to the ABA, clause 3(2) did not impose upon a licensee an obligation to ensure balance or to broadcast a range of competing opinions. Nor did the licence condition amount to a requirement to promote accuracy and fairness. The requirement to give 'reasonable opportunities' simply amounted to "...an obligation not to refuse or deny access to a political party" which sought airtime.<sup>6</sup> Further, clause

3(2) did not require the broadcaster to solicit material or to provide equal format or time opportunities.<sup>7</sup>

Thus in determining whether 3MP had provided "reasonable opportunities", the question for the ABA was really whether the licensee had refused or denied access to airtime. Examining the evidence, the ABA concluded that 3MP had not breached clause 3.<sup>8</sup> The ABA considered several factors relevant. As already mentioned, 3MP was willing to provide airtime to the Labor Party subject to terms. Secondly, the Liberal Party understood that the broadcast would not be exclusive to it and that 3MP was free to broadcast music and other items as well as paid advertisements. Thirdly, the ABA noted that these advertisements included advertisements for the Labor Party and for the Independent candidates standing in the supplementary election and that they were broadcast during the live broadcast.<sup>9</sup> These appear to have been pre-recorded advertisements, not directly referable to the Liberal Party's broadcast. Taking these factors into account, the ABA concluded that reasonable opportunities had been given to all political parties to broadcast election matter.<sup>10</sup> The ABA reached this conclusion even though, as it acknowledged, the Labor Party would have been unlikely to have been able to broadcast in a similar format as the Liberal Party's live broadcast took place on the day on which the election blackout would commence.<sup>11</sup> The fact that this did not deter the ABA from its conclusion is perhaps not surprising given its

interpretation of clause 3(2), but it does indicate what limited scope is given to the term "reasonable opportunities".

The ABA's interpretation of the clause 3 obligation appears limited, yet it is not at odds with the legislative intention. Clause 3 was originally introduced in 1956 following the recommendation of the Royal Commission on Television although the Commission had recommended an obligation to provide "equal" opportunities.<sup>12</sup> It is clear that clause 3 demands a low threshold for compliance and it is difficult to envisage many situations in which a licensee would be found in breach. Clearly, a blatant refusal to broadcast the election matter of a particular political party would almost certainly constitute a breach. It might also be possible to determine that a political party has effectively been denied an opportunity to broadcast, if, for example, the licensee set airtime rates for a particular party well in excess of what might normally be expected for a broadcast of that nature and during a particular time period. However, the 3MP Report clearly indicates that the format and timing of an election broadcast is unlikely to be a relevant consideration. This is well-illustrated by the facts of the 3MP case. As the ABA stated clause 3 does not invoke any requirement of balance.

The limited scope of clause 3 illustrates the failure of government in Australia to articulate the place and conduct of election broadcasting in political debate<sup>13</sup> and to recognise the importance of the public's interest in accessing that

debate.<sup>14</sup> It might be argued that, subject to financial resources, the present regime, with its lack of restraints, leaves those wishing to participate in political debate free to do so. Yet as Barendt comments something more may be required:

*[Political broadcasting...] now plays a crucial part in the efficient working of an informed democracy. That role justifies regulation to ensure fairness and balance between political parties. It is perfectly legitimate for a broadcasting authority to take ordinary commercials on a 'first come, first served' basis .... But balance and impartiality, if not absolute equality, are rightly required in the case of political and election broadcasts. This is primarily a matter of (constitutional) principle.<sup>15</sup>*

It needs to be remembered also that the freedom of political communication is a freedom which exists not just for the benefit of the speaker but for the listener (the general public) also, whatever the qualitative value of paid political broadcasting might be. Protecting the public's right to access open political debate may also justify more proactive regulation. In its present terms clause 3 offers limited protection, and such protection it offers is for a limited class of speakers, namely those political parties already represented in parliament. As noted earlier, the ABA specifically rejected the idea that clause 3 had a role to play in the promotion of balance or fairness. If that is correct, then, given Barendt's comments, it would seem all the more appropriate that legislative attention be given to ensuring that election broadcasts are regulated in a way which will more actively promote fairness. The *ACTV* decision, and the cases which have succeeded it, should not be seen as prohibiting appropriately designed rules.<sup>16</sup>

There is a certain irony in the ABA's view that clause 3 has nothing to do with the obligation to promote accuracy and fairness, given that the same broadcast, and hence content, was also considered by the ABA under clause 4. As discussed in the next section of this note, clause 4 does come within the obligation to promote accuracy and fairness. Further, the ABA had earlier noted in the *3MP Report* that it considered that some of the Commercial Radio Codes of Practice were relevant to the broadcast.<sup>17</sup> The ABA didn't specify which codes, but one assumes that it had in mind Code 2, dealing with news and current affairs programs and, possibly, Code 3 which

covers advertising.<sup>18</sup> The purpose of Code 2 is to promote accuracy and fairness in news and current affairs programs. Again, it is ironic that if the ABA had been considering whether there was a breach of Code 2, issues of fairness would have been relevant to the same 3MP broadcast. In fact, because the Labor Party had not followed the correct procedure for Code breaches the ABA was unable to consider this matter.<sup>19</sup> These apparent inconsistencies would seem to strengthen further the need for a more cohesive approach to the role of regulation in the broadcasting of political speech.

### **THE BROADCASTING OF POLITICAL MATTER**

The ABA also investigated whether the broadcast had been in breach of clause 4. Under clause 4(2) a broadcaster who broadcasts 'political matter' "...at the request of another person ... must, immediately afterwards, cause the required particulars in relation to the matter to be announced...". For the purpose of this broadcast, the 'required particulars' meant the name of the political party, the place of its principal office, the name of the natural person responsible for authorising the broadcasting of the political matter, and the name of every speaker delivering an address or making a statement forming part of the political matter (Schedule 2, clause 1).

There was little doubt that what was broadcast was 'political matter'.<sup>20</sup> However, as the ABA noted, "during an election period a significant proportion of what is broadcast on radio can be described as 'political matter'".<sup>21</sup> Clause 4 is applicable only when the political matter is broadcast at the request of another person. This requirement will be satisfied if it can be shown that another person was responsible for approving the matter's content and for the decision to present it for broadcasting.<sup>22</sup> As already noted, the Liberal Party had selected the interviewees and had provided 'lead-ins' for the interviews. 3MP argued that the broadcast was not one in which the content, that is the political matter, had been approved, and that, by its very nature, a live radio interview was a broadcast in which the content couldn't be approved.<sup>23</sup> Further it submitted that every interview which contained political matter and included a politician, as a result of arrangements made by the politician or relevant political party, would fall within clause 4.<sup>24</sup> The ABA did not accept 3MP's submissions:

*... there is a difference between on the one hand, arranging for a live interview with a politician or representative of a political party in the course of news or current affairs programs and making a payment to a licensee to enable a person to dictate the arrangements for the program including the content of the interview and the questions to be asked by a now partial and not disinterested interviewer.<sup>25</sup>*

The ABA assessed each interview and concluded that political matter had been broadcast in each interview at the request of another person without the required particulars been given.<sup>26</sup> Even where the Liberal Party had not provided 'lead-ins' as in the case of Mr Kennett's interview, the ABA considered that it was nevertheless political matter broadcast at the request of another person because it formed "...part of an advertising package negotiated by or on behalf of the Liberal Party. The broadcast of the interview fulfils the Liberal Party's stated aim for the broadcast, ie the promotion of Liberal Party candidate Ms McLean".<sup>27</sup>

Although the ABA found 3MP to be in breach of clause 4, and hence of a licence condition, by failing to announce the required particulars at the end of each of the 8 interviews, the ABA took no action beyond stating its intention to monitor 3MP's compliance with the BSA and with the codes of practice.<sup>28</sup> The ABA's response is curious given its comments on clause 4 in its final report for the Commercial Radio Inquiry. In that report, the ABA noted the importance of political broadcasting disclosure as a principle both in general and as recognised by the regulatory framework:

*Broadcasting services play an influential role in the course of Australian political debate, and Parliament recognised this in a number of places within the Act. It is reflected in the Objects of the Act, particularly 3(c) and 3(d), where greater regulation is placed on the 'more influential broadcasting services', and it is recognised in the requirement to 'tag' political broadcasts....*

*Whereas other matters were left to the Authority and industry to develop guidelines for regulation, Parliament regarded the disclosure of the sponsor of political advertisements as a matter of such singular importance that detailed guidance was included in the Act. In accordance with the regulatory policy set down for it by*

*Parliament, the Authority regards it as a matter of the highest importance that, in the course of political debate, listeners and viewers clearly know who it is that is trying to persuade them.*

*... The Authority is strongly of the view that it is an essential element of fairness and accuracy that presenters advise their audience of the existence of commercial arrangements which may influence opinions broadcast on political matters....*

*... Licensees should also note the gravity with which the Authority will continue to view breaches of the Act in relation to political matter.<sup>29</sup>*

Given the strength of these comments it seems all the more surprising that the ABA took no action particularly since, as it noted in the 3MP Report, the obligation under clause 4 was not a new requirement.<sup>30</sup> Whilst the ABA might assert the importance of compliance with clause 4, in practice the message conveyed to licensees might be less clear. Not only was no action taken against 3MP but it was almost two years before the ABA released its findings. Such lengthy delays might encourage the perception amongst the industry that an investigation's outcome is of symbolic or historical significance only.

Whilst the ABA's lack of action may be surprising, there may be another difficulty here relating to the design of this obligation. Notwithstanding the emphasis upon the importance of political broadcasting disclosure and its relationship to the principles of accuracy and fairness, the actual obligation is rather narrowly drawn. Compliance with clause 4 demands essentially a formulaic response, namely the announcement of certain particulars. There is no broader inquiry concerning the political broadcast and its promotion of fairness. This can be contrasted with the more open-ended inquiry under Code 2. Despite the claims of the ABA regarding the seriousness of this obligation, there may be a tendency to view its breach less seriously given that once the elements of clause 4 are found to be present, the only issue is whether the particulars have or have not been given. There is no scope under clause 4 for taking into account the wider context of the broadcast such as the way in which the political matter has been presented. In other words, the lack of disclosure might be viewed more seriously, such seriousness being reinforced by appropriate action, if the other features

of the broadcast were able to be taken into account.

In this context, it is interesting to look at the 3MP broadcast where several aspects of the broadcast would seem to contribute to a failure on the part of the licensee to promote fairness. First, it is clear from the transcript of the interviews that the questioning of the interviewees was 'soft' as the following examples show:

- In leading up to a question directed to Mr Kennett, the interviewer, Mr Carter stated: "... it's an amazing thing to me to think about the track record of the Liberal Party over the last few years and how they've increased business and all the good things that the Liberal Party has done."
- When interviewing another MP, the then Treasurer, Mr Carter asked: "*The Cain/Kirner [referring to a former Labor Government] was a very expensive one, wasn't it?*" and further on: "*Do you think Labor can actually afford some of their promises?*"
- In the course of interviewing another Liberal MP, State Government minister, Louise Asher, Mr Carter provided the following lead-in for Ms Asher to comment upon: "*I was speaking to her [the candidate] earlier this morning and she's obviously as she said herself, a quiet achiever, not somebody to blow her own trumpet and quite often, the quiet achievers, they're the people to have, because they actually get down and do stuff. Don't they? I think Cherie is one of those people who gets in and does it without sort of blowing her own trumpet too much.*" Needless to say Asher was happy to agree with this!<sup>31</sup>

Of course, one might expect soft questioning for what was a paid political advertisement, but, secondly, it was apparent that there was an attempt to suppress the real nature of the broadcast. Although, 3MP had broadcast at various times throughout the program an announcement such as the following "*3MP in a live broadcast till 2, paid for by the Liberal Party of Victoria ...*"<sup>32</sup>, these announcements were never broadcast 'immediately after' the interviews. They were usually broadcast after other program material, such as music and advertising, and before the next interview. Interestingly, the announcement was not made at all before or near the interviews with Mr Kennett and, the candidate, Ms McLean. Indeed it seems that the information that it was

a paid broadcast was not given until the start of the fourth interview.

Finally, it is clear that 3MP made little attempt to ensure that listeners understood that the interviews were part of an advertisement by the Liberal Party. Not only was there a failure to give the required particulars, but more proactively, albeit clumsily, the broadcaster appeared to be trying to disguise the nature of the broadcast. The announcer regularly created the impression that the interviews were impromptu and not pre-arranged. For example, in introducing several of the interviews, he made statements such as the following:

- "*We've just been speaking to our Caretaker Premier, Jeff Kennett about how things are going and Cherie McLean has dropped by.*"
- "*It's 16 past 11. 3MP live today at the Karingal Hub Shopping Centre in the bowels of the Frankston East electorate and we're talking to some passing politicians. There seem to be a lot in this shopping centre today, just happen to be passing by.*"
- "*And passing by, another passing politician, who I've managed to hook in with my big walking stick, is Denis Naphine... "*"

As was apparent in the Commercial Radio Inquiry, paid messages which can be disguised as such are of much greater value to the person paying than those which cannot be so disguised. The 3MP broadcast took place in the context of an election which would have an important bearing on which political party would be in a position to form the next government in Victoria, and the political matter paid for by the Liberal Party was presented in a way which attempted to disguise the true nature of the broadcast. Nevertheless, these important factors were beyond the scope of the ABA's inquiry.

## CONCLUSION

The circumstances giving rise to the investigation into 3MP must raise concerns once more about the responsiveness of commercial licensees to their obligations. More broadly, the investigation highlights the limitations of current rules on political and election broadcasting as well as the lack of a coherent regulatory role for the ABA. The failure of government to place regulation of political and election broadcasting firmly within fairness principles means that existing rules and

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

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

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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.

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### THE PROCEEDINGS

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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.

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### INFORMATION ILLEGALLY OBTAINED CAN BE USED BY AN INNOCENT PARTY

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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.

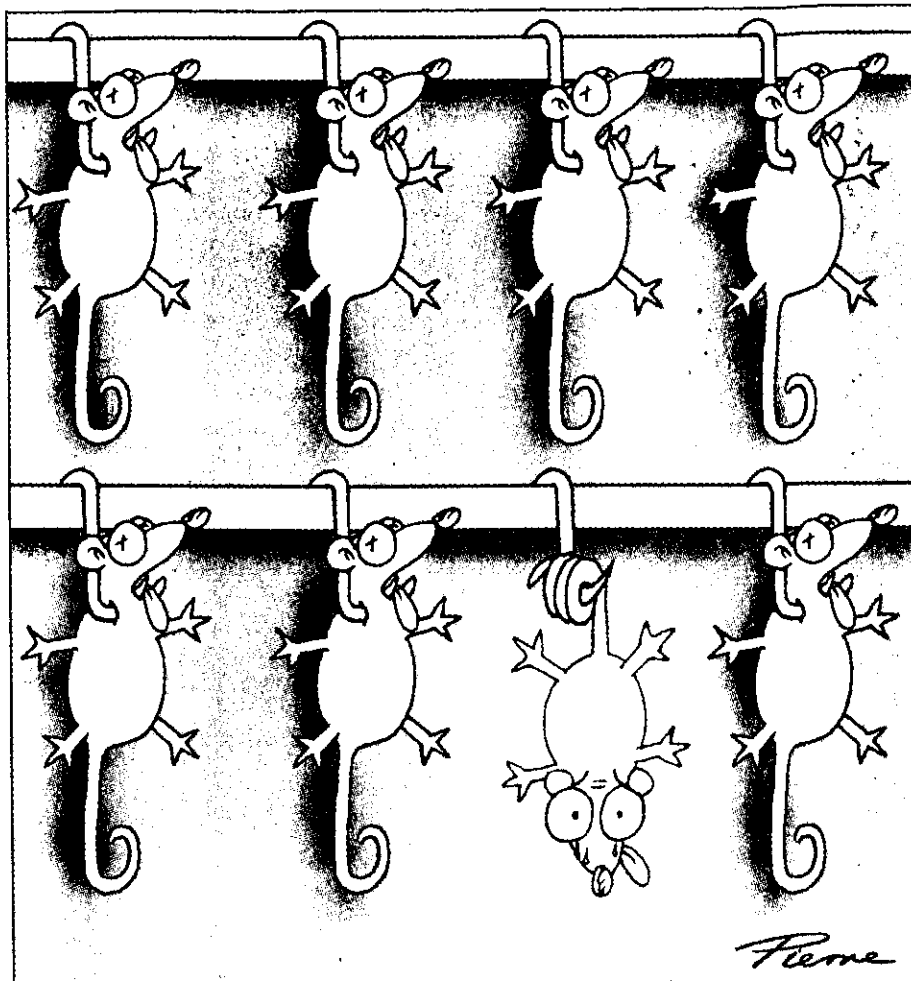
Justice Callinan dissented, holding that once the ABC came into possession of the illegally obtained film, it necessarily came into a relationship with the respondent, much like a receiver of stolen property, and so should not be allowed to broadcast the film.

### **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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# Espionage and Related Offences Bill

**Rebecca Sharman examines the rise and fall of controversial provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill.**

In June 2001, the Government announced its intention to introduce the *Criminal Code Amendment (Espionage and Related Offences) Bill*. The Bill repeals Part VII of the *Crimes Act 1995* a new Chapter 5 entitled 'The Integrity and Security of the Commonwealth'. The Bill was introduced into Parliament on 27 September 2001. Certain provisions of the Bill were met with immediate criticism from the media and from the Democrats and the Australian Labor Party.

On 13 March 2002, the Government announced that it was abandoning a key provision regarding unauthorised disclosure of information. This article analyses the Bill and the rise and fall of the unauthorised disclosure of information provisions.

## THE BILL

(The Bill) covers two broad categories of offences, those relating to espionage, and those relating to official information.

### Espionage & Similar Activities

With regard to information concerning Commonwealth security or defence or information concerning the security or defence of another country, it is an offence to:

*communicate or make available the information with the intent of prejudicing the Commonwealth's security or defence;*<sup>1</sup>

*communicate the information, without authority, with the intention of giving an advantage to another country's security or defence;*<sup>2</sup>

*make, obtain or copy a record of the information with the intention that the record will be delivered to another country or foreign organisation or person acting on their behalf and to prejudice the Commonwealth security or defence;*<sup>3</sup>

*make, obtain or copy a record of the information with the intention that the record will be delivered to another*

*country or foreign organisation or person acting on their behalf and intending to give an advantage to another country's security or defence.*<sup>4</sup>

An important element of the four offences referred to above, is the requirement that the person's actions must result in, or be likely to result in, the information being disclosed to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation. The maximum penalty for these offences under the Bill was raised from 14 years to 25 years imprisonment.<sup>5</sup> The conduct constituting the offence does not have to have occurred within Australia.

### Official Records of Information & Official Information

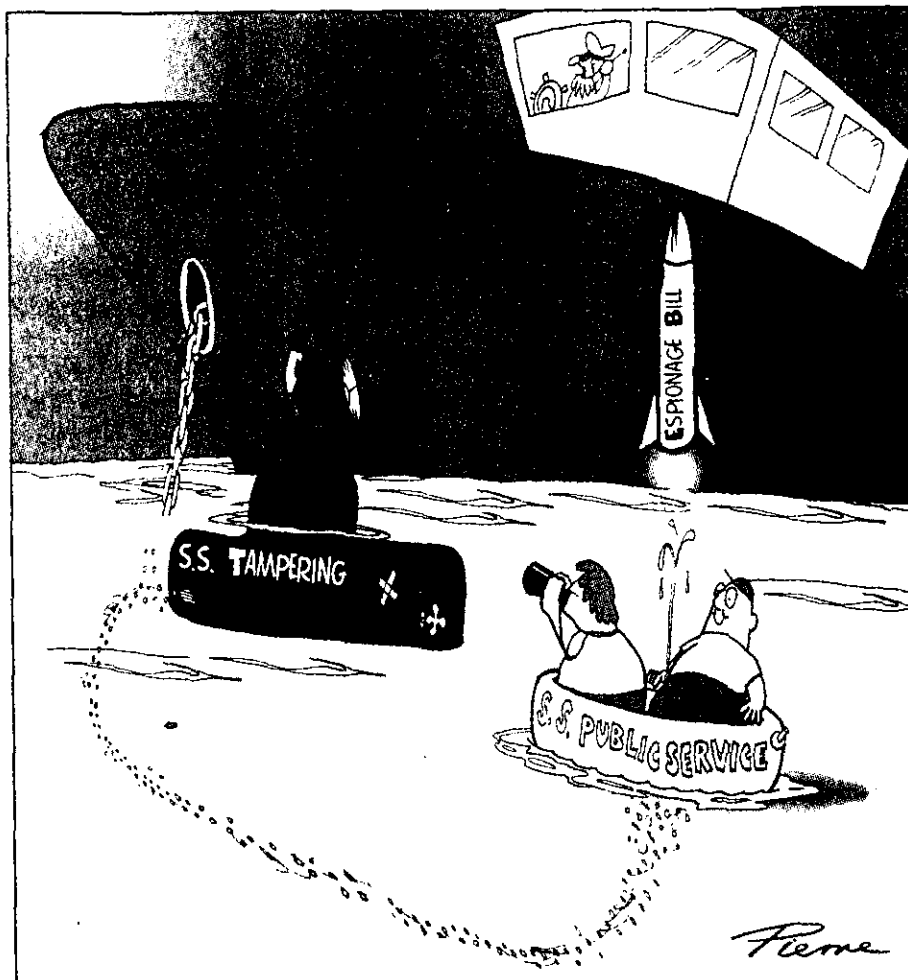
The Bill also covers offences relating to official records of information and official information. Offences under these

provisions are not restricted to disclosure to another country or foreign organisation. This information is defined as including records and information that a person has in their possession or control where:

*a Commonwealth public official has entrusted it to the person and the person is under a duty to keep it secret;*<sup>6</sup> or

*it has been made, obtained or copied by a Commonwealth public official, or by a person who is/has been employed by such a person and who are under a duty to keep the information secret;*<sup>7</sup> or

*the person has made, obtained or copied information with the permission of the Minister and the person is under a duty to keep it secret;*<sup>8</sup> or





it relates to a prohibited place and the person knows or is reckless to the fact that it should not be communicated or made available.<sup>9</sup>

Information is defined as any information of any kind, whether true or false and whether in a material form or not and includes an opinion and a report or conversation.<sup>10</sup>

If such a person communicates or makes available an official record of information or official information to a person to whom he or she is not authorised to communicate it, they may face imprisonment for 2 years. Where the information is communicated or made available with the intention of prejudicing the Commonwealth's security or defence, the Bill imposes a penalty of 7 years imprisonment. Furthermore, it is an offence for the person to retain an official record of information or official information in his or her possession or control when they have no right to, or where retention is contrary to their duty.<sup>11</sup>

The person who receives official records of information or official information, communicated or made available to them as described above, is also guilty of an offence. The penalties range for 2-7 years imprisonment depending on the intention of the communicator. It is a statutory defence if the defendant can prove that the information was communicated or made available to them contrary to their wishes.

## **MEDIA CONCERNS**

Following the announcement of the Bill, the media expressed outrage over the provisions relating to official information. It was feared that the Bill could be used, not only to jail public servants who leak sensitive information to the media, but to imprison journalists as well. Furthermore, the provisions are not restricted to information that involves the security and defence of the Commonwealth.

Fred Hilmer, Fairfax chief executive officer was quoted as saying:

*"If it becomes a crime to disclose any unauthorised information, or to receive any such information, this bill, by limiting the coverage of the workings of government, directly hampers and prevents public discussions of the issues of the day, and therefore goes to the heart of the operation of a free press in a democracy".<sup>12</sup>*

Concern was also expressed by the Sydney Morning Herald that:

*"Such a law would permit politicians to keep telling lies with minimum fear of contradiction from those who know the truth".<sup>13</sup>*

As Tony Harris of the Australian Financial Review summed up:

*"It doesn't matter that there have been few, if any, criminal charges laid against public officials for unauthorised disclosure of information. The mere presence of these laws intimidates public officials in their communication with members of the public and the media".<sup>14</sup>*

Dr Jean Lennane, national president of Whistleblowers Australia described the jail threats as:

*"one of the steps between democracy and totalitarianism".<sup>15</sup>*

It is not just the media and consumer bodies that were troubled by the Bill, concern was also expressed by political parties. A representative for Federal Opposition spokesman on Home Affairs said:

*"The Opposition supports legitimate moves to strengthen national security measures, but we won't support measures which reduce the protection for whistleblowers".<sup>16</sup>*

Similarly, the Democrats supported the ALP stating they "...are absolutely opposed to any legislation that would bring in jail terms for whistleblowers".<sup>17</sup>

In response to these concerns, the Federal Attorney General issued a press release on 3 February 2002. It disputed claims that the Government intends to use its espionage legislation to 'plug leaks'. A spokeswoman for the Attorney General denied that the bill encroached on freedom of the press:

*"The provisions that are receiving media attention are those which are known as the 'official secret' provisions; these provisions are current law contained in the Crimes Act".<sup>18</sup>*

## **COMPARISON WITH THE CURRENT 'OFFICIAL SECRETS' PROVISIONS**

A close examination of the Bill and the Crimes Act indicates that the provisions are similar, but not identical.

### 1) Scope of conduct

The Bill has sought to extend the scope of offences beyond simply communicating the sensitive information to another party, to situations where information is 'made available' and 'access' is permitted to an unauthorised person. Furthermore, the Bill introduces a new offence where a person, with the intention of prejudicing the Commonwealth's security or defence, retains sensitive information where they have no right to do so, or where it is contrary to their duties. This attracts 7 years imprisonment.

### 2) Intention – 'security' vs 'safety'

The Bill refers to a person's intention to prejudice the Commonwealth's security or defence. The current law refers to an intention to prejudice Commonwealth 'safety' or defence. The Explanatory Memorandum to the Bill states:

*"The change to the term security or defence in the Bill reflects the modern intelligence environment. The term security is intended to capture information about operations, capabilities and technologies, methods and sources of Australian intelligence and security agencies. The term safety is unlikely to include such information."*

### 3) Disclosure Provisions

As stated above, one of the main criticisms of the Bill is that it introduced provisions making the disclosure to an unauthorised person or receiving of information by that same person an offence, regardless of whether it related to the security or defence of the Commonwealth.<sup>19</sup> The Attorney General, in his news release stated that these provisions 'simply intend to restate the existing provisions under the Crimes Act in more modern language consistent with the language now used in the Code'.<sup>20</sup>

In the Bill, the disclosure offence is worded in positive language.<sup>21</sup> That is, it is an offence if a person either (a) communicates the information to a person to whom that person is not authorised to communicate it or makes it available; or (b) a person communicates the official information or makes it available to a person whom it is, in the interests of the Commonwealth, his or her duty not to communicate it or make it available. A whistleblower will most likely be caught under (a), as a public official will probably not have authorisation to communicate or make



available official information to the media.

However the current provision in the Crimes Act is worded in the negative.<sup>22</sup> Under this provision it is an offence to communicate a prescribed sketch, plan, photograph, model, cipher, note, document or article or prescribed information, or to permit access to such things, unless the communication or access is to either (a) a person to whom he is authorised to communicate it; or (b) a person to whom it is in the interest of the Commonwealth or part of the Queen's dominions, his duty to communicate it. Therefore, as a whistleblower who discloses 'secret' information to the media can argue that it was their duty to do so in the interest of the Commonwealth, they have not committed an offence under current law.

This raises the question of whether there is an error in drafting in relation to the Bill, or if there is a change of intention on behalf of the Government. The EM does not indicate an intention to criminalise behaviour or limit freedom of press. This clearly illustrates the dangers involved in re-drafting provisions. As of March 13, the disclosure provisions has been excised from the Bill.

#### 4) Receiving Information

With regard to the offence of 'receiving' information, the Bill does differ to the Crimes Act. The current law prescribes that the defendant must have known or

had reasonable grounds to believe at the time when they receive the information, that it is in contravention of the legislation. Under the proposed Bill the mere possession of such information brings you within the scope of the provisions. Therefore, an offence under the Crimes Act for 'receiving' information is narrower.

### **CONCLUSION**

It is clear from the above analysis that the Bill did impose penalties both on whistleblowers who divulged government secrets and upon unauthorised recipients of such information. Given the crisis faced by the Government over the past few years, including the Tampa crisis, the Collin class submarine project disclosure and the attempts by Mr Wispelaere who stole and planned to sell hundreds of top-secret US documents provided to Australia under defence agreements, it is not surprising that they Government may have wanted to restrict the flow of government information. However, any restriction on the ability of the press to scrutinise the government on matters that do not prejudice security or defence, chips away at the democratic foundations our society is built on. For these reasons it is the authors conclusion that the objections to the Bill were well-founded and that the unauthorised disclosure offence was correctly removed.

1 Clause 81.1(1)

- 2 Clause 81.1(2)
  - 3 Clause 81.1(3)
  - 4 Clause 81.1(4)
  - 5 See above clauses
  - 6 Clause 82.1(1)(b)
  - 7 Clause 82.1(1)(c)
  - 8 Clause 82.1(1)(d)
  - 9 Clause 82.2(1)(e)
  - 10 Clause 80.1(1)
  - 11 6 months imprisonment
  - 12 The Age; Media Chief Takes Aim At Howard on Several Fronts, Annabel Crabb, 28/2/02
  - 13 Sydney Morning Herald: Gags Go On: Expose A Porky, Go Directly To Jail, Richard Ackland, 22/2/02
  - 14 Australian Financial Review, Gagging Communication, Tony Harris 12/2/02
  - 15 Sydney Morning Herald: Spy bill to go under the spotlight; Andrew Stevenson, 4/2/02
  - 16 ibid
  - 17 ibid: citing Democrat's Law and Justice Spokesman, Senator Brian Greig.
  - 18 The Age; Media Chief Takes Aim At Howard on Several Fronts, Annabel Crabb, 28/2/02
  - 19 see: 82.3(1)(a) and 82.4(3) of the Bill.
  - 20 Attorney-General News Release Government Gets Tough on Spies – Not Freedom of Speech 3/2/02
  - 20 Clause 82.3(1)
  - 20 s79(3)
- The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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## **Gutnick Goes to the High Court**

**Glen Sauer analyses the recent Gutnick case dealing with internet defamation.**

**T**his year, the High Court will consider jurisdictional issues that arise when material that is placed on the internet overseas is read by people in Australia. Dow Jones has obtained special leave to appeal to the High Court in relation to the Supreme Court of Victoria's decision that in *Gutnick + Dow Jones Inc [2001] USC (Gutnick)* material placed on the internet in the US and read in Victoria was published, and is therefore actionable, in Victoria.

The case is a timely reminder that people who publish on the internet overseas may find themselves liable under Australian law for material that would not be

actionable in the jurisdiction in which it was posted. In particular, people who post defamatory material in the US, where libel laws are more favourable to publishers, could well find themselves liable for publication of the material in Australia. This risk will be particularly great if the person who publishes the material has assets or does business in Australia and the person defamed lives or is known in Australia.

### **THE PROCEEDINGS**

Dow Jones was the publisher of *Barron's Magazine*. *Barron's Magazine* published

an article entitled "*Unholy Gains*" (the article) which described the plaintiff, Joseph Gutnick as the biggest customer of Nachum Goldberg, a gaoled money launderer and tax evader.

A very small number of print copies of *Barron's Magazine* were sold in Victoria. The article was also published on the Internet in *Barron's Online*, a website operated by Dow Jones on a web server in New Jersey. A number of subscribers to the website downloaded and read the article in Victoria.

Gutnick commenced defamation proceedings in the Supreme Court of

Victoria. Gutnick argued that the article imputed that he was masquerading as a reputable citizen when he was a tax evader who had laundered large amounts of money through Goldberg and had bought his silence. Gutnick's claims for defamation were in relation to both the Internet version of the article published in *Barron's Online* and the sale of the paper edition of *Barron's Magazine* in Victoria.

Dow Jones argued that the Supreme Court did not have jurisdiction because the article was published in New Jersey and not in Victoria. It also argued that the Supreme Court should decline jurisdiction on the basis that New Jersey, not Victoria, was the appropriate forum.

Justice Hedigan rejected both Dow Jones' arguments and found that defamation law has, for centuries, considered that publication occurs at the time and place that the material is seen or heard. On this basis, his Honour upheld Gutnick's argument that the article was published in Victoria, where it was downloaded, and read by Dow Jones' subscribers.

Dow Jones' argument that the article was published when it was uploaded to a web server (in New Jersey) was rejected. His Honour added that, even if the place of uploading was considered to be the place of publication (despite the fact that its meaning, at the point of uploading, was incomprehensible), he was of the view that it was published, for the purposes of defamation law, in both New Jersey and Victoria. Uploading from the web server in New Jersey and arrival in Victoria were virtually simultaneous, and for the law's purpose, indivisible.

His Honour also considered the problem of whether the Victorian Supreme Court ought to put a foreigner (Dow Jones) to the inconvenience, cost and annoyance of having to take part in proceedings in Victoria. In finding that Victoria was an appropriate and convenient forum his Honour noted that, at the end of the day, it was significant that the proceedings were commenced by a Victorian resident conducting his business and social affairs in Victoria in respect of a defamatory publication published in Victoria, suing only on the publication in Victoria and not pursuing any form of damages in any other place.



### HIGH COURT APPEAL

On 14 December 2001, Chief Justice Gleeson granted Dow Jones special leave to appeal to the High Court in relation to Justice Hedigan's decision. The Victorian Court of Appeal had refused leave to appeal on 21 September 2001.

Publishers will need to wait for the High Court's judgment to find out whether Justice Hedigan's decision is correct. If Justice McHugh's views are any indication, Justice Hedigan's decision may well be upheld. On 14 November 2001, before special leave was granted, Justice McHugh said that:

*"I might also mention that it does not seem to me that Dow Jones' prospects of succeeding in an appeal are high. It is possible that Dow Jones may be granted special leave to appeal to enable this Court to authoritatively declare the law on the point of jurisdiction. Although I have not had the advantage of detailed argument from Dow Jones' counsel on the various points, the reasons of Justice*

*Hedigan and my own understanding of the law suggests that the prospects of success in an appeal are relatively low. I think it would require a fundamental departure from orthodox principle for Dow Jones to succeed in the appeal."*

### INJUNCTIONS FOR DEFAMATORY MATERIAL PUBLISHED ON THE INTERNET

The decision in *Gutnick* can be contrasted with the decision of the New South Wales Supreme Court in *Macquarie Bank Limited v Berg* [1999] NSWSC 526 (2 June 1999). In that case, Justice Simpson refused to allow an order restraining the defendant from publishing certain material about Macquarie Bank on the internet because such an order would restrain the defendant from publishing that material anywhere in the world, including places where the defendant might well have an unfettered right to publish it.

Her Honour said that such an order would

superimpose the defamation law of NSW on every other state, territory or country of the world and therefore would exceed the proper limits of the court's injunctive power.

If Justice Simpson's decision is followed, then it will be even more difficult to obtain injunctions restraining publication of defamatory material on the internet than it is to obtain such injunctions for material to be published in more traditional media, such as television and newspapers.

However, in many cases, a person defamed on the internet may achieve a similar result by simply notifying Australian internet service providers of the defamatory material. Internet content hosts and internet service providers are likely to be immune from defamation liability for content that they have seen and that they do not know the nature of under Clause 91(1) of Schedule 5 of the *Broadcasting Services Act 1992* (Cth).

Clause 91(1) provides that State and Territory laws and rules of common law and equity have no effect to the extent that they would subject an internet content host or internet service provider to liability in respect of content hosted or carried by it in a case in which it was not aware of the nature of the content. Defamation laws have not been exempted from this immunity. By notifying an ISP of defamatory material, the person defamed could deprive the ISP of this protection, thereby giving the ISP an incentive to take down or block the material if it cannot be defended under Australian defamation laws.

### **PRACTICAL IMPLICATIONS**

Justice Hedigan's decision is likely to be of most concern to internet publishers in the United States and other countries in which defamation laws are more favourable to publishers than those in

Australia. The risk of being sued in Australia will be particularly great for those internet publishers which have assets or do business here. Sports people, Hollywood stars and others that rely in part upon their reputations in Australia for their livelihoods may well choose to sue here for material placed on the internet in the US.

Publishers should consider whether an article is defamatory not only under Australian law, but also under the legal systems of any other countries which may be able to assume jurisdiction over defamation proceedings, such as places where the person defamed resides, does business, or has a reputation. Particular care should be taken with respect to the jurisdictions in which the publisher has assets.

*Glen Sauer is a lawyer at the Sydney office of Blake Dawson Waldron*

## **The New Privacy Obligations and the Media Exemption**

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**Glen Sauer reviews how the new privacy regime deals with the media.**

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Since 21 December 2001, new privacy laws have applied to most private sector organisations, including most media organisations. An exemption applies in respect of acts and practices "in the course of journalism" by media organisations which have publicly committed to standards dealing with privacy in the media context. Activities of media organisations that do not constitute "journalism", such as marketing, will be caught by the legislation. The next few years are likely to bring some interesting debates before the Courts as to what does and does not constitute "journalism".

### **THE NEW PROVISIONS AND THE JOURNALISM EXCEPTION**

The new private sector privacy laws are contained in the *Privacy Act 1988* (Cth) (the Act). Most important, from the private sector's perspective, are the National Privacy Principles (NPPs), which contain rules governing collection,

use, and disclosure of "personal information" (defined as matters relating to information and opinions about individuals).

The NPPs do not apply to acts and practices of a "media organisation" carried out in the course of "journalism" so long as that media organisation has publicly committed to standards dealing with privacy in the media context.

By providing this exemption, the Act recognises the role of the media in keeping the Australian public informed. The exemption aims to balance the public interest in privacy against the public interest in allowing a free flow of information. Frequently, the media provides the public with information about individuals which the individuals may prefer not to be known. Without the exemption, individuals might, in certain circumstances, be able to prevent the media from collecting or using such information.

Organisations which disseminate information to the public need to consider three issues in relation to the exemption. First, whether the organisation is a "media organisation". Second, which of its acts and practices are and are not "journalism". Third, whether or not the organisation has publicly committed to standards that deal with privacy in the media context and that are sufficient to trigger the exemption.

### **WHAT IS A MEDIA ORGANISATION?**

"Media organisation" is defined in the Act as an organisation whose activities consist of or include collecting, preparing or disseminating to the public, news, current affairs, information or documentaries, or commentary, opinion or analysis of such material. "Organisations" include individuals as well as corporations, partnerships, associations and trusts.

Broadcasters and magazine and

newspaper publishers obviously fall within the definition. Individuals who publish material of the requisite type on the internet are also likely to fall within it. As a matter of common sense, it appears likely that organisations which disseminate material only to those members of the public who subscribe to their services, such as pay television services, will also be included.

There are, however, some types of organisation which do not so obviously fall within or without the "media organisation" definition. For example, it will be interesting to see whether organisations which operate business information services, such as Reuters and Dun & Bradstreet, will be found to be media organisations. This will depend, to some extent on the breadth of meaning given to "information" in the definition above. It could be interpreted narrowly to mean only information in a form similar to news, current affairs or documentaries. Such an interpretation would be based on a principle of statutory interpretation known as *Ejusdem Generis*.

Alternatively, "information" could be given a broader meaning, on the basis that a narrow interpretation would not provide the balance between privacy and the free flow of information which Parliament sought to achieve.

### WHAT IS "JOURNALISM"?

There is even greater doubt as to what "Journalism" means for the purposes of the Act. This word is the key to the media exemption and is not defined. The Commonwealth Attorney General has stated that the term is intended to have its everyday meaning and to apply in a technology neutral way.<sup>23</sup> The problem is, of course, that different people attach different "everyday meanings" to the term. For example, one person might consider that interviews conducted by "Borat" on the Da Ali G Show fall squarely within the ambit of journalism and another may consider them to fall outside it. Drama, comedy, infotainment and information services all fall within the potential grey area.

The Macquarie Dictionary, which is the dictionary of preference for Australian Courts, does not answer these questions.



It defines "journalism" as:

*"1. the occupation of writing for, editing, and producing newspapers and other periodicals, and television and radio shows. 2. such productions viewed collectively."*

This definition is so general in its terms that courts may not find it helpful. It could, perhaps, support an argument that all material made available to the public by media organisations should be treated as "journalism" for the purpose of the exemption. Such an interpretation would be consistent with the objective of ensuring a free flow of information to the public.

Courts may also look to the "media organisation" definition in seeking to define journalism. Depending upon the approach taken to the word "information" (discussed above), this could result in a broad or a narrow exemption.

### STANDARDS FOR MEDIA ORGANISATIONS

The Act is also very general in relation

to the standards to which media organisations must publicly commit to obtain the benefit of the exemption. It merely specifies that the standards must "deal with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters)" and must have been "published in writing by the organisation or a person or body representing a class of media organisations". The Explanatory Memorandum does not provide any guidance as to what will be sufficient to meet this requirement. The Office of the Privacy Commissioner has not expressed any views on this issue and says that it has received very few inquiries in relation to the media exemption. Those that it has received have been from some Public Relations companies, which have been informed that the exemption is not available to them because those particular companies had not publicly committed to any standards dealing with privacy.<sup>5</sup>

It will be necessary to wait for the Commissioner and the courts to consider this provision before we know whether a broad statement found in media codes of conduct to the effect that "privacy should

be respected"<sup>6</sup> would be sufficient. It is likely that more detailed rules relating to privacy will be required.

Other provisions also recognise the important role of the media in facilitating the free flow of information to the public. Importantly, it is not an offence for a journalist to refuse to give information, answer a question or produce a document or record which he or she would otherwise be required to give under the Act (eg. to the Privacy Commissioner) where this would tend to reveal the journalist's confidential source.<sup>7</sup>

The legislation also recognises<sup>8</sup> that the public interest in the free flow of information to the public through the media may compete with the right to privacy. The Privacy Commissioner and approved privacy code adjudicators will be required to take these competing

interests into account when considering complaints.<sup>9</sup>

## CONCLUSION

The Act contains provisions designed to preserve the ability of the media to provide information to the public. The most important of these provisions is the journalism exemption. Like other provisions in the Act, the journalism exemption is general in its terms. This gives the Act the flexibility to accommodate technological and other developments, but also means that much will depend upon interpretation of it by the Commissioner and the courts.

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<sup>33</sup> Attorney General Fact Sheet – Privacy and the Media, July 19 2001 <http://law.gov.au/privacy/>

[newfacts/Media.html](http://newfacts/Media.html).

<sup>5</sup> Office of the Federal Privacy Commissioner telephone hotline 7 January 2002.

<sup>6</sup> see, eg., clause 2.2(e) of the Commercial Radio Code of Practice ("In the preparation and presentation of current affairs programs, a licensee must ensure that respect is given to each person's legitimate right to protection from unjustified use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy"), clause 9 of the Australian Journalists' Code of Ethics ("They shall respect private grief and personal privacy and shall have the right to resist compulsion to intrude on them"), clause 3 of the Australian Press Council Statement of Principles ("Readers of publications are entitled to have news and comment presented to them honestly and fairly, and with respect for the privacy and sensibility of individuals. However the right to privacy should not prevent publication of matters of public record or obvious or significant public interest") and the MEAA Code of Ethics (MEAA members commit themselves to "respect private grief and personal privacy").

<sup>77</sup> section 66 (1A)

<sup>9</sup> sub-section 29(a).

# Spam – Is Enough Being Done?

**Ben Kuffer and Rebecca Sharman take a hard look at spamming issues.**

On 30 May 2002, the European Parliament voted to approve an opt-in system for email, faxes and automated calling systems. The result of this is that European businesses and individuals should give permission for receiving unsolicited electronic communications for marketing purposes. The formal adoption of the directive by member States makes it illegal to send unsolicited email, text messages or other advertisements to individuals with whom companies do not have a pre-existing relationship.

CAUBE believes this will turn Europe into a virtual "spam free zone" by the end of 2003. However, many European politicians and lawyers have voiced doubt over the effectiveness of the new anti-spam laws. As Michael Cashman, MEP and Member of the Citizen's Freedoms and Rights, Justice and Home Affairs Committee points out "spammers do not abide by the law and the expectation that they will be caught under this new directive is crazy". Furthermore, the directive does nothing to curb spam coming from outside Europe and it will take years to restructure EU member States IT systems which presently operate on an opt-out approach.

The Federal Government announced in February 2002 that, with the continuing expansion of Internet usage in Australia,

it wishes to ensure that "spamming does not get out of hand". This article considers the problem of spamming, the effectiveness of the current legislative and self-regulatory measures to limit spamming and what can be done to improve the current deluge of emails that hit your inbox on a daily basis.

## WHAT IS SPAM?

Unsolicited bulk email, commonly referred to as "spam", is any electronic mail message that is transmitted to a large number of recipients where some or all of those recipients have not explicitly and knowingly requested those messages. Spam is now recognised by government, industry and consumer groups in Australia and overseas as a significant problem requiring urgent management.

Spam raises many issues, including breaches of privacy, illicit content, misleading and deceptive trade practices and increased costs to consumers and businesses for internet service provider access. Spammers are in effect taking resources away from users of valuable resources and the suppliers of these resources without compensation and/or authorisation.

### How Prevalent is Spam?

Spam is growing at a rapid rate. Statistics compiled by Brightmail Inc, a spam

filtering service, state that in the last 12 months, spam constituted 20% of all email screened by them. The Coalition Against Unsolicited Bulk Email (CAUBE) found that the number of unsolicited bulk email received by Australian Internet users in 2001, was six times more than that received in 2000. America Online have stated that spam accounts for half of all electronic mail they process.

In 1999 CAUBE conducted a 12 month spam survey, where addresses were 'planted' at internet sites where spammers were known to have harvested addresses. CAUBE found that of the spammers utilising the 'planted' email addresses, Australian based organisations accounted for 16% of the spammers caught.

## PROBLEMS ASSOCIATED WITH SPAM

A number of problems are associated with spamming. It has been said that, the Internet relies on the cooperative use of private resources and that the sending of an email is a privilege not a right. These issues are described below.

**No cost to the sender means unlimited spam**

Spam enables a sender to advertise

The Communications Law Bulletin is the journal of the Communications and Media Law Association (CAMLA) which is an independent organisation which acts as a forum for debate and discussion and welcomes the widest range of views. The views expressed in the Communications Law Bulletin and at CAMLA functions are personal views of the respective authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

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Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

*Contributions in hard copy and on disk and comments should be forwarded to:*

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In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

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