HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

AUSTRALIAN BROADCASTING CORPORATION APPELLANT

AND

LENAH GAME MEATS PTY LTD RESPONDENT

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd
[2001] HCA 63
15 November 2001
H2/2000

ORDER

1. *Appeal allowed.*

2. *Set aside Orders 1, 2 and 3 of the Full Court of the Supreme Court of Tasmania made on 2 November 1999 and in place thereof order that the appeal to that Court be dismissed.*

3. *The appellant to pay the costs of the respondent of the appeal to this Court.*

On appeal from the Supreme Court of Tasmania

Representation:

T K Tobin QC with J C Gibson and R D Glasson for the appellant (instructed by Judith Walker, ABC Ultimo Centre)

S B McElwaine with J F E Bourke for the respondent (instructed by S B McElwaine)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with A J Abbott and J S Stellios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

B M Selway QC, Solicitor-General for the State of South Australia with J C Cox intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor for South Australia)

CATCHWORDS

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd

Equity – Equitable remedies – Interlocutory injunction – Principles to be applied – Need for plaintiff to show a serious question to be tried – Defence that plaintiff has no equity – Nature of discretion to grant interlocutory relief – Relevance of implied freedom of political communication under the Constitution.

Practice and procedure – Interlocutory injunctions – Power of Supreme Court to grant interlocutory injunction – Whether s 11(12) of *Supreme Court Civil Procedure Act* 1932 (Tas) alters basis on which the Supreme Court has power to grant an interlocutory injunction – Purpose for which power exists to grant an interlocutory injunction – Meaning of "just and convenient".

Torts – Privacy – Whether Australian law recognises a tort of invasion of privacy – Whether right to privacy attaches to corporations – Relevance of implied freedom of political communication under the Constitution to the tort of privacy.

Constitutional law (Cth) – Interpretation of Constitution – Implications from Constitution – Implied freedom of communication concerning government and political matters – Whether law providing for interlocutory injunction against broadcaster infringes implied freedom – Whether injunction if granted would infringe freedom – Relevance of implied freedom to grant of injunction – Whether properly or at all taken into account.

Trespass to land – Trespasser illegally made clandestine film of activities and gave it to a broadcaster – Whether owner has right to restrain publication of film by broadcaster.

Words and phrases – "unconscionability" – "just and convenient" – "interlocutory injunction".

Supreme Court Civil Procedure Act 1932 (Tas), ss 10, 11.

1 GLEESON CJ. This appeal concerns an application for an interlocutory injunction, pending the hearing of an action brought by the respondent against the appellant and another party, to restrain the broadcasting of a film of the respondent's operations at a "brush tail possum processing facility". The film was made surreptitiously and unlawfully, and was given to the appellant with the evident purpose that the appellant would broadcast it. The appellant probably realised, when it received the film, that it had been made in a clandestine manner. It certainly knew that by the time the application for an injunction was heard. The evidence, unchallenged at this stage, is that the broadcasting would cause financial harm to the respondent.

2 The proceedings were commenced, by Statement of Claim, in the Supreme Court of Tasmania. They have not yet come on for a final hearing. There was an interlocutory application for an "interim injunction". The application was heard by Underwood J, who dismissed it on three grounds. First, by reference to the facts alleged in the Statement of Claim, which were supported by the evidence, he held that there was no serious question to be tried. Secondly, even assuming that there had been a cause of action disclosed in the Statement of Claim, he held that it could only have been in defamation, and the principles relating to prior restraint on the publication of defamatory matter dictated that interlocutory relief should not be granted. Thirdly, in any event, damages were an adequate remedy. There was an appeal to the Full Court of the Supreme Court[1]. It was made clear that no action for defamation was being pursued. Accordingly, the second ground upon which Underwood J decided the matter was irrelevant. By majority, (Wright and Evans JJ), the appeal was upheld. An interlocutory injunction was granted. Slicer J dissented, primarily on the ground that Underwood J was right to hold that it had not been shown that there was a serious issue to be tried. Following the decision of Underwood J, and before the hearing before the Full Court, the appellant broadcast a segment of the material, but it was not argued that anything turned on that.

3 Although the argument in this Court ranged more widely, the appellant contends that Underwood J and Slicer J were correct in holding that, even if the facts alleged in the Statement of Claim were true, they disclosed no legal or equitable basis on which the respondent was entitled to final injunctive relief and, there being no serious issue to be tried between the parties, this was not a proper case for interlocutory relief.

4 That contention should be addressed first. The procedural context in which it was, and is, raised is familiar, and requires the application of established principles concerning interlocutory relief.

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1 *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* [1999] TASSC 114.

5 The respondent, as plaintiff, brought an action seeking an injunction and damages. The defendants were the appellant and Animal Liberation Limited, which supplied to the appellant the video tape made as a result of the filming of the respondent's operations. (Animal Liberation Limited is not a party to the present appeal.) The final injunctive relief sought against the appellant was a mandatory injunction requiring the appellant to deliver up to the respondent "all copies of the video or excerpts from it in its possession, custody or power". That relief, if granted, would have the practical effect of permanently preventing the appellant from broadcasting the material on the video without the respondent's permission. The respondent also gave notice, in its Statement of Claim, that it claimed "[a]n interim injunction restraining [the appellant], its servants or agents, from publishing or causing to be published the video or excerpts from it". On the same day as the Statement of Claim was filed, there was also filed an interlocutory application claiming an interim injunction in the terms mentioned above. The application was supported by an affidavit of Mr Kelly, a director of the respondent, who gave evidence of the facts alleged in the Statement of Claim, and explained how the distribution and publication of the material on the video was likely to have an adverse effect on the respondent's business.

6 Thus, the respondent sought final injunctive relief which would require the appellant to hand over the video, and all copies of, or excerpts from, it, and would prevent the appellant from broadcasting, or further broadcasting, the material on it. Interim relief was sought, in the form of an interlocutory injunction restraining the appellant from publishing the video or excerpts from it pending the hearing of the application for final relief.

7 Presumably the matter was not dealt with as an urgent application for final relief because the parties, or at least one of them, wished to keep open the possibility of further investigating factual issues that might arise on the pleadings. There does not seem to be much room for dispute about the allegations in the Statement of Claim concerning the making of the video, and how it came into the appellant's possession. However, if and when there is a final hearing, there may be a contest about the allegations concerning damage.

8 When a plaintiff applies to a court for an interlocutory injunction, the first question counsel may be asked is: what is your equity? If a plaintiff, who has commenced an action seeking a permanent injunction, cannot demonstrate that, if the facts alleged are shown to be true, there will be a sufficiently plausible ground for the granting of final relief, then that may mean there is no basis for interlocutory relief. That is what happened here. Underwood J looked at the allegations in the Statement of Claim, supported as they were by the evidence of Mr Kelly, and, after hearing argument, concluded that, even if those allegations were true, they could not justify the final injunctive relief sought by the respondent. On that ground, he refused interlocutory relief. That approach was in accordance with practice and principle. Of course, if Underwood J made an

error in concluding that the respondent had no equity, then his decision was flawed. But, having regard to the way the case was conducted by the parties, he asked the right question. The central issue in this appeal is, or ought to be, whether he gave the right answer.

The nature of the jurisdiction

9 Sir Frederick Jordan, in his *Chapters on Equity in New South Wales*, said[2]:

> "The purpose of an interlocutory injunction is to keep matters in *statu quo* until the rights of the parties can be determined at the hearing of the suit."

10 That is a sufficient description of the purpose for which the Supreme Court of Tasmania might properly have granted an interlocutory injunction in the present case. It is not a complete description of the circumstances in which an interlocutory injunction may be granted[3]. But it covers this case. The respondent claimed a right, which it sought to have vindicated by a permanent injunction, to prevent the appellant from publishing or broadcasting any of the material on the video tape which had come into its possession. Subject to any argument as to whether damages were an adequate remedy, there was a probability that such right would be rendered worthless if, before the final hearing, the appellant broadcast the material as and when it pleased. In order to preserve the subject matter of the dispute, and to prevent the practical destruction of the right claimed by the respondent before the action could be heard on a final basis, the Supreme Court had power to grant an interlocutory injunction. The immediate source of that power was s 11 of the *Supreme Court Civil Procedure Act* 1932 (Tas). Power of that nature has a long history, and is exercised according to principle, not unguided discretion. I agree with what is said by Gummow and Hayne JJ as to the relevant principles. For present purposes, what is most significant is that the justice and convenience of granting an interlocutory injunction, in a case such as the present, is to be found in the purpose for which the power exists.

11 The corollary of the proposition stated by Sir Frederick Jordan is that a plaintiff seeking an interlocutory injunction must be able to show sufficient colour of right to the final relief, in aid of which interlocutory relief is sought. Lord Cottenham LC in *The Great Western Railway Company v The Birmingham Railway Company*[4] formulated the issue as whether "this bill states a substantial question between the parties". In *McCarty v The Council of the Municipality of*

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2 6th ed (1947) at 146.

3 See Spry, *Equitable Remedies*, 5th ed (1997) at 446-456.

4 (1848) 2 Ph 597 at 603 [41 ER 1074 at 1076].

North Sydney[5], the Chief Judge in Equity described the proposition that a plaintiff seeking an interlocutory injunction must show at least a probability that he will succeed in establishing his title to the relief sought at the final hearing as "so well established that no authority is really needed in support of it".

12 We are not concerned in the present case with forms of relief, such as the Mareva order, or anti-suit injunctions, which have expanded the boundaries of this area of jurisprudence. Nor are we concerned with some special statutory jurisdiction. A plaintiff claims a right and seeks to have it vindicated by a permanent injunction. It claims to be entitled to restrain the appellant, permanently, from making use of a video. The justice and convenience of imposing interim restraint, pending the hearing of the final action, if it exists, lies in the need to prevent the practical destruction of that right before there has been an opportunity to have its existence finally established.

13 In *Castlemaine Tooheys Ltd v South Australia*[6], Mason ACJ summarised the principles governing the grant or refusal of interlocutory injunctions in both private law and public law litigation. He said:

> "In order to secure such an injunction the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction."

14 Underwood J held that the respondent failed to satisfy either (1) or (2).

15 A dispute arose in the course of argument as to "whether interlocutory injunctive relief to prevent publication can be granted without any underlying cause of action to be tried". In the context of the present case, this is puzzling. There could be no justification, in principle, for granting an interlocutory injunction here other than to preserve the subject matter of the dispute, and to maintain the status quo pending the determination of the rights of the parties. If the respondent cannot show a sufficient colour of right of the kind sought to be vindicated by final relief, the foundation of the claim for interlocutory relief disappears.

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5 (1918) 18 SR (NSW) 210 at 211-212.

6 (1986) 161 CLR 148 at 153. See also *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 24 [21]; *Fejo v Northern Territory* (1998) 195 CLR 96 at 121-122 [26]-[27].

16 In a context such as the present, a proposition that the respondent has a "free-standing" right to interlocutory relief is a contradiction in terms. This is demonstrated, not only by the purpose for which interlocutory relief is granted, but by the form of the relief. The Full Court granted the injunction sought "until further order". A more usual form of interlocutory injunction would be "until the hearing of the action or further order", but the effect is the same. If there were a "free-standing" right to injunctive relief, why would the injunction be limited in time? If there is no serious question to be tried because, upon examination, it appears that the facts alleged by the respondent cannot, as a matter of law, sustain such a right, then there is no subject matter to be preserved. There is then no justice in maintaining the status quo, because that depends upon restraining the appellant from doing something which, by hypothesis, the respondent has no right to prevent.

17 Unconscionability is a concept that may be of importance in considering the nature and existence of the claimed right which a plaintiff seeks to vindicate. It is a matter that requires examination in the present case. But, in these circumstances, it cannot be used to conjure up a right to interlocutory relief where there is no right to final relief. If the respondent cannot demonstrate that there is at least a serious question as to whether the appellant is free to keep the video and to use it as it thinks fit, how could conscience require or justify temporary restraint upon the use of the video by the appellant? If there is no serious question to be tried in the action, how can it be unconscientious to keep and use the video in the meantime? Unconscionability has a role to play in the present case; but that role is in the evaluation of the claim to final relief. Such an evaluation became necessary at the interlocutory stage because it was contended that the plaintiff had no equity.

18 The extent to which it is necessary, or appropriate, to examine the legal merits of a plaintiff's claim for final relief, in determining whether to grant an interlocutory injunction, will depend upon the circumstances of the case. There is no inflexible rule. It may depend upon the nature of the dispute. For example, if there is little room for argument about the legal basis of a plaintiff's case, and the dispute is about the facts, a court may be persuaded easily, at an interlocutory stage, that there is sufficient evidence to show, prima facie, an entitlement to final relief. The court may then move on to discretionary considerations, including the balance of convenience.

19 In the present case, both before Underwood J and in the Full Court, careful consideration was given to the legal basis upon which the respondent claimed permanent injunctive relief in its action. That was appropriate. Apart from the respondent's assertions as to the harm it would suffer if the appellant broadcast, or broadcast further, the material in its possession, there was little contest about the essential facts alleged in the Statement of Claim. The time available for argument was not so limited that the parties did not have a full

opportunity of presenting their cases. The main issue between them was whether, having regard to the circumstances in which the film was made, and then passed on to the appellant, the appellant could be restrained from making use of the film. The respondent's case on that issue was not going to improve between the interlocutory hearing and the ultimate trial. There was no injustice to the parties in giving full consideration to that issue. If, upon such consideration, it appeared that the outcome of the final hearing might turn upon facts that were in dispute, or had not been fully explored, then discretionary considerations may have become decisive. But if it appeared, as to Underwood J it did, that the respondent's case was not going to get any better; that the facts alleged in the Statement of Claim, and supported by the affidavit evidence, even if true, did not make out an entitlement to prevent the appellant from using the film; and that therefore the respondent had no equity, then it was proper to deny interim relief, for there was no justice in restraining the appellant from broadcasting the material.

20 The scales of justice are a powerful image in the judicial process. But the imagery should not lead to the misapprehension that the essential function of a court is to decide every case by a discretionary preference for one possible outcome over another. If Underwood J had concluded that there was a probability that, if the evidence remained the same, the respondent at a final hearing would have been entitled to permanent injunctive relief, then he would have had to undertake a discretionary exercise, to determine whether the balance of convenience favoured the granting of an interim injunction. But the first issue, which was whether the respondent, on the facts alleged, had a right to prevent the appellant making such use of the film as it pleased, raised a question of principle. The answer must be capable of application in a variety of circumstances. As the arguments on either side were developed, they invoked concepts of unconscionability, free speech, rights of property, and privacy. In relation to free speech, implied rights said to be protected by the Constitution were called in aid. These are all legitimate matters to be taken into account in identifying a principle. But they are not commensurate. The Constitution's protection of freedom of political communication, for example, precludes the curtailment of such freedom by the exercise of legislative or executive power[7]. It restricts law-making power and executive action. And, because the common law of Australia conforms to the Constitution, it has an important role in the formulation of common law principle. But it is not a mere balancing factor in a discretionary judgment as to the preferred outcome in a particular case, to be given such weight as to a court seems fit.

21 It is not contended that the appellant has contravened, or threatens to contravene, any statute. It appears that the people from whom the appellant

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7 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

received the video broke the law, perhaps in a number of respects. And it is pointed out that the appellant knows that the respondent's activities were filmed unlawfully, and without the respondent's consent. But if the respondent has the right to prevent the appellant's use of the film, that right must emerge from some principle of general application. The appellant says that it has broken no law, and there is no principle which justifies an order preventing it from broadcasting the material that has come into its possession. It does not seek, or require, judicial approval of its conduct. It maintains that it is free to broadcast, simply because there is no law against it.

The facts

22 The essential facts alleged by the respondent, and established by the evidence, are as follows.

23 The respondent is a processor and supplier of game meat. It sells possum meat for export. Tasmanian brush tail possums are killed and processed at licensed abattoirs. The respondent's business is conducted according to law, and with the benefit of all necessary licences. The methods by which the possums are killed, although lawful, are objected to by some people, including people associated with Animal Liberation Limited, on the ground that they are cruel.

24 A person or persons unknown broke and entered the respondent's premises and installed hidden cameras. The possum-killing operations were filmed, without the knowledge or consent of the respondent. The film was supplied to Animal Liberation Limited, which, in turn, supplied the film, or part of it, to the appellant, with the intention that the appellant would broadcast it. Although the Statement of Claim does not make this specific allegation, the appellant is now aware, if from no other source than the evidence of Mr Kelly, that the film was obtained by unlawful entry and secret surveillance. It probably inferred that, even before Mr Kelly's affidavit was filed.

25 It is not suggested that the operations that were filmed were secret, or that requirements of confidentiality were imposed upon people who might see the operations. The abattoir is, no doubt, regularly visited by inspectors, and seen by other visitors who come to the premises for business or private reasons. The fact that the operations are required to be, and are, licensed by a public authority, suggests that information about the nature of those operations is not confidential. There is no evidence that, at least before the events giving rise to this case, any special precautions were taken by the respondent to avoid its operations being seen by people outside its organisation. But, like many other lawful animal slaughtering activities, the respondent's activities, if displayed to the public, would cause distress to some viewers. It is claimed that loss of business would result. That claim is not inherently improbable. A film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion. In the present state of the evidence, the case has been

argued on the basis, and all four judges in the Supreme Court have accepted, that the respondent will suffer some financial harm if the film is broadcast. The nature of that harm was described by Mr Kelly as follows:

> "The distribution and publication of this film is likely to adversely and substantially affect the [respondent's] business. The film is of the most gruesome parts of the [respondent's] brush tail possum processing operation. It shows possums being stunned and then having their throats cut. It is likely to arouse public disquiet, perhaps even anger, at the way in which the [respondent] conducts its lawful business. This is no different from any animal slaughtering operation in Australia, which is normally hidden from public view."

26 The exact meaning of "hidden from public view" is not clear, and was not explained. The evidence does not show that it is easier, or more difficult, for a member of the public to enter abattoirs generally, or the respondent's premises in particular, than it is to enter any other private property where a manufacturing operation is being carried on, or, for that matter, commercial premises. There is a sense in which most activities conducted on private property are "hidden from public view". But it may be necessary to examine more closely the meaning of such an expression if questions of legal confidentiality arise.

The respondent's claim of right

27 In order to give focus to the principles invoked by the respondent in support of its claim to be entitled to require the appellant to hand over the film in its possession, and to restrain the appellant from broadcasting the film, it is necessary to identify the essential elements of the claim.

28 As an article of personal property, the film itself does not belong to the respondent. Presumably it belongs to the people who sent it to Animal Liberation Limited, and they are content for it to remain in the appellant's possession. There is no claim by the respondent to copyright, or any other form of intellectual property, in relation to the film, or what is depicted on the film. No trade secrets are at risk.

29 The film is the means by which the trespassers recorded, and intended to communicate to others, what goes on in the slaughtering process. Because it is an effective method of doing so, it is clearly relevant to any harm which the respondent is likely to suffer. But does it have additional relevance? If the trespassers had simply entered the premises themselves, secretly observed what was happening, and later described on television what they had seen, what difference would that have made to the respondent's case, except on the question of damage? If a mechanic, called to the premises to repair machinery, had later described the slaughtering process to a public audience, would the case be different? One possible answer to those questions is that the film itself is a visual

image, and a sound recording, in a potent form, which the respondent did not wish to be available for public display. The images and sounds recorded on a film may themselves constitute information; and the circumstances in which the film was made, the nature of the activities recorded, a person's concern that they not be seen by the general public, and an inference that trespassers and broadcasters or publishers knew of that concern, could make the image and the sounds confidential.

30 The respondent contends that the conduct of the appellant in publishing a film known to have been taken as the result of a trespass would on that account alone be unconscionable, and should be restrained. An alternative submission was made by analogy with established principles concerning confidential information. It was to the following effect. A person who comes into possession of information, which that person knows to be confidential, may come under a duty not to publish it[8]. The usual elements for an equitable remedy are, first, that the information is confidential, secondly, that it was originally imparted in circumstances importing an obligation of confidence, and thirdly, that there has been, or is threatened, an unauthorised use of the information to the detriment of the party communicating it[9]. It is unnecessary to go into the circumstances in which an "innocent" recipient of confidential information may be restrained from using it. Here, it is conceded that information about the nature of the processing is not confidential, and was not imparted in confidence. But, it is argued, all information obtained as the result of trespass ought to be treated in the same way as confidential information.

31 The Attorney-General of the Commonwealth, intervening, made the following submissions:

1. A court of equity has jurisdiction to grant an injunction to restrain the use of information where the information has been obtained by a trespasser, or by some other illegal, tortious, surreptitious or otherwise improper means and use of the information would be unconscionable.

2. The jurisdiction extends to ordering an injunction against any person to whom the information has been conveyed, whether or not that person is implicated in the trespass or other illegal, tortious, surreptitious or otherwise improper conduct.

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8 *Prince Albert v Strange* (1849) 1 Mac & G 25 [41 ER 1171]; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 260, 268.

9 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 per Megarry J.

3. In determining whether the use of the information would be unconscionable, the court should take account of all the circumstances of the case, including the competing public interests in preserving the rule of law, protecting private property and in otherwise protecting the relevant information, and the public interest in freedom of speech.

4. In all cases, the fact that the information was improperly obtained should weigh heavily against allowing the information to be used.

5. The onus of showing that the publication is in the public interest should rest on the person seeking to publish the improperly obtained information.

32 The arguments appeared to proceed upon the basis that the relevant information is what the processing of possums, as carried out by the respondent, looks, and sounds, like. The film was the means adopted by the trespassers for obtaining, recording, and communicating, that information. The film is their property; just as if a less well equipped intruder had used a note book, or a sketch pad, to record in written or pictorial form what was seen and heard. The slaughtering process is not confidential, and information about it was not obtained in circumstances of trust and confidence, or otherwise importing an obligation of good faith. The trespassers acted illegally, tortiously and surreptitiously, not merely to obtain the information, but to obtain it in a form calculated to facilitate its public display, and to maximise its potential impact upon those to whom it was ultimately conveyed. It is the conduct of the trespassers in obtaining and recording the information that is said to expose the appellant to restraint upon the use it may make of the product of that conduct.

33 That way of looking at the case, and characterising the relevant information, may explain the way the case was argued in the Full Court, and the surprising concentration on the question whether there is a "free-standing" right to an interlocutory injunction even if the Statement of Claim discloses no cause of action. In the Full Court, the present respondent, (there the appellant), made a limited challenge to the reasoning of Underwood J. Wright J recorded a concession by counsel that the respondent had no maintainable action for breach of confidence. Slicer J recorded that no issue of breach of confidentiality was raised.

34 It is clear that there was no relationship of trust and confidence between the respondent and the people who made, or received, the film. It is also clear that if, by information, is meant the facts as to the slaughtering methods used by the respondent, such information was not confidential in its nature. But equity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. And the principle of good faith upon which equity acts to protect information imparted in confidence may

also be invoked to "restrain the publication of confidential information improperly or surreptitiously obtained"[10]. The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information. In *Hellewell v Chief Constable of Derbyshire*[11], Laws J said:

> "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available."

35 I agree with that proposition, although, to adapt it to the Australian context, it is necessary to add a qualification concerning the constitutional freedom of political communication earlier mentioned. The present is at least as strong a case for a plaintiff as photography from a distance with a telephoto lens. But it is the reference to "some private act" that is central to the present problem. The activities filmed were carried out on private property. They were not shown, or alleged, to be private in any other sense. That is consistent with the concession referred to above.

36 When, in *Attorney-General v Guardian Newspapers Ltd (No 2)* Lord Goff of Chieveley gave examples of cases where an obligation of confidence would be imposed, even in the absence of some confidential relationship, his Lordship referred to "obviously confidential" documents, or "secrets of importance to national security" coming into the possession of a member of the public[12]. What his Lordship described as "a public interest in the maintenance of confidences" extends to matter which a reasonable person would understand to be intended to be secret, or to be available to a limited group to which that person does not belong.

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10 *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50 per Mason J citing *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475 per Swinfen Eady LJ.

11 [1995] 1 WLR 804 at 807; [1995] 4 All ER 473 at 476.

12 [1990] 1 AC 109 at 281.

37 In *Douglas v Hello! Ltd*[13], there was some difference of opinion between members of the English Court of Appeal as to whether a celebrity wedding to which 250 guests were invited, and at which photography was closely controlled, was private. However, images of the wedding were treated as confidential information.

38 An argument for the respondent invoked privacy in a somewhat different context. The respondent invited this Court to depart from old authority[14]; declare that Australian law now recognises a tort of invasion of privacy; hold that it is available to be relied upon by corporations as well as individuals; and conclude that this is the missing cause of action for which everyone in the case has so far been searching.

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

40 By current standards, the manner in which the information in the present case was obtained was hardly sophisticated, and, if there were a relevant kind of privacy invaded, the invasion was not subtle. The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy. As Rehnquist CJ recently observed in a case in the Supreme Court of the United States concerning media publication of an unlawfully intercepted telephone conversation[15]:

> "Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations."

41 But the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends. Another reason is the tension that exists between interests in privacy and interests in free

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13 [2001] 2 WLR 992; [2001] 2 All ER 289.

14 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

15 *Bartnicki v Vopper* 69 USLW 4323 at 4331 (2001).

speech. I say "interests", because talk of "rights" may be question-begging, especially in a legal system which has no counterpart to the First Amendment to the United States Constitution or to the *Human Rights Act* 1998 of the United Kingdom. The categories that have been developed in the United States for the purpose of giving greater specificity to the kinds of interest protected by a "right to privacy" illustrate the problem[16]. The first of those categories, which includes intrusion upon private affairs or concerns, requires that the intrusion be highly offensive to a reasonable person. Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people.

42 There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

43 It is unnecessary, for present purposes, to enter upon the question of whether, and in what circumstances, a corporation may invoke privacy. United Kingdom legislation recognises the possibility[17]. Some forms of corporate activity are private. For example, neither members of the public, nor even shareholders, are ordinarily entitled to attend directors' meetings. And, as at present advised, I see no reason why some internal corporate communications are any less private than those of a partnership or an individual. However, the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity. This may be incongruous when applied to a corporation. The outcome of the present case would not be materially different if the respondent were an individual or a

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16 See, for example, Prosser, "Privacy", (1960) 48 *California Law Review* 383; *Restatement of the Law Second, Torts*, §652A.

17 *R v Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2000] 3 WLR 1327 at 1336-1337; [2000] 3 All ER 989 at 998-999.

partnership, rather than a corporation. The problem for the respondent is that the activities secretly observed and filmed were not relevantly private. Of course, the premises on which those activities took place were private in a proprietorial sense. And, by virtue of its proprietary right to exclusive possession of the premises, the respondent had the capacity (subject to the possibility of trespass or other surveillance) to grant or refuse permission to anyone who wanted to observe, and record, its operations. The same can be said of any landowner, but it does not make everything that the owner does on the land a private act. Nor does an act become private simply because the owner of land would prefer that it were unobserved. The reasons for such preference might be personal, or financial. They might be good or bad. An owner of land does not have to justify refusal of entry to a member of the public, or of the press. The right to choose who may enter, and who will be excluded, is an aspect of ownership. It may mean that a person who enters without permission is a trespasser; but that does not mean that every activity observed by the trespasser is private.

44 It is necessary, then, to return to the principal arguments advanced on behalf of the respondent. The first point to note about these arguments is the manner in which the concept of unconscionability is employed. In the case of the argument put by the respondent, the conduct (or threatened conduct) of the appellant in publishing a film known to have been taken as the result of a trespass is characterised as unconscionable. It does not matter whether, in order to justify that characterisation, it is thought necessary to add a reference to the harm likely to be suffered by the respondent; at this stage such harm is not in contest. Such unconscionability, if established, is then said to provide the ground in equity for the relief claimed in the action. In the case of the argument put by the Attorney-General, unconscionability is introduced as an additional element, apparently connecting the wrongful conduct of the trespassers in obtaining the film to the use of the information by the appellant. It is elaborated in proposition 3, stated above.

45 No doubt it is correct to say that, if equity will intervene to restrain publication of the film by the appellant, the ultimate ground upon which it will act will be that, in all the circumstances, it would be unconscientious of the appellant to publish. But that leaves for decision the question of the principles according to which equity will reach that conclusion. The conscience of the appellant, which equity will seek to relieve, is a properly formed and instructed conscience. The real task is to decide what a properly formed and instructed conscience has to say about publication in a case such as the present. If the Attorney-General is correct, it will take account of a number of factors additional to the circumstances in which the film was obtained, including (although this is not spelled out) what the appellant knew or ought to have known about those circumstances.

46 The necessary first step is to say that, subject to possible qualifications of the kind set out in proposition 3, the circumstances in which the film was made,

known as they now are to the appellant, mean that the appellant is bound on conscience not to publish. That proposition is not self-evidently correct, and cannot be established by mere assertion. The appellant is in the business of broadcasting. I accept that, although a public broadcaster, its position is not materially different from a commercial broadcaster with whom it competes. In the ordinary course of its business it publishes information obtained from many sources, thereby contributing to the flow of information available to the public. The sources from which that information may come, directly or indirectly, cover a wide range of behaviour; some of it impeccable, some of it reprehensible, and all intermediate degrees. If the appellant, without itself being complicit in impropriety or illegality, obtains information which it regards as newsworthy, informative, or entertaining, why should it not publish? It is, of course, subject to any relevant statute law, including criminal law, and to the law of defamation, breach of confidence, negligence, and any other potential liability in tort or contract. But we have arrived at this point in the argument because of the respondent's inability to point to any specific legal inhibition on publication. The respondent must explain why the appellant is bound in conscience not to publish; and, bearing in mind the consequences of such a conclusion for the free flow of information, it is not good enough to say that any person who fails to see this dictate of conscience is merely displaying moral obtuseness.

47 The step from the illegality of the behaviour of the trespassers to a conclusion that the appellant must not publish, even though the appellant was not party to the illegality, itself involves an important matter of principle: the extent to which the civil courts will lend their aid to the enforcement of the criminal law. There are, in a number of Australian jurisdictions, statutes which prohibit or regulate secret surveillance, and deal with the consequences of breaches, including the use that may be made by third parties of the products of such surveillance. Legislation of that kind was in issue, for example, in *John Fairfax Publications Pty Ltd v Doe*[18]. Some may think there ought to be legislation covering a case such as the present; but there is not. And it is only necessary to consider the complexity which such legislation, when enacted, takes, and the exceptions and qualifications that are built into it, to see the need for caution in embracing superficially attractive generalisations.

48 In *Bartnicki v Vopper*, Stevens J, speaking for the majority of the Supreme Court of the United States, said[19]:

> "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions

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18 (1995) 37 NSWLR 81.

19 69 USLW 4323 at 4328 (2001).

> that presently attach to a violation of [the statute] do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party."

49 That statement, it is true, was made in a context influenced by the First Amendment to the United States Constitution. But Lord Wilberforce, in *Gouriet v Union of Post Office Workers*[20] examined the reasons of history and policy that explain why enforcement of the criminal law by civil injunction at the suit of a private litigant is an exceptional and narrowly confined jurisdiction. In *The Commonwealth of Australia v John Fairfax & Sons Ltd*[21] Mason J rejected an attempt to rely upon a contravention of the *Crimes Act* 1914 (Cth) as a basis to restrain the publication of classified government documents.

50 Next, reliance was placed upon the act of trespass. Again, the difficulty is to bridge the gap between the trespassers' tort and the appellant's conscience.

51 There is judicial support for the proposition that the trespassers, if caught in time, could have been restrained from publishing the film. In *Lincoln Hunt Australia Pty Ltd v Willesee*[22] some representatives of a producer of material for television entered commercial premises, with cameras rolling, and harassed people on the premises. Their conduct amounted to trespass. Young J had to consider whether to restrain publication of the film. Because of the effrontery of the conduct of the defendants, he concluded this was a case for large exemplary damages, and that damages were an adequate remedy. On that ground, he declined an injunction. In accordance with settled practice, and principle, however, the first question he asked himself was as to the plaintiff's equity. Because of the ground on which he declined relief, he did not need to decide that question which, he said, took him "into very deep waters"[23]. However, he expressed the following tentative opinion[24], which has been taken up in later cases[25]:

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20 [1978] AC 435 at 476-484.

21 (1980) 147 CLR 39 at 49-50.

22 (1986) 4 NSWLR 457.

23 (1986) 4 NSWLR 457 at 461.

24 (1986) 4 NSWLR 457 at 464.

25 eg *Rinsale Pty Ltd v Australian Broadcasting Corporation* (1993) Aust Torts Reports ¶81-231 at 62,380; *Emcorp Pty Ltd v Australian Broadcasting Corporation*

(Footnote continues on next page)

> "In the instant case, on a prima facie basis I would have thought that there is a lot to be said in the Australian community where a film is taken by a trespasser, made in circumstances as the present, upon private premises in respect of which there is some evidence that publication of the film would affect goodwill, that the case is one where an injunction should seriously be considered."

52 If, in the present case, the appellant had been a party to the trespass, it would be necessary to reach a conclusion about the question which Young J thought should seriously be considered. I would give an affirmative answer to the question, based on breach of confidence, provided the activities filmed were private. I say nothing about copyright, because that was not argued. But the case was one against the trespassers. That was why exemplary damages were available, and constituted a sufficient remedy.

53 A rather different case was *Donnelly v Amalgamated Television Services Pty Ltd*[26]. Police, executing a search warrant, took a video recording of the plaintiff, in his underpants, in a bedroom. The video found its way into the hands of a television broadcaster. An action was brought to restrain publication of the video and for an interlocutory injunction. Hodgson CJ in Eq, in the orthodox manner, first considered whether the plaintiff had shown a serious question to be tried[27]. He said[28]:

> "If police, in exercising powers under a search warrant or of arrest, were to enter into private property and thereby obtain documents containing valuable confidential information, albeit not protected by the law concerning intellectual property, I believe they could in a proper case be restrained, at the suit of the owner of the documents, from later using that information to their own advantage, or to the disadvantage of the owner, or passing the information on to other persons for them to use in that way; and if other persons acquired such information from the police, knowing the circumstances of its acquisition by the police, then I believe those other persons could likewise be restrained.
>
> I believe the same applies to material obtained in that way which is gratuitously humiliating rather than confidential …".

[1988] 2 Qd R 169 at 174; *Takhar v Animal Liberation SA Inc* [2000] SASC 400 at [75]-[80].

26 (1998) 45 NSWLR 570.

27 (1998) 45 NSWLR 570 at 573.

28 (1998) 45 NSWLR 570 at 575.

54 A film of a man in his underpants in his bedroom would ordinarily have the necessary quality of privacy to warrant the application of the law of breach of confidence. Indeed, the reference to the gratuitously humiliating nature of the film ties in with the first of the four categories of privacy adopted in United States law, and the requirement that the intrusion upon seclusion be highly offensive to a reasonable person.

55 For reasons already given, I regard the law of breach of confidence as providing a remedy, in a case such as the present, if the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential. But, if that condition is not fulfilled, then the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it. The consequences of such a proposition are too large.

Conclusion

56 Underwood J was correct to dismiss the respondent's application on the first ground of his decision. It is unnecessary to consider the other ground.

57 I would allow the appeal. I agree with the orders proposed by Gummow and Hayne JJ.

58 GAUDRON J. I agree with the judgment of Gummow and Hayne JJ and with the orders they propose. Because this case raises a distinct issue with respect to injunctions, however, I desire to add some short observations of my own.

59 It is beyond controversy that the role of Australian courts is to do justice according to law – not to do justice according to idiosyncratic notions as to what is just in the circumstances. Hence, the rule of law and not the rule of judges. Necessarily, that basic proposition informs and controls the power conferred on the Supreme Court of Tasmania by s 11(12) of the *Supreme Court Civil Procedure Act* 1932 (Tas) to grant an interlocutory injunction "in all cases in which it shall appear to the Court or judge to be just and convenient that such order should be made".

60 In recent times, the word "injunction" has come to be used to mean any order by which a court commands a person to do or refrain from doing some particular act. Thus, it has come to be used in connection with orders of that kind that are specifically authorised by statute[29]. It has also been used to describe orders which a court makes to protect its own processes such as an asset preservation order (sometimes called a "Mareva injunction")[30] and some anti-suit injunctions[31]. Leaving those matters to one side, however, an injunction is a curial remedy. Because it is a remedy, it is axiomatic that it can only issue to protect an equitable or legal right or, which is often the same thing, to prevent an equitable or legal wrong[32]. So to say, is simply to emphasise that the function of courts is to do justice according to law.

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29 See, for example, the power conferred by s 80 of the *Trade Practices Act* 1974 (Cth) discussed in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591. In that case Gummow J noted, at 618 [67], that "[t]he regime established by s 80 differs in several respects from that applying to injunctions as traditionally understood." See also *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 394 [27]-[29] per Gaudron, McHugh, Gummow and Callinan JJ; Duns, "The Statutory Injunction: An Analysis", (1989) 17 *Melbourne University Law Review* 56.

30 See *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32-33 [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399-401 [41]-[42] per Gaudron, McHugh, Gummow and Callinan JJ.

31 See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391-392 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

32 Note that it may be that, in the case of some public wrongs, an injunction will issue notwithstanding that no equitable or legal right is infringed. See *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*

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61 There is no statutory provision specifically authorising the grant of an order restraining publication of material obtained in the circumstances in which the appellant, the Australian Broadcasting Corporation ("the ABC"), obtained the material in issue in this case. And for the reasons given by Gummow and Hayne JJ, Lenah Game Meats Pty Limited ("Lenah") points to no equitable or legal right which is or will be infringed by, nor to any equitable or legal wrong involved in, the publication of that material by the ABC. It is, therefore, not entitled to any legal or equitable remedy, including by way of injunction.

62 The only other basis upon which the injunction might have been granted by the Full Court was to protect that Court's own processes. Indeed, it may well be that the interlocutory injunction is properly to be seen as the paradigm example[33] of an order made to protect a court's processes, the interlocutory injunction being, originally, the means by which a court of equity ensured that it was not disabled from granting final injunctive relief in the event that an entitlement to that relief were to be established[34]. Assuming that to be so, however, a need to protect the Court's own processes could only arise in this case

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(1998) 194 CLR 247 at 257-260 [24]-[32], 267-268 [49]-[52] per Gaudron, Gummow and Kirby JJ; Hanbury, "Equity in Public Law", in *Essays in Equity*, (1934) 80 at 112; Sykes, "The Injunction in Public Law", (1953) 2 *University of Queensland Law Journal* 114 at 117-120. More generally, with regard to the broad scope of equitable remedies available in order to enforce obligations required by public law, see *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [56]-[58] per Gaudron J; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628-629 [97]-[98] per Gummow J.

33 This was said of Mareva injunctions (or more correctly, "asset preservation orders") in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; affirmed in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399-401 [41]-[42] per Gaudron, McHugh, Gummow and Callinan JJ. Similar comments were made with respect to anti-suit injunctions in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391-392 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

34 See *Preston v Luck* (1884) 27 Ch D 497 at 505 per Cotton LJ; *Heavener v Loomes* (1924) 34 CLR 306 at 326 per Isaacs and Rich JJ; *Harriman v Northern Securities Co* 132 F 464 (1904) and the authorities therein cited. See also Jordan, *Chapters on Equity*, 6th ed (1947) at 146; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 589-591 [2167]-[2168]; Spry, *Equitable Remedies*, 6th ed (2001) at 453-454.

if it were arguable that Lenah had an entitlement to final injunctive relief. That not being so, there is no basis upon which the interlocutory injunction could properly have been granted by the Full Court.

63 GUMMOW AND HAYNE JJ. The appellant, the Australian Broadcasting Corporation ("the ABC"), seeks from this Court an order discharging an interlocutory injunction granted by the Full Court of the Supreme Court of Tasmania (Wright and Evans JJ; Slicer J dissenting) on 2 November 1999. The injunction restrains, until further order, the ABC, its servants and agents:

> "from distributing, publishing, copying or broadcasting a video tape or video tapes filmed by a trespasser or trespassers showing [Lenah's] brush tail possum processing facility at 315 George Town Road Rocherlea in Tasmania".

The Full Court allowed an appeal by the present respondent, Lenah Game Meats Pty Ltd ("Lenah"), against an order made on 3 May 1999 by a judge of the Supreme Court (Underwood J) dismissing Lenah's application for interlocutory relief. On 4 May, Cox CJ had refused an interlocutory injunction in aid of what was then the pending appeal by Lenah[35]. After that decision by the Chief Justice and before the hearing of the appeal, the ABC had televised segments of the video tape in question.

64 In this Court, the ABC submits that the interlocutory injunction granted by the Full Court should be discharged. An interlocutory injunction is granted to preserve the status quo pending the determination at trial of the rights of the parties to final relief. Here, it is said that, quite apart from any question of the balance of convenience, as a matter of law there could be no serious question to be tried and the action was doomed to fail[36]. The ABC submits that this would be the outcome because Lenah has not pointed to any activity by the ABC, the engagement in which or the repetition of which has infringed or will infringe any legal or equitable right of Lenah. In short, the ABC submits that Lenah had "no equity" in the sense of "an immediate right to positive equitable relief"[37] in the equitable jurisdiction of the Supreme Court of Tasmania. In order to appreciate what is involved in that submission and the other submissions by the parties, it is necessary first to describe the proceeding in the Supreme Court in which the interlocutory application was made.

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35 See *Paringa Mining & Exploration Co Plc v North Flinders Mines Ltd* (1988) 165 CLR 452 at 459-460.

36 *Fejo v Northern Territory* (1998) 195 CLR 96 at 121-122 [26].

37 The phrase used by Deane J in *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 434. See also *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-114 [9]-[10]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628 [96].

The Supreme Court action

65 On 29 March 1999, by writ and statement of claim, Lenah instituted an action against the ABC and Animal Liberation Limited ("Animal Liberation"). In its pleading, Lenah alleged, and the matter is not disputed, that at all material times it has been a processor of, amongst other things, brush tail possums at its premises at Rocherlea ("the premises") which are licensed as an export abattoir by the Australian Quarantine Inspection Service.

66 Lenah asserted that on an unknown date prior to March 1998 persons unknown to it, and without its consent, broke and entered the premises, installed therein up to three video cameras with audio recording facilities, and filmed through those video cameras and recorded in audible form aspects of Lenah's brush tail possum processing operations, in particular the stunning and killing of possums; that persons unknown to Lenah entered the premises without Lenah's consent and retrieved the video and audio tapes; and that, on a date prior to 16 March 1999, Animal Liberation gave to the ABC a video tape with sound of approximately 10 minutes duration which depicted the image and sound of the stunning and killing of possums and which had been filmed under the circumstances alleged by Lenah. Lenah then pleaded that it was the intention of the ABC to incorporate excerpts of this video in a nationally televised programme known as the "7.30 Report".

67 It was not alleged that the ABC was implicated in or privy to the trespasses upon the premises. Nor has Lenah pleaded that the ABC was a party to a combination to commit an unlawful act with the intention of harming Lenah's economic interests, or to perform an act, not itself unlawful, with the predominant object of harming Lenah[38]. Thus the tort of conspiracy has not entered the picture.

68 In addition to interlocutory injunctive relief, Lenah sought in the statement of claim mandatory injunctions obliging Animal Liberation and the ABC to deliver up to it all copies of the video or excerpts from it in their possession, custody or power. Lenah also sought damages.

69 By its defence dated 22 April 1999, the ABC admitted that it had in its possession a video tape of approximately 10 minutes duration showing aspects of brush tail possum processing including the stunning and killing of possums and that it was its intention to include parts thereof in the "7.30 Report". Beyond the pleadings, it appears that no steps have been taken to ready the action for trial.

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38 *McKernan v Fraser* (1931) 46 CLR 343; *O'Brien v Dawson* (1942) 66 CLR 18; *Williams v Hursey* (1959) 103 CLR 30.

The interlocutory application

70 On 29 March 1999, the day on which the action was commenced, Lenah sought interlocutory injunctive relief against the ABC and Animal Liberation. There was no appearance for Animal Liberation and Evans J ordered that until further order Animal Liberation be restrained from distributing, publishing or copying the video. There has been no appeal by Animal Liberation against that order and it remains in force.

71 Also on 29 March, the ABC, by its counsel, gave an undertaking not to broadcast or distribute any video or videos showing Lenah's brush tail possum processing facilities at the premises until the further hearing of Lenah's application for interlocutory relief. The ABC later indicated that it wished to be released from its undertaking, and Lenah then pressed its application for interlocutory relief against the ABC. After a hearing on 3 May 1999, Underwood J ordered that the application be dismissed. It was against that order that Lenah brought its successful appeal to the Full Court. The only parties to the appeal to the Full Court, as in this Court, were the ABC and Lenah.

72 At first instance, Underwood J held that the statement of claim discloses on its face no cause of action against the ABC, particularly given that "there [was] no evidence to suggest that either [the ABC] or [Animal Liberation], by their servants or agents, were the trespassers". His Honour also considered whether there were sufficient facts pleaded in the statement of claim to sustain a cause of action under par (b) of s 5(1) of the *Defamation Act* 1957 (Tas) for an imputation concerning Lenah which was likely to cause it injury in its trade[39]. This provision follows the terms of the Queensland legislation considered in *Hall-Gibbs Mercantile Agency Ltd v Dun*[40] and s 5 of the *Defamation Act* 1958

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39 Section 5(1) provides:

> "An imputation concerning a person … by which –
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> (a) the reputation of that person is likely to be injured;
>
> (b) that person is likely to be injured in his profession or trade; or
>
> (c) other persons are likely to be induced to shun, avoid, ridicule, or despise that person –
>
> is defamatory, and the matter of the imputation is defamatory matter."

40 (1910) 12 CLR 84.

(NSW) considered in *Mirror Newspapers Ltd v World Hosts Pty Ltd*[41]. His Honour decided that, even if Lenah could make out such a cause of action, the case was not one where the discretion to grant interlocutory injunctive relief should be exercised in favour of Lenah. In that regard, Underwood J referred to the discussion by Hunt J in *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd*[42] of the authorities which discountenance the restraint by injunction of discussion in the press of matters of public interest or concern.

The Full Court appeal

73 In the Full Court, Wright J noted that Lenah conceded that it had no maintainable action for defamation. That concession extended to the absence of a claim for breach of confidence. The absence of publicity about the procedures employed in slaughtering possums (and other creatures) in abattoirs would not necessarily invest those procedures with "the necessary quality of confidence" required by the authorities[43]. Information may be categorised as public knowledge though only notorious in a particular industry[44].

74 In his dissenting judgment, Slicer J analysed the material before the Court, in particular the pleadings, to determine whether they were capable of raising a serious issue which on trial could lead to a final remedy. His Honour referred to *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[45] as determining that "[t]here is no right of privacy within this jurisdiction"; in any event, at the hearing before the Full Court counsel for Lenah, in response to a question by Slicer J, had expressly eschewed any reliance upon a tort of privacy. Slicer J also noted that there was no issue respecting infringement of copyright or any other intellectual property right, misfeasance by public officer, intentional infliction of economic harm or malicious falsehood.

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41 (1979) 141 CLR 632.

42 [1980] 1 NSWLR 344.

43 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215; *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 437-439.

44 *O'Brien v Komesaroff* (1982) 150 CLR 310 at 326.

45 (1937) 58 CLR 479.

The evidence

75 It will be convenient to consider the grounds upon which, in this Court, Lenah seeks to uphold the relief it obtained in the Full Court after referring to the evidence which had been before Underwood J. Lenah moved on an affidavit sworn on 26 March 1999 by Mr John Kelly, a director of Lenah. The affidavit was read without objection by counsel for the ABC. For its part, the ABC did not apply to cross-examine Mr Kelly and read no affidavits in opposition to the application.

76 Mr Kelly deposed that Lenah had a licence to take and hold brush tail possums from the Tasmanian Department of Parks, Wildlife and Heritage and that it had all approvals and licences necessary to carry on the business of killing, processing and exporting possums. A substantial portion of Lenah's business related to that export and, for the year ended 31 December 1998, its gross export sales were approximately $300,000. On 16 March 1999, Mr Kelly had been interviewed in his office by an ABC journalist. She played in his presence a video tape which she told Mr Kelly she had obtained from a Mr Mark Pearson who was involved in Animal Liberation. Mr Kelly confirmed that the tape showed Lenah's processing operation. This included the stunning of possums with a captive bolt pistol followed by the cutting of their throats. These images were accompanied by a sound recording. In response to a question, Mr Kelly affirmed that his company's operations complied with the industry code, the Animal Welfare Code of Practice for Processing Brush Tail Possums.

77 After the interview, Mr Kelly caused investigations to be made as to how it had come to pass that his company's operations had been filmed. In his affidavit he described the result of his investigations as follows:

> "One camera was placed above the stunning area and one above the sticking area (which is where the throats are cut). I suspect that a third was placed above the boning room. The evidence which I have to support this is that as a result of Tasmania Police investigations I have observed holes which were cut in the roof of the facility. The holes were not cut from the outside. A person would have had to break in to the facility to cut the holes and place video cameras. The cameras were well hidden. They were not noticed by me or any other staff of [Lenah]. In one case the camera lens appeared to be a three millimetre optic fibre cable which had been drilled from one portion of the ceiling to another. Officers of the Tasmania Police have also located a number of items in and about [Lenah's] premises which are consistent with the surreptitious installation of video cameras."

78 Mr Kelly went on to point out that, whilst the way in which Lenah conducted its lawful business was no different from any animal slaughtering

operation in Australia, such activities normally were "hidden from public view"; distribution and publication of the video, showing possums being stunned and having their throats cut, was likely to arouse public disquiet, perhaps anger. He added:

> "Presently the vast bulk of brush tail possums processed by [Lenah] are exported to Asian markets, particularly Hong Kong and China. The likely damage to [Lenah] in those market places if this film is shown will be quite severe. These are sensitive markets which [Lenah] has spent between four (4) and five (5) years developing. [Lenah] also wishes to expand into other markets. The likely effect of airing this [sort] of graphic video material could be potentially catastrophic for [Lenah's] present business and the business which it may be able to do in the future especially in new markets."

Lenah's case

79 Mr Kelly's evidence identifies the interest of Lenah for which it seeks protection in this litigation. Lenah seeks protection of the goodwill of its business against the damage it apprehends is a likely consequence of publicity respecting its methods of slaughtering possums whose meat it processes and sells. The apprehension is that the publicity will weaken what otherwise is Lenah's "right or privilege to make use of all that constitutes 'the attractive force which brings in custom'"[46]. The interest of Lenah is in the profitable conduct of its business. Its sensitivity is that of the pocket book. This provides an important point of distinction between the present case and the situation where an individual is subjected to unwanted intrusion into his or her personal life and seeks to protect seclusion from surveillance and to prevent the communication or publication of the fruits of such surveillance.

80 The litigation is striking in another respect. Commercial enterprises may sustain economic harm through methods of competition which are said to be unfair[47], or by reason of other injurious acts or omissions of third parties[48]. However, the common law does not respond by providing a generalised cause of action "whose main characteristic is the scope it allows, under high-sounding generalizations, for judicial indulgence of idiosyncratic notions of what is fair in

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46 *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 615 [23].

47 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414.

48 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 192-193 [5]-[6], 218-220 [100]-[105], 240-243 [167]-[171], 267-270 [242]-[247], 299-300 [328]-[329], 324 [402].

the market place"[49]. Rather, the common law provides particular causes of action and a range of remedies. These rights and remedies strike varying balances between competing claims and policies.

81 The fundamental difficulties facing Lenah's case are twofold. It has not pleaded or presented its case as one raising a recognised cause of action which attracts injunctive relief at the interlocutory level. Then Lenah submits that this deficiency is not fatal because, in effect, that interlocutory remedy is at large; the only touchstone of relief is said to be "unconscionable conduct".

82 In the Full Court these submissions met with some success. Wright J, who with Evans J constituted the majority, approached the matter on the basis, which Wright J said was conceded by counsel then appearing for the ABC, that "the granting of an injunction is not dependent upon the existence of an enforceable cause of action by [Lenah] against the [ABC]". However, Evans J took the expression "cause of action" as encompassing facts sufficient to justify relief in the exclusive jurisdiction of equity. His Honour held that "the Court's exclusive equitable jurisdiction to grant relief may be invoked when it can be established that it would be unconscionable to allow a person in possession of a video tape which is the product of a trespass, to publish that tape".

The submissions in this Court

83 In this Court, Lenah seeks to uphold the order made by the Full Court on the grounds upon which it succeeded in the Full Court. It also submits for the first time that for the ABC to engage in the activity enjoined by the order would constitute an actionable invasion of a right of Lenah to "privacy".

84 The ABC, in addition to disputing these submissions, contends that this is not the appropriate occasion to consider whether the common law of Australia recognises an action to protect privacy. First, this is because in any event "privacy" is not a "right" enjoyed by corporations. The ABC further submits that any formulation of a principle whereby injunctive relief could be obtained in the circumstances of the present case must give effect to the constitutional protection of the freedom to disseminate information respecting government and political matters which was identified in *Lange v Australian Broadcasting Corporation*[50].

85 We turn to consider these submissions.

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49 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 445-446.

50 (1997) 189 CLR 520.

Interlocutory injunctions

86 Section 10 of the *Supreme Court Civil Procedure Act* 1932 (Tas) ("the Supreme Court Act") provides for the concurrent administration by the Supreme Court of law and equity, but with the rules of equity to prevail in any conflict or variance between those rules and the rules of the common law (s 11(10)). Sub-section (7) of s 10 provides that the Court shall grant either absolutely or on terms all such remedies as any of the parties may be entitled to in respect of every legal or equitable claim brought forward in the proceeding "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided".

87 Section 11 of the Supreme Court Act then deals with miscellaneous matters. Sub-section (12) of s 11 reads:

> "A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Court or a judge thereof in all cases in which it shall appear to the Court or judge to be just and convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court or judge shall think just; and if, whether before, or at, or after the hearing of any cause or matter, an application is made for an injunction to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the Court or judge thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."

This provision closely follows the terms of s 25(8) of the *Supreme Court of Judicature Act* 1873 (UK) ("the Judicature Act"). That is not surprising. The Tasmanian legislature enacted the Supreme Court Act with the expressed objective of adopting the system established in England by the Judicature Act[51].

88 Lenah fixes upon the phrase in s 11(12) "in all cases in which it shall appear to the Court or judge to be just and convenient" as indicating all that has to be shown to enliven the power to award an interlocutory injunction. However,

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51 An account of the second reading speech of the Attorney-General upon the Bill for the Supreme Court Act is given in *The Mercury*, 14 December 1932.

the terms which introduce that phrase, "injunction" and "receiver", are legal terms of art. The point was made by Lindley LJ, early in the operation of the Judicature system. In *Holmes v Millage* his Lordship said[52]:

> "Although injunctions are granted and receivers are appointed more readily than they were before the passing of the Judicature Acts, and some inconvenient rules formerly observed have been very properly relaxed, yet the principles on which the jurisdiction of the Court of Chancery rested have not been changed."

More recently, in *The Siskina*, Lord Diplock declared[53]:

> "Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton LJ in *North London Railway Co v Great Northern Railway Co*[54], which has been consistently followed ever since."

89 Where interlocutory injunctive relief is sought in some special statutory jurisdiction which uses the term "injunction" to identify a remedy for which it provides, that term takes its colour from the statutory regime in question[55]. Nor should the references in the authorities to legal or equitable rights obscure the significant and traditional use of the injunction in the administration of public trusts, being trusts for charitable purposes, and in ensuring the observance of public law at the suit of the Attorney-General, with or without a relator, or at the suit of a person with a sufficient interest.

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52 [1893] 1 QB 551 at 557. See also the judgment of the Full Court delivered by Holroyd J in *Attorney-General v President &c of Shire of Huntly* (1887) 13 VLR 66 at 70, cited with approval by Dixon CJ in *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 454.

53 *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* [1979] AC 210 at 256. See also Hanbury and Martin, *Modern Equity*, 16th ed (2001) at 758-759; *Snell's Equity*, 30th ed (2000) at 715; Spry, *The Principles of Equitable Remedies*, 6th ed (2001) at 328-332.

54 (1883) 11 QBD 30 at 39-40.

55 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 394 [28]-[29].

90 Further, as was pointed out in *Cardile v LED Builders Pty Ltd*[56], the injunctive remedy is still the subject of development in courts exercising equitable jurisdiction. This is true in public law, as *Enfield City Corporation v Development Assessment Commission*[57] illustrates. The treatment of the requirement for a legal right that is proprietary in nature, and of negative stipulations, referred to in *Cardile*[58], are other examples. In addition, as the general law develops in such fields as the economic torts and the protection of confidential information, there is an increase in the scope of the legal and equitable rights for which an injunctive remedy may be available. Similar development of equity is to be observed in England. Lord Millett has said that in England equity is not only "now fully awake" and "on the march again", but "[i]ndeed it is rampant"[59]. However, his Lordship also emphasised that "the essential basis for principled advance" lies in "analytical exposition of traditional doctrine"[60].

91 The basic proposition remains that where interlocutory injunctive relief is sought in a Judicature system court, it is necessary to identify the legal (which may be statutory[61]) or equitable rights which are to be determined at trial and in respect of which there is sought final relief which may or may not be injunctive in nature[62]. In *Muschinski v Dodds*[63], Deane J said that an equitable remedy:

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56 (1999) 198 CLR 380 at 395 [30].

57 (2000) 199 CLR 135. See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628-629 [97]-[98].

58 (1999) 198 CLR 380 at 395 [30].

59 Foreword, *Snell's Equity*, 30th ed (2000).

60 Foreword, *Snell's Equity*, 30th ed (2000).

61 *Fejo v Northern Territory* (1998) 195 CLR 96 at 123 [33]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628 [97].

62 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 395-396 [31].

63 (1985) 160 CLR 583 at 615.

> "is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles".

92 Remarks by Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*[64] are also in point. His Honour referred to the circularity involved in saying that, because a court of equity should enjoin interference with the economic or commercial interests of the plaintiff, those interests were proprietary in nature and that it was upon protection of those proprietary interests that the intervention of the court was to be based. Further, in *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]*[65], Deane J, delivering the judgment of the Court, set out a passage from the judgment of Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[66], which included the following:

> "But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization."

Equally, courts of equity will not always grant injunctions against a party profiting from an illegal activity of some other person. That, too, is a "wide generalisation" which provides an insufficient basis for identifying whether relevant equitable principles are engaged.

"Anti-suit injunctions"

93 Reliance by Lenah on certain English authority, in particular the decision of the House of Lords in an "anti-suit injunction" case, *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV*[67], makes it necessary to add something on this subject. Subsequent to the decision in *South Carolina*,

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64 (1968) 122 CLR 25 at 34.

65 (1984) 156 CLR 414 at 444-445.

66 (1937) 58 CLR 479 at 509.

67 [1987] AC 24.

it was explained in the joint judgment of six members of this Court in *CSR Ltd v Cigna Insurance Australia Ltd*, with reference to "anti-suit injunctions", that[68]:

> "[i]f the bringing of legal proceedings involves unconscionable conduct or the unconscientious exercise of a legal right, an injunction may be granted by a court in the exercise of its equitable jurisdiction in restraint of those proceedings[69] no matter where they are brought[70]."

That remedy frequently, as in *Cigna* itself, will be interlocutory but will have the practical effect of deciding the dispute as to the forum of the trial. In *Associated Newspapers Group Plc v Insert Media Ltd*[71], Hoffmann J referred to *South Carolina* and remarked[72]:

> "There is no doubt that injunctions of that kind stand on a different footing. They are most commonly sought by defendants who are not seeking to assert any independent cause of action but simply a right not to be sued in the foreign court."

However, as is recognised in this passage, there will be cases in which the equitable jurisdiction is exercised in aid of legal rights asserted by the plaintiff. In the joint judgment in *Cigna*, the majority said[73]:

> "Thus, as the respondents correctly contend, if there is a contract not to sue, an injunction may be granted to restrain proceedings brought in breach of that contract, whether brought here or abroad. Similarly, an injunction may be granted in aid of a promise not to sue in a foreign

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68 (1997) 189 CLR 345 at 392.

69 See generally Story, *Commentaries on Equity Jurisprudence*, 13th ed (1886), vol 2 at 209-213. See also *British Airways Board v Laker Airways Ltd* [1985] AC 58 at 81, 95; *South Carolina Co v Assurantie NV* [1987] AC 24 at 40; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209 at 232.

70 See generally *Carron Iron Co v Maclaren* (1855) 5 HLC 416 at 439 [10 ER 961 at 971]: "if the circumstances are such as would make it the duty of the Court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court."

71 [1988] 1 WLR 509; [1988] 2 All ER 420.

72 [1988] 1 WLR 509 at 514; [1988] 2 All ER 420 at 425.

73 (1997) 189 CLR 345 at 392 (footnotes omitted).

jurisdiction constituted, for example, by an agreement to submit to the exclusive jurisdiction of the courts of the forum."

94 It was also emphasised in *Cigna* that the grant of what are somewhat loosely called "anti-suit injunctions" in some instances did not involve the exercise of the power deriving from the Court of Chancery. The order in question may be supported as an exercise of the power of the court to protect the integrity of its processes once set in motion[74]. Likewise it was emphasised in the joint judgments in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[75] and in *Cardile v LED Builders Pty Ltd*[76] that the doctrinal basis of the Mareva order is to be found in the power of the court to prevent the frustration of its process. In *Cardile*[77], the point was emphasised by the statement that to avoid confusion as to its doctrinal basis it is preferable to substitute "Mareva order" for the term "injunction". The Supreme Court of the United States, shortly after *Cardile* was decided, held that a Mareva order is not a preliminary injunction within the traditional principles of equity jurisdiction[78].

95 The distinctions drawn in the above decisions are not readily to be perceived in the judgments in the English cases which preceded them. This is important for the present case, given the reliance placed by Lenah upon observations by Lord Brandon of Oakbrook in *South Carolina*. In that case, the House of Lords discharged orders made by Hobhouse J restraining the defendants from taking further interlocutory steps in a particular action in the United States. Lord Brandon determined the matter by considering whether the conduct which was enjoined by the order made in England was oppressive or vexatious or interfered with the due process of the English court in concurrent litigation before it[79]. His Lordship used the expression "unconscionable" to describe such conduct and classified the orders which had been made as injunctions. However, as is apparent from *Cigna*, the doctrinal basis for these

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74 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391-392.

75 (1998) 195 CLR 1 at 32-33 [35].

76 (1999) 198 CLR 380 at 400-401 [41].

77 (1999) 198 CLR 380 at 401 [42].

78 *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc* 144 L Ed 2d 319 at 330-331 (1999).

79 [1987] AC 24 at 41-43.

orders may equally readily have been found in the power of the English court, by order, to protect the integrity of its processes[80].

96 What was said in *South Carolina* does not support the proposition that, in the present case, the Supreme Court of Tasmania was at liberty to enjoin the ABC if, without more, it had formed the opinion that the ABC had behaved or threatened to behave in a manner which, to it, appeared unconscionable. The submissions by Lenah that the Supreme Court was so empowered should be rejected.

97 Further brief reference to English authority is appropriate. Whilst s 11(12) of the Supreme Court Act, like s 25(8) of the Judicature Act, refers only to interlocutory injunctions, s 37(1) of the *Supreme Court Act* 1981 (UK) ("the 1981 Act") used the expression "just and convenient" in respect of injunctive orders "whether interlocutory or final". Thereafter, it was said by Lord Denning MR[81] that this conferred a new and extensive jurisdiction to grant an injunction, the only limitation upon that power was that the plaintiff must have a "sufficient interest", and the decision in *The Siskina* had been effectively supplanted by the 1981 Act. The House of Lords, in *Pickering v Liverpool Daily Post and Echo Newspapers Plc*[82], disagreed with these propositions.

Australian authorities

98 The terms "unconscientious" and "unconscionable" are often used interchangeably. The former, as Deane J pointed out in *The Commonwealth v Verwayen*[83], is the better term to indicate the areas in which equity intervenes to vindicate the requirements of good conscience by denying enforcement of or setting aside transactions. A recent example is *Bridgewater v Leahy*[84]. Disapproval of unconscientious behaviour also finds expression in such principles as those respecting estoppel in equity; it is "the driving force behind

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80 Statements by Sir Thomas Bingham MR in *Burris v Azadani* [1995] 1 WLR 1372 at 1377; [1995] 4 All ER 802 at 807 indicate that the decision in that case may have been put on that basis.

81 *Chief Constable of Kent v V* [1983] QB 34 at 42; the contrary view was taken by Donaldson LJ at 45 and Slade LJ at 49. See also *Burris v Azadani* [1995] 1 WLR 1372 at 1376-1377; [1995] 4 All ER 802 at 807.

82 [1991] 2 AC 370 at 420-421.

83 (1990) 170 CLR 394 at 444, 446.

84 (1998) 194 CLR 457 at 477-479 [72]-[76].

equitable estoppel"[85]. But the notion of unconscionable behaviour does not operate wholly at large as Lenah would appear to have it.

99 In *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)*, French J said[86]:

> "The fundamental principle according to which equity acts is that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct[87]. So it can be said that the overriding aim of all equitable principle is the prevention of unconscionable behaviour – a term which can be seen to encompass duress, undue influence and 'unconscionable dealing as such'[88]. This is not to say that unconscionable conduct within the meaning of the unwritten law, as it presently stands, is any conduct which attracts the intervention of equity. Too broadly defined it may become, in the words of Professor Julius Stone, a 'category of meaningless reference'[89]."

100 Lenah referred to the use of "unconscionable" as an apparent gloss upon the phrase "just and convenient" in Australian cases. In particular, Lenah relied upon the statement by Young J in *Lincoln Hunt Australia Pty Ltd v Willesee*[90]:

> "[T]he Court has power to grant an injunction in the appropriate case to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved. However, the Court will only intervene if the circumstances are such to make publication unconscionable."

Young J added that, on a prima facie basis, an injunction should seriously be considered where a film was taken by a trespasser upon private premises and

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85 The expression is that of Mason CJ in *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 407.

86 (2000) 96 FCR 491 at 498.

87 *Legione v Hateley* (1983) 152 CLR 406 at 444 per Mason and Deane JJ.

88 Hardingham, "Unconscionable Dealing", in Finn (ed), *Essays in Equity*, (1985) 1 at 1.

89 Stone, *Legal System and Lawyers' Reasonings*, (1964) at 241-246, 339-341.

90 (1986) 4 NSWLR 457 at 463.

there is some evidence that publication of the film would affect goodwill[91]. Otherwise, the court would be powerless to restrain a defendant who had "obtained the fruits of his tort without holding money or property of the plaintiff and without a breach of confidentiality"[92]. Although in *Lincoln Hunt*, in the event, damages were considered an adequate remedy, Young J's remarks have been treated in later cases[93] as supporting orders enjoining the publication by the defendant of films it made or caused to be made in the course of trespass upon the premises of the plaintiff. *Lincoln Hunt* has been said "through the medium of unconscionability, [to open] a new possibility of restraining the publication of materials obtained by trespassers"[94].

101 It may be that the outcome in *Lincoln Hunt* and subsequent decisions is to be supported upon a basis which, whilst not articulated in those cases, is directly referable to principle. Reference is necessary to various provisions of Pt IV (ss 84-113) of the *Copyright Act* 1968 (Cth) ("the Copyright Act"). Copyright subsists in a cinematograph film made in Australia (s 90). The term "cinematograph film" includes the aggregate of the sounds embodied in a sound track associated with the visual images (s 10(1)). The copyright is personal property (s 196(1)). Ownership of that copyright vests, in general, in the maker (s 98)[95]. The Copyright Act confers the exclusive right, among other things, to make copies of the film and to broadcast it (s 86).

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91 (1986) 4 NSWLR 457 at 464.

92 (1986) 4 NSWLR 457 at 462.

93 These include *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169 and *Rinsale Pty Ltd v Australian Broadcasting Corporation* [1993] Aust Torts Rep ¶81-231.

94 Hudson, "Consumer Protection, Trespass and Injunctions", (1988) 104 *Law Quarterly Review* 18 at 21.

95 However, sub-s (3) provides:

> "Where:
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> (a) a person makes, for valuable consideration, an agreement with another person for the making of a cinematograph film by the other person; and
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> (b) the film is made in pursuance of the agreement;
>
> the first-mentioned person is, in the absence of any agreement to the contrary, the owner of any copyright subsisting in the film by virtue of this Part."

102 A cinematograph film may have been made, as in *Lincoln Hunt*, in circumstances involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff. It may then be inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film. The maker may be regarded as a constructive trustee of an item of personal (albeit intangible) property, namely the copyright conferred by s 98 of the Copyright Act[96]. In such circumstances, the plaintiff may obtain a declaration as to the subsistence of the trust and a mandatory order requiring an assignment by the defendant of the legal (ie statutory) title to the intellectual property rights in question[97]. Section 196(3) of the Copyright Act provides that an assignment of copyright does not have effect unless it is in writing signed by or on behalf of the assignor.

103 In the meantime, the making of any broadcast would be subject to interlocutory restraint, as an invasion of the equitable interest in the copyright of the plaintiff[98]. The armoury of equitable remedies includes that species of discovery with which the House of Lords dealt in *Norwich Pharmacal Co v Customs and Excise Commissioners*[99] and *British Steel Corporation v Granada Television Ltd*[100]. This remedy extends to disclosure to the plaintiff of the identity of a wrongdoer in whose tortious acts the defendant has, even innocently, become involved[101], and the English Court of Appeal has held that it goes beyond the disclosure of the identity of a tortfeasor[102]. Lenah made no

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96 Various authorities are collected and discussed in Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 2nd ed (1995), vol 1 at 582-584.

97 *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 546; *Adamson v Kenworthy* (1931) 49 RPC 57 at 72-73; *Sterling Engineering Co Ltd v Patchett* [1955] AC 534 at 544, 548. The discussion in these passages concerns the imposition of trusts upon patents obtained by licensees and employees in breach of their obligations to their licensors and employers.

98 cf *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1; *Stack v Brisbane City Council (No 2)* (1996) 67 FCR 510.

99 [1974] AC 133.

100 [1981] AC 1096.

101 *Breen v Williams* (1996) 186 CLR 71 at 120.

102 *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366 at 374-375 per Hoffmann LJ; cf *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 regarding the "newspaper rule".

claim to copyright in a cinematograph film. The questions about ownership of the intellectual property rights in respect to the sounds and images in the tape have, therefore, not been raised or explored in these proceedings, whether in this Court or below.

104 Lenah also relied upon *Donnelly v Amalgamated Television Services Pty Ltd*[103]. That was a case which involved a third party. Hodgson CJ in Eq granted an interlocutory injunction restraining the broadcasting of material recorded on a video tape obtained by the television broadcaster; the tape had been made by police officers after they gained access to the house of the plaintiff's mother where the plaintiff was to be found. Use of the tape by the police, except for purposes connected with the investigation, prosecution, and disposal of criminal proceedings against the plaintiff, was arguably an abuse of the powers of the police under the search warrant. On that basis, making the tape available for broadcast by another was itself arguably an abuse by the police of those powers. His Honour said that he was inclined to think that the broadcasting of the material recorded within the house of the plaintiff's mother might well involve the knowing participation by the broadcaster in that abuse by the police of their powers[104]. In the present case, as has been noted earlier in these reasons, it is not alleged that the ABC was implicated in or privy to the trespasses upon the premises and there is no allegation of the tort of conspiracy. Unlike *Donnelly*, then, it is not alleged that there was any knowing participation by the ABC in what is alleged to have been the relevant wrongdoing – the trespasser's act of trespass as distinct from a separate act of wrongdoing by misusing the tape. Further, it may be that the outcome in *Donnelly* is also to be understood having regard to the fact that there was said to be an abuse of coercive powers and that those powers had been exercised to gain access to otherwise private residential premises, neither of which factors is present here.

No equity to injunctive relief

105 The ABC's submission on this branch of the case should be accepted. The conferral upon the Supreme Court by statute of the power to grant interlocutory injunctions in cases in which it appears to the Court to be just or convenient to do so is not at large. Here, the statute did not confer on the Court power to make an order on the application of Lenah other than in protection of some legal or equitable right of Lenah which the Court might enforce by final judgment. It becomes necessary then to consider the submission by Lenah that, in any event,

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103 (1998) 45 NSWLR 570.

104 (1998) 45 NSWLR 570 at 575.

there is such a right which is the subject of the tort dealing with invasions of privacy.

Victoria Park

106 In *Church of Scientology v Woodward*[105], Murphy J identified "unjustified invasion of privacy" as one of the "developing torts". Subsequently, Kirby P said in *Australian Consolidated Press Ltd v Ettingshausen*[106]:

> "The result of legislative inaction is that no tort of privacy invasion exists. Thus, whilst the value of privacy protection may generally inform common law developments, it would not be proper to award Mr Ettingshausen compensation for the invasion of his privacy, as such."

The *Privacy Act* 1988 (Cth), particularly since its amendment by the *Privacy Amendment (Private Sector) Act* 2000 (Cth), confers some enforcement power upon the Federal Court and the Federal Magistrates Court, but the legislation stops short of enacting what might be called a statutory tort of privacy invasion. Lenah suggested in its submissions that to date the Australian courts most probably had not developed "an enforceable right to privacy" because of what generally was taken to follow from the failure of the plaintiff's appeal in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[107].

107 *Victoria Park* does not stand in the path of the development of such a cause of action. The plaintiff in that case was a company which carried on for profit the business of conducting race meetings at a racecourse owned by it in a Sydney suburb. Signals and noticeboards within the grounds displayed information respecting each race about 20 minutes before it commenced[108]. There were three defendants: the owner and occupier of nearby land on which an observation platform was erected; a radio broadcasting station; and an employee of that station who, from the platform, observed the races and the information displayed on the racecourse and broadcast these matters to the public. The plaintiff sought injunctive relief to restrain the actions of the defendants but failed before Nicholas J[109]. On appeal directly to this Court, the plaintiff

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105 (1982) 154 CLR 25 at 68.

106 Unreported, Court of Appeal of New South Wales, 13 October 1993 at 15.

107 (1937) 58 CLR 479.

108 (1937) 58 CLR 479 at 480.

109 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322.

submitted that it should succeed on the ground of infringement of copyright and in an action on the case which it said might be divided into common law nuisance and the rule in *Rylands v Fletcher*[110]. The appeal was dismissed.

108 In the course of his judgment, Latham CJ rejected the proposition that under the head of nuisance the law recognised a right of privacy[111]. But the decision does not stand for any proposition respecting the existence or otherwise of a tort identified as unjustified invasion of privacy. Writing in 1973, Professor W L Morison correctly observed[112]:

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

109 The subsequent significance of *Victoria Park* in the decisions of this Court has lain elsewhere. In *Victoria Park*, Dixon J had referred with approval[113] to the dissenting judgment of Brandeis J in *International News Service v The Associated Press*[114]. The decision of the majority of the Supreme Court of the United States in that case generally has been taken as founding a broadly framed tort respecting unfair competition. That path has not been followed in Australia. In giving the judgment of the Court in *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]*[115], Deane J, in the course of deciding that Australian law knows no general tort of unfair competition or unfair trading, referred with approval to what had been said by Dixon J in *Victoria Park*.

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110 (1868) LR 3 HL 330.

111 (1937) 58 CLR 479 at 495-496.

112 New South Wales, Parliament, *Report on the Law of Privacy*, Paper No 170, (1973), par 12.

113 (1937) 58 CLR 479 at 509-510.

114 248 US 215 (1918).

115 (1984) 156 CLR 414 at 444-445.

110 The significance of these judgments for the present appeal lies in the view taken by Dixon J and Deane J as to preferable legal method. In particular, Deane J cautioned against the use of a broad phrase such as "unfair competition" as suggesting the existence of a unity of underlying principle between different causes of action when, in truth, there is none[116]. In the present appeal, Lenah encountered similar difficulty in formulating with acceptable specificity the ingredients of any general wrong of unjustified invasion of privacy. Rather than a search to identify the ingredients of a generally expressed wrong, the better course, as Deane J recognised, is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances. Deane J referred, for example, to the adaptation of the traditional doctrine of passing-off to meet new circumstances of deceptive trading[117].

111 The litigation in *Victoria Park* is significant in the present case in a further respect. Not only did the "privacy" in that case concern the opposition by the plaintiff to the turning to commercial account by the defendants of the business operations of the plaintiff, but the plaintiff itself was a corporation. As will be mentioned later in these reasons, at that time, and subsequently, existing authority in the United States did not accept that corporations, as distinct from individuals, enjoyed the interests which a tort of unjustified invasion of privacy protected. In those circumstances, it is perhaps not surprising that "privacy" was not at the forefront of the arguments by the plaintiff in *Victoria Park.*

Other common law jurisdictions

112 We were referred by Lenah to decisions, reports of law reform agencies and academic writings in several common law countries, with a view to providing encouragement to follow what was said to be the "trend" there disclosed. The most recent English decision is that of the Court of Appeal in *Douglas v Hello! Ltd*[118]. The first and second plaintiffs, who were show-business celebrities, had contracted with the third plaintiff, which published *OK!* magazine, to give it exclusive rights to publish photographs of their wedding at the Plaza Hotel in New York City. The Court of Appeal discharged an interlocutory injunction restraining the defendant, which published *Hello!* magazine, from publishing photographs taken surreptitiously at the wedding by an unidentified photographer.

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116 (1984) 156 CLR 414 at 440.

117 (1984) 156 CLR 414 at 445.

118 [2001] 2 WLR 992; [2001] 2 All ER 289.

113 The Court of Appeal held that the balance of convenience came down against "prior restraint", although at trial the first and second plaintiffs might establish a case of breach of confidence. A claim of copyright infringement was pleaded but not relied upon at the interlocutory level[119]. There was no pleading of a cause of action for invasion of privacy. However, Sedley LJ observed[120]:

> "I would conclude, at lowest, that [counsel for the plaintiffs] has a powerfully arguable case to advance at trial that his two first-named clients have a right of privacy which English law will today recognise and, where appropriate, protect. To say this is in my belief to say little, save by way of a label, that our courts have not said already over the years. …
>
> What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."

However, his Lordship went on to note that[121]:

> "the major part of the claimants' privacy rights have become the subject of a commercial transaction: bluntly, they have been sold".

This suggested that, for the frustration of that commercial transaction, a money remedy would be sufficient.

114 Keene LJ said[122] that it was unlikely that *Kaye v Robertson*[123], which had decided that there was no actionable right of privacy in English law, today would be decided the same way. His Lordship added[124]:

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119 [2001] 2 WLR 992 at 1033; [2001] 2 All ER 289 at 327.

120 [2001] 2 WLR 992 at 1025; [2001] 2 All ER 289 at 320.

121 [2001] 2 WLR 992 at 1030; [2001] 2 All ER 289 at 325.

122 [2001] 2 WLR 992 at 1036; [2001] 2 All ER 289 at 330.

123 [1991] FSR 62.

124 [2001] 2 WLR 992 at 1036; [2001] 2 All ER 289 at 330.

> "Consequently, if the present case concerned a truly private occasion, where the persons involved made it clear that they intended it to remain private and undisclosed to the world, then I might well have concluded that in the current state of English law the claimants were likely to succeed at any eventual trial."

115 Brooke LJ stated[125] that English law had not been willing to preclude unwarranted intrusions into people's privacy when the conditions for an action for breach of confidence did not exist. His Lordship considered the significance for the development of the English common law of the *Human Rights Act* 1998 (UK) and the conflict between considerations of privacy and freedom of expression[126]. He also referred to the decision of the Supreme Court of Canada in *Aubry v Éditions Vice-Versa Inc*[127], which was concerned with the provision in Art 5 of the Quebec Charter of Human Rights and Freedoms. This states that "[e]very person has a right to respect for his private life."

116 Nothing in *Douglas* suggests that the right to privacy which their Lordships contemplate is enjoyed other than by natural persons. Further, the necessarily tentative consideration of the topic in that case assumes rather than explains what "privacy" comprehends and what would amount to a tortious invasion of it. The difficulties in obtaining in this field something approaching definition rather than abstracted generalisation have been recognised for some time[128].

117 In submissions, it was suggested that the present position in New Zealand could provide no guidance and that this was because the outcome in the decided cases had been controlled by statute, the *Privacy Act* 1993 (NZ). However, that law has a limited scope and does not confer an enforceable cause of action for damages (s 11(2)). There are decisions of the High Court of New Zealand, at the interlocutory level, which do not turn upon the statute and which favour the development of a tort of breach of privacy in respect of public disclosure of true

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125 [2001] 2 WLR 992 at 1012; [2001] 2 All ER 289 at 307-308.

126 [2001] 2 WLR 992 at 1017-1019; [2001] 2 All ER 289 at 312-314. Similar considerations, concerning the Canadian Charter of Rights and Freedoms, arose before the Supreme Court of Canada in *Canadian Broadcasting Corporation v Lessard* [1991] 3 SCR 421.

127 [1998] 1 SCR 591.

128 See, in particular, the analyses by Benn, "The Protection and Limitation of Privacy", (1978) 52 *Australian Law Journal* 601 at 608; and by Wacks, "The Poverty of 'Privacy'", (1980) 96 *Law Quarterly Review* 73.

private facts, where the disclosure would be highly offensive and objectionable to a reasonable person of ordinary sensibilities[129]. But there appears to be no decision to that effect at trial and no discussion of the subject by the Court of Appeal. In the interlocutory decisions, the plaintiffs were natural persons.

118 It is in the United States that, in many jurisdictions, the subject has received much judicial attention and it was to that learning that Lenah invited us to have closest regard. However, what the law is said to be may diverge from its practical operation, as seen at first hand. Some caution in this regard may be prudent in considering the position in the United States. There, the application of State and federal laws, protective of the privacy of the individual, in some circumstances may violate the First Amendment. This is because in those cases "privacy concerns give way when balanced against the interest in publishing matters of public importance". The words are those of Stevens J in delivering the opinion of the Court in *Bartnicki v Vopper*[130].

119 It recently has been said by an academic commentator[131]:

> "But privacy is not the only cherished American value. We also cherish information, and candour, and freedom of speech. We expect to be free to discover and discuss the secrets of our neighbours, celebrities, and public officials. We expect government to conduct its business publicly, even if that infringes the privacy of those caught up in the matter. Most of all, we expect the media to uncover the truth and report it – not merely the truth about government and public affairs, but the truth about people.
>
> The law protects these expectations too – and when they collide with expectations of privacy, privacy almost always loses. Privacy law in the United States delivers far less than it promises, because it resolves virtually all these conflicts in favour of information, candour, and free speech. The sweeping language of privacy law serves largely to mask the fact that the law provides almost no protection against privacy-invading disclosures. (As we shall see later, the law is more successful in protecting against commercial exploitation, although for reasons that have more to do with commerce than privacy.)"

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129 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR 591.

130 69 USLW 4323 at 4329 (2001).

131 Anderson, "The Failure of American Privacy Law", in Markesinis (ed), *Protecting Privacy*, (1999) 139 at 140.

With that warning in mind, it is convenient to turn to consider the position in the United States, which has been treated as the fount of privacy jurisprudence.

The United States

120 The development of authority in the United States is best, and authoritatively, seen from the treatment of the topic "Privacy" in the *Restatement of the Law Second, Torts*, published in 1977. Section 652A states as a general principle:

> "One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other."

The Section then continues that this right to privacy is invaded in each of the four ways detailed in Sections 652B-652E. The first is identified as "Intrusion upon Seclusion" and is described:

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

The second, identified as "Appropriation of Name or Likeness", is described as:

> "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

The third, identified as "Publicity Given to Private Life", is described as:

> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public."

The fourth, identified as "Publicity Placing Person in False Light", is described as:

> "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

121 Lenah submits that the first and third of these, unreasonable intrusion upon seclusion and unreasonable publicity given to private life, or some combination of them, are relevant to its case.

122 Several points should be made respecting that submission. The first appears in par *c* of the Comment by the Reporters (who included Professor Prosser) upon Section 652A. It is there said:

> "Thus far, as indicated in the decisions of the courts, the four forms of invasion of the right of privacy stated in this Section are the ones that have clearly become crystallized and generally been held to be actionable as a matter of tort liability. Other forms may still appear, particularly since some courts, and in particular the Supreme Court of the United States, have spoken in very broad general terms of a somewhat undefined 'right of privacy' as a ground for various constitutional decisions involving indeterminate civil and personal rights."

A celebrated example of this is the discovery in *Griswold v Connecticut*[132] of "the zone of privacy" located in the penumbras of specific guarantees in the Bill of Rights. Perhaps more conventionally, in a number of cases the prohibition imposed by the Fourth Amendment (applicable to the States by the Fourteenth Amendment) upon unreasonable searches and seizures of property has been interpreted by reference to a reasonable expectation of privacy[133].

123 The second point is that, in Australia, one or more of the four invasions of privacy, to which reference has been made, in many instances would be actionable at general law under recognised causes of action. Injurious falsehood, defamation (particularly in those jurisdictions where, by statute, truth of itself is not a complete defence), confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the

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132 381 US 479 at 485 (1965).

133 *Ferguson v City of Charleston* 69 USLW 4184 at 4187-4188, 4195 (2001); Antieau, *Modern Constitutional Law*, 2nd ed (1997), vol 1, §16.01; Wacks, "The Poverty of 'Privacy'", (1980) 96 *Law Quarterly Review* 73 at 79-80.

plaintiff[134], and the activities of eavesdroppers and the like[135]), passing-off (as extended to include false representations of sponsorship or endorsement[136]), the tort of conspiracy, the intentional infliction of harm to the individual based in *Wilkinson v Downton*[137] and what may be a developing tort of harassment[138], and the action on the case for nuisance constituted by watching or besetting the plaintiff's premises[139], come to mind. Putting the special position respecting defamation to one side, these wrongs may attract interlocutory and final injunctive relief.

124 The statement in par *b* of the Comment to Section 652A of the *Restatement* must be read with an appreciation of the Australian position. The Reporters there state:

> "As it has developed in the courts, the invasion of the right of privacy has been a complex of four distinct wrongs, whose only relation to one another is that each involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others. Even this nexus becomes tenuous in the case of the appropriation of name or likeness … which appears rather to confer something analogous to a property right upon the individual."

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134 *Breen v Williams* (1996) 186 CLR 71 at 128.

135 Gurry, *Breach of Confidence*, (1984) at 162-168; Richardson, "Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law", (1994) 19 *Melbourne University Law Review* 673 at 684-697.

136 *Henderson v Radio Corporation Pty Ltd* (1960) 60 SR (NSW) 576; *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 445.

137 [1897] 2 QB 57.

138 Townshend-Smith, "Harassment as a Tort in English and American Law: The Boundaries of *Wilkinson v Downton*", (1995) 24 *Anglo-American Law Review* 299; Todd, "Protection of Privacy", in Mullany (ed), *Torts in the Nineties*, (1997) 174 at 200-204.

139 *J Lyons & Sons v Wilkins* [1899] 1 Ch 255 at 267-268, 271-272, 273-274; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 504, 517, 524; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760 at 767.

125 The reference to the nexus between the various categories may disguise the distinct interests which are protected. Whilst objection possibly may be taken on non-commercial grounds to the appropriation of the plaintiff's name or likeness, the plaintiff's complaint is likely to be that the defendant has taken the steps complained of for a commercial gain, thereby depriving the plaintiff of the opportunity of commercial exploitation of that name or likeness for the benefit of the plaintiff. To place the plaintiff in a false light may be objectionable because it lowers the reputation of the plaintiff or causes financial loss or both. The remaining categories, the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy "as a legal principle drawn from the fundamental value of personal autonomy", the words of Sedley LJ in *Douglas v Hello! Ltd*[140]. It is upon these two aspects that Lenah relies in the present litigation.

126 However, Lenah can invoke no fundamental value of personal autonomy in the sense in which that expression was used by Sedley LJ. Lenah is endowed with legal personality only as a consequence of the statute law providing for its incorporation. It is "a statutory person, a *persona ficta* created by law" which renders it a legal entity "as distinct from the personalities of the natural persons who constitute it"[141]. Lenah's activities provide it with a goodwill which no doubt has a commercial value. It is that interest for which, as indicated earlier in these reasons, it seeks protection in this litigation. But, of necessity, this artificial legal person lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy.

127 In a New Jersey decision[142], the Court said[143]:

> "The tort of invasion of privacy focuses on the humiliation and intimate personal distress suffered by an individual as a result of intrusive behavior. While a corporation may have its reputation or business

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140 [2001] 2 WLR 992 at 1025; [2001] 2 All ER 289 at 320.

141 *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 at 385.

142 *NOC Inc v Schaefer* 484 A 2d 729 (1984). See also *Southern Air Transport Inc v American Broadcasting Companies Inc* 670 F Supp 38 at 42 (1987); Allen, "Rethinking the Rule against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law", (1987) 20 *John Marshall Law Review* 607 at 610-612.

143 484 A 2d 729 at 730-731 (1984).

> damaged as a result of intrusive activity, it is not capable of emotional suffering."

128 The distinction is expressed, in terms with which we would agree, by an American commentator as follows[144]:

> "Business firms, as Posner notes[145], use privacy as a means to produce income. A trade secret is useful to a firm because it provides a monopoly, which of course enhances profits. Any firm would reveal its trade secrets if it could obtain equivalent monopoly rights for a worthwhile period of time; this is in fact what happens when the government awards a firm a patent that makes the former trade secret a matter of public record. The public inspection to which the patent or copyright is open does not annoy the corporation. As an artificial person, the firm suffers no mental distress when the patent reveals its hidden processes; it simply lacks sensitivity to the value of 'privacy'. A corporation does not want privacy for its own sake. Privacy to a corporation is only an intermediate good."

Hence, the proposition in Section 652I of the *Restatement*:

> "Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."

In par *c* of the Comment to that Section, the Reporters observe that a corporation has no cause of action for any of the four forms of invasion specified in Section 652A. They continue:

> "It has, however, a limited right to the exclusive use of its own name or identity in so far as they are of use or benefit, and it receives protection from the law of unfair competition. To some limited extent this may afford it the same rights and remedies as those to which a private individual is entitled under the rule [respecting appropriation of another's name or likeness]."

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144 D'Amato, "Comment: Professor Posner's Lecture on Privacy", (1978) 12 *Georgia Law Review* 497 at 499-500.

145 Posner, "The Right of Privacy", (1978) 12 *Georgia Law Review* 393 at 394.

Corporate privacy in Australia

129 However else it may develop, the common law in Australia upon corporate privacy should not depart from the course which has been worked out over a century in the United States.

130 Moreover, development of a generalised tort of privacy protecting the commercial interests of a corporation such as Lenah would cut across the reasoning employed in this Court when dealing with an analogous attempt to endorse a generalised tort of unfair competition. Reference has been made earlier in these reasons to the preference in *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* for the adaptation of traditional doctrines to meet new circumstances rather than a loosely defined generalised cause of action.

131 Questions arise as to the limits within corporate structures of access to information respecting the affairs of the corporation in question[146]. The respective roles of shareholders and directors are important in answering those questions. The affairs of statutory corporations which are not publicly held but, by statute, perform public functions give rise to "privacy" issues in the context of accountability for performance of those functions[147]. These are not matters that arise on this appeal.

132 For these reasons, Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, "free from the prying eyes, ears and publications of others"[148]. Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in *Victoria Park*.

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146 Benn, "The Protection and Limitation of Privacy", (1978) 52 *Australian Law Journal* 601 at 604.

147 See the definition of "agency" in s 6(1) of the *Privacy Act* 1988 (Cth).

148 *Restatement of Torts*, 2d, §652A, Comment *b*.

Other issues

133 The conclusion reached above makes it unnecessary to consider the application of the reasoning in *Lange v Australian Broadcasting Corporation*[149] to any evolution in the common law.

134 The Attorney-General of the Commonwealth intervened, apparently asserting a right to present submissions on questions of the general law, outside any consideration of constitutional or federal statute law. The Attorney claimed a "special interest" in the principles that apply to the use of information taken from the Commonwealth and the acquisition of information for Commonwealth purposes.

135 We would deal with the matter by granting leave to intervene but then would find it unnecessary to rule upon those of the substantive submissions put by the Solicitor-General which are not already disposed of by the success of the appeal.

136 The submissions were that:

(a) a court of equity has jurisdiction to enjoin the use of information obtained by illegal or otherwise improper means, if use of the information, which need not have the necessary quality of confidence to be protected on that ground, would be "unconscionable"; and

(b) a third party may be enjoined from using the information even if not implicated in the illegal or otherwise improper initial obtaining of it.

137 These submissions would have the effect of reversing the failure of the confidential information case presented to Mason J in *The Commonwealth of Australia v John Fairfax & Sons Ltd*[150]. They also cut across the trend of authority in this Court respecting the accountability in equity of third parties in

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149 (1997) 189 CLR 520.

150 (1980) 147 CLR 39.

abuse of confidence cases[151]. Further, as Mason J pointed out[152], "when equity protects government information it will look at the matter through different spectacles". This appeal does not provide any occasion to reconsider the outcome in *John Fairfax*. No governmental secrecy is involved here.

138 In so far as submission (a) turns upon some indeterminate notion of what is "unconscionable", it does not stand with what has been said earlier in these reasons. Further, to invoke "discretion" as the Commonwealth Solicitor-General did in his argument is not sufficient to enliven equitable remedies. The court determines the legal or equitable right upon which the plaintiff relies for its equity, considers the adequacy of legal remedies, and then comes to discretion and such matters as the imposition of terms, and the form of any relief. Decisions of equity courts are not a wilderness of single instances determined by idiosyncratic exercises of discretion. To utter the undoubted truth that in Australia equitable principles have a dynamic quality is not to deny that it is those principles that are decisive.

Conclusions

139 The appeal should be allowed. In accordance with the condition attached to the grant of special leave, the appellant should pay the costs of the respondent. No order should be made respecting the costs of the interveners. Orders 1, 2 and 3 of the orders of the Full Court (which excludes the costs orders) made on 2 November 1999 should be set aside. In place thereof it should be ordered that the appeal to that Court should be dismissed.

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151 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 459-460; *Breen v Williams* (1996) 186 CLR 71 at 129; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 537, 567. In the United States, the Supreme Court has declined to answer categorically whether, consistently with the First Amendment, a law may ever forbid the publication of truthful information by whatever means it has been obtained by the publisher: *New York Times Co v United States* 403 US 713 (1971); *Bartnicki v Vopper* 69 USLW 4323 at 4329 (2001).

152 *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51.

140 KIRBY J. This appeal[153] raises three principal questions:

- whether, upon any of the bases propounded, the Supreme Court of Tasmania ("the Supreme Court") lacked the power to grant the interlocutory injunction which it issued against the appellant;

- whether in this Court an alternative basis for the injunction exists, on the ground that the common law now recognises an actionable wrong of invasion of privacy[154]; and

- whether the exercise of any power that otherwise existed miscarried in the circumstances by reason of the failure of those who granted the injunction to take into account limitations, implied from the Constitution, restricting the inhibition by law of free expression. This Court has held that an implication arises from the Constitution that no law may be enacted that would unduly prevent discussion of governmental and political matters relevant to the representative democracy of the Commonwealth. In expressing the common law of Australia (and any rule of equity or judicial practice) courts must also ensure that the law they apply is compatible with this constitutional rule[155].

Other questions were argued in the appeal and will be mentioned. But these three issues capture the essence of the case.

The facts and course of proceedings

141 *Facts and orders*: In their reasons, Gleeson CJ, Gummow and Hayne JJ and Callinan J have severally described the background facts[156]. Their Honours have also explained the course of the proceedings in the Supreme Court of

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153 From a judgment of the Full Court of the Supreme Court of Tasmania: *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* (1999) A Def R ¶53,040; [1999] TASSC 114.

154 The respondent accepted that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 stood in the way of this proposition.

155 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567; *Levy v Victoria* (1997) 189 CLR 579 at 622, 647.

156 Reasons of Gleeson CJ at [22]-[26]; reasons of Gummow and Hayne JJ at [75]-[78]; reasons of Callinan J at [229]-[234].

Tasmania[157], including in the Full Court from whose judgment, by special leave, this appeal comes[158].

142 The primary judge in the Supreme Court refused an injunction[159]. He did so on the basis that the statement of claim of Lenah Game Meats Pty Ltd ("the respondent") "discloses on its face no cause of action" against the Australian Broadcasting Corporation ("the appellant"). Additionally, the primary judge concluded that there was "no reason to suppose that, at least against [the appellant], damages will not provide an adequate remedy". The Full Court divided. Although Slicer J dissented, a majority (Wright and Evans JJ), for differing reasons, concluded that a power existed in the Supreme Court to grant an interlocutory injunction and that, in the circumstances, such an injunction should issue[160]. So it did. It remains in force pending the outcome of this appeal.

143 *Common ground*: Between the refusal of the injunction by the primary judge and the judgment of the Full Court, parts of a videotape depicting the respondent's brushtail possum processing facility ("the videotape") were broadcast by the appellant. Self-evidently, the gruesome sights and sounds of brushtail possums being slaughtered would be upsetting to many who might witness and hear the videotape. Doubtless the same would be true of the slaughter of other animals. Such conduct does not become more agreeable by the use of the word "processing". However, it was not suggested that the method of slaughter used by the respondent was different in kind from that used in Australia in killing other animals for domestic consumption.

144 The appellant conceded below that there was sufficient evidence before the Supreme Court that broadcast of the videotape would cause harm to the respondent's export business. Accordingly, if a legal basis for the grant of relief were established, the balance of convenience arguably justified the issue of an injunction, at least on an interlocutory basis.

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157 Reasons of Gleeson CJ at [2], [5]-[8]; reasons of Gummow and Hayne JJ at [65]-[72]; reasons of Callinan J at [235]-[238].

158 eg reasons of Gleeson CJ at [2]; reasons of Gummow and Hayne JJ at [73]-[74]; reasons of Callinan J at [239]-[241].

159 *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* unreported, 3 May 1999 per Underwood J.

160 *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* (1999) A Def R ¶53,040 at 44,815-44,818 per Wright J, 44,833-44,836 per Evans J; [1999] TASSC 114 at [1]-[18], [58]-[82].

145 The appellant did not dispute that the equipment installed to record the videotape on the premises of the respondent was illegally positioned. A powerful inference was available that this had been done by a person associated with Animal Liberation Limited, a body initially a defendant in the proceedings. It was not suggested that the appellant itself had encouraged, or participated in, the acts of unlawful trespass, pursuant to which the videotape was procured. However, it had received and used a portion of it. It maintained its right to broadcast more if it succeeded in this appeal.

146 *Procedural issues*: In its written submissions, the appellant set out a description of the issues that were raised in the initial programme it had broadcast before the Full Court granted the interlocutory injunction in dispute. Before this Court the respondent objected to any reliance being had on that material. It did so on the footing that neither the videotape, nor a transcript, were formally proved in the Supreme Court, either at trial or before the Full Court. For the purposes of the relief provided, the evidentiary foundation was, and could only be, the evidence tendered by the parties. According to current doctrine, the failure of the appellant to prove the contents of its proposed programme in the courts below prevents it from proving and relying on that material in this Court[161].

147 A different problem beset the respondent in respect of its belated reliance upon a proposed development of the law of privacy. Before the Full Court, the respondent had conceded that it did not wish to take that Court "down the path of creating a tort of privacy even though one exists in New Zealand and the United States"[162]. Notwithstanding this concession, the respondent was permitted to advance its privacy argument before this Court, subject to any procedural injustice being shown[163]. There is no procedural injustice. The argument raises only questions of law.

148 Instead of applying for the discharge of the interlocutory injunction, or for an early trial of the substantive claims against it, the appellant appealed to this Court against the Full Court's orders. Although the precise issues that might arise out of a television programme, illustrated by the videotape, are not proved by evidence, some elements of the evidence give a fairly clear indication of what was involved.

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161 *Mickelberg v The Queen* (1989) 167 CLR 259 at 271, 274, 297-298; *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

162 *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation*, transcript of proceedings, Supreme Court of Tasmania, 25 May 1999 at 6.

163 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9.

149 *Evidence at trial*: The affidavit of Mr Kelly, a director of the respondent, read before the primary judge, was unchallenged and he was not cross-examined upon it. The appellant proffered no affidavits in reply. In his affidavit, Mr Kelly recounts a pre-arranged interview he had with Ms Tierney, a reporter employed by the appellant for its evening current affairs programme, the "7.30 Report". According to Mr Kelly, Ms Tierney played the videotape in his presence. It "showed the processing of possums at our facility and in particular stunning them with a captive bolt pistol followed by the cutting of their throats, with audio sound".

150 Mr Kelly said that Ms Tierney asked him "questions relating to the [respondent's] operations and whether they complied with the Animal Welfare Code of Practice for Processing Brush Tail Possums". Mr Kelly was being filmed by a camera crew during this conversation. He responded to the lastmentioned question in the affirmative. Ms Tierney told Mr Kelly that she had received the videotape from a person involved in "Animal Liberation (NSW)" together with explanatory "documents printed on letterhead of" Animal Liberation Limited. Although the objects of that organisation are not proved, some of them can be inferred from its name. Thus, it would be a fair inference that the organisation would have concerns about animal welfare, animal slaughtering, perhaps consumption of animal meat and, specifically, in the present instance, the respondent's method of "killing, processing and exporting" native Australian animals.

151 According to the uncontested evidence, Ms Tierney had arranged to visit the respondent's facility "on the pretext of wishing to ask [Mr Kelly] about possum processing and sustainable wildlife utilisation for commercial purposes in Tasmania, but also for other parts of Australia". The brushtail possums "processed" by the respondent are all exported, particularly to Asia. However, as Ms Tierney's questions proceeded, they were directed not to questions about the market but to issues relevant to animal welfare.

152 *Values in conflict*: Both parties in this Court relied on broad principles to support their respective cases. The appellant objected to prior judicial restraint of matters for broadcast. It also relied upon a constitutionally protected zone of immunity from injunctive or other orders which had the effect of restricting publication concerning governmental and political questions. The respondent relied on broad principles protecting private property holders from unlawful trespass; those depriving media defendants of the fruits of such trespass[164]; and a

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164 eg *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457.

general right to privacy which the law of Australia has so far failed to recognise[165].

The applicable legislation

153 *The criminal trespass*: In his reasons[166], Callinan J has set out the provisions of the *Criminal Code* (Tas)[167] and of the *Police Offences Act* 1935 (Tas)[168] which applied to the conduct of the person or persons who surreptitiously installed video cameras inside the respondent's premises by drilling holes into the ceiling. Although it is possible that such installation was performed by a person working in, or otherwise having lawful access to, the respondent's premises, a strong inference arises that what was done involved a trespass to, and unlawful entry upon, the respondent's land, unlawful injury to its property and, possibly, the gaining of entry amounting to burglary so as to commit a crime of unlawful injury to the respondent's property.

154 *The power to grant injunctions*: Another enactment must be noticed. It concerns the provisions of legislation affording the Supreme Court relevant jurisdiction and powers. Under s 73 of the Constitution, the "Supreme Court of a State" has a constitutional status within the integrated Australian Judicature. The Supreme Court of Tasmania is the same court as that originally established pursuant to the *Australian Courts Act* 1828 (Imp)[169]. Section 11 of that Act conferred "such equitable Jurisdiction, as the Lord High Chancellor of Great Britain". By 1828, the Lord Chancellor and the Court of Chancery enjoyed the discretionary power to issue writs granting injunctions to restrain a subject from acting in a particular way. Indeed, it was the power to grant an injunction restraining a subject from executing an unconscionable judgment obtained at common law that led to a confrontation in England between the courts of chancery and of common law[170]. It follows that the Supreme Court originally

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165 *Victoria Park* (1937) 58 CLR 479; cf Taylor, "Why is there no Common Law Right of Privacy?", (2000) 26 *Monash University Law Review* 235.

166 Reasons of Callinan J at [229] fn 319-321.

167 ss 243, 244.

168 ss 14B, 37.

169 9 Geo IV c 83. The letters patent of 4 March 1831 ("the Charter of Justice") and the applicable Imperial legislation are described in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 16 [132].

170 *Earl of Oxford's Case* (1615) 1 Chan Rep 1 [21 ER 485] cited in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 7 [112]; cf Holdsworth, *A History of English Law*, 7th ed (1956), vol 1 at 458 cited in *Lenah*

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enjoyed an equitable jurisdiction equivalent to that of the Court of Chancery in England before the powers of that Court were affected by the statutory reforms introduced by the *Supreme Court of Judicature Act* 1873 (UK).

155 This situation was, in turn, altered in Tasmania by the passage of the *Supreme Court Civil Procedure Act* 1932 (Tas). That Act introduced many of the *Judicature Act* reforms into the law of Tasmania. Section 10 provides:

> "[I]n every cause or matter commenced in the Court, law and equity shall be administered according to the following provisions of this section:
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> (1) If any plaintiff … claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any … right, title, or claim whatsoever asserted by any defendant … in such cause or matter, or to any relief founded upon a legal right which heretofore could only have been given by the Court in its jurisdiction in equity, the Court or judge shall give to such plaintiff … the same relief as ought to have been given by the Court in its jurisdiction in equity in a suit or proceeding for the like purpose properly instituted before the commencement of this Act.
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> …
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> (6) Subject to the provisions of this Act for giving effect to equitable rights and other matters of equity … the Court and every judge thereof shall recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law … in the same manner as the same would have been recognized and given effect to if this Act had not passed.
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> …"

Section 11(12) provides that an injunction may be granted by interlocutory order where it appears "just and convenient that such order should be made"[171].

The establishment of a cause of action is not essential

156 *Conflicting authority*: The first submission of the appellant was that an injunction could not be granted in the absence of a pleading asserting, and

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Game Meats Pty Ltd v Australian Broadcasting Corporation (1999) A Def R ¶53,040 at 44,823 per Slicer J; [1999] TASSC 114 at [34].

171 Section 11(12) is set out in the reasons of Gummow and Hayne JJ at [87].

evidence demonstrating, to the appropriate degree[172], the existence of an arguable legal or equitable cause of action. This argument was accepted by the primary judge and by Slicer J in the Full Court. The respondent's failure to establish a relevant cause of action meant, in Slicer J's opinion, that there was no serious issue to be tried. Accordingly, there was "no power [in the Court] to grant interlocutory relief on the basis of potential injury or harm which might be suffered by the [respondent] upon publication"[173]. A threshold question is presented as to whether this expresses the correct approach.

157 Passages appear in judicial opinions in England[174], in this Court[175] and other Australian courts[176] and in respected texts[177] that appear to lend support to the general proposition, stated thus broadly. However, I agree with Callinan J[178] that it is essential to read such observations in the context in which, and for the purposes for which, they were stated.

158 For example, the dicta expressed in the joint reasons (to which Callinan J was party) in *Cardile v LED Builders Pty Ltd*[179] should not, I believe, be taken out of context. That case involved the availability of an "asset preservation order" (known as a "*Mareva* injunction")[180]. As Callinan J points out in this

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172 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 594-595 [2173]; cf reasons of Callinan J at [246].

173 Reasons of Slicer J at 44,829; [47].

174 *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30 at 39-40; *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA* ("*The Siskina*") [1979] AC 210 at 256.

175 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 617, 621, 632, 641; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 395-396 [31].

176 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 276-277; *Bank of Queensland Ltd v Grant* [1984] 1 NSWLR 409 at 413; *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321.

177 see Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 535-538 [2107], 607-608 [2186], 611-613 [2189].

178 Reasons of Callinan J at [282].

179 (1999) 198 CLR 380; see reasons of Callinan J at [281].

180 *Cardile* (1999) 198 CLR 380 at 412 [79]; *Mareva Compania Naviera SA v International Bulkcarriers SA* ("*The Mareva*") [1975] 2 Lloyd's Rep 509.

appeal, that remedy was itself a novel invention of judges, one of two[181] described as law's "'nuclear' weapons"[182]. In an age of such recent, potent, radical and generally beneficial judicial inventions, it would be inappropriate for this Court to retreat into absolute rules, incapable of adaptation to the needs of particular procedural circumstances.

159 *Avoiding rigid preconditions*: Least of all would it be appropriate for this Court to endorse an absolute rule in a case such as the present. There are at least four reasons why this is so. In *Cardile*[183] I mentioned some of them. Those specially relevant here are:

(1) *Statutory power*: First, it is an oft repeated mistake of lawyers to gloss statutory language with presuppositions derived from pre-existing law. Every court, but particularly a court within the Australian Judicature established under the Constitution, must obey, and give full effect to, valid Australian legislation understood according to its terms. This is the starting point for a consideration of the power of the Supreme Court. With respect, it is erroneous to start with Chancery practice, the history of injunctions, or observations of English judges on those subjects[184]. It is equally erroneous to start with the opinions of local judges who have not begun the "elucidations" of their relevant powers, as they should, with the terms of the statute by which those powers are granted. This does not mean that the entire ambit of the power is to be found in the statutory provision permitting interlocutory injunctions to be granted where it appears "just and convenient" to do so[185]. Australian judges are not, for this purpose, issued "with a portable palm tree"[186]. But neither is the statutory language confined to particular categories, specified circumstances or enumerated prerequisites fixed for all time by legal history. Unsurprisingly, the power is granted in extremely broad terms to apply to circumstances of almost infinite variety. It is an elementary

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181 See also *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

182 *Bank Mellat v Nikpour* [1985] FSR 87 at 92 per Donaldson LJ; see reasons of Callinan J at [284].

183 (1999) 198 CLR 380 at 421-429 [106]-[124].

184 See *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]; 181 ALR 307 at 319; *The Commonwealth v Yarmirr* [2001] HCA 56 at [249].

185 *Supreme Court Civil Procedure Act*, s 11(12).

186 Tilbury, *Civil Remedies*, (1990), vol 1 at 306 [6055] referring to *Chief Constable of Kent v V* [1983] QB 34 at 45 per Donaldson LJ.

canon of statutory construction that such provisions should not be narrowed by judicial analysis which distorts the meaning derived from the words used.

(2) *Powers of courts*: Another canon of construction of direct relevance applies where the powers in question are granted to a court of law, indeed a superior court of record enjoying, in Australia, a constitutional status[187]. Where, as here, the powers are conferred in broad terms on such a court by a parliament, it is contrary to basic principle to restrict such powers to closed categories[188].

(3) *Equitable character*: In so far as history continues to be imported by the very nature of the remedy of "injunction"[189], it is the history of equity. Whilst that branch of the law, over time, undoubtedly "developed positive rules and shed its ex tempore characteristics"[190], it continues to resist attempts (often said to arise at the hands of common lawyers[191]) to impose on discretions equitable in character classifications described "in terms of inflexible rules"[192]. That approach would be contrary to "fundamental equitable principles"[193]. Above all, such principles require that the beneficial remedy of interlocutory injunctions must, like other injunctions now provided by statute for particular purposes, be kept available to fulfil those purposes and not imprisoned in a cage of unyielding rules derived from ancient cases. The dilemma presented by this appeal evokes the warning of Justice E W Thomas, who in an extrajudicial remark recently described the law's fixation with certainty and formal rules and its distrust of discretion as "adolescent dogmas which the judiciary has outgrown and

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187 Constitution, s 73; cf *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 191, 205; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 56-57 [112].

188 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639; *Cardile* (1999) 198 CLR 380 at 423 [110].

189 *Supreme Court Civil Procedure Act*, s 11(12); see also Constitution, s 75(v).

190 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 7 [114].

191 Spry, *Equitable Remedies*, 6th ed (2001) at 20-22 cited in reasons of Callinan J at [350].

192 Spry, *Equitable Remedies*, 6th ed (2001) at 20.

193 Spry, *Equitable Remedies*, 6th ed (2001) at 22; see reasons of Callinan J at [350].

discarded as the decision-making process has assumed greater maturity"[194].

(4) *Interlocutory realities*: A final consideration of special relevance to the present appeal arises from the realities that commonly attend applications for interlocutory injunctions, seeking relief prior to a trial. Of their nature, as in the present case, such injunctions are usually sought urgently. Such applications may not always be accompanied by well-prepared pleadings and evidence. That is why the power of the Supreme Court to provide relief is conferred in broad terms. An "interlocutory order"[195] is obviously adjunct to a substantive claim and a "serious issue to be tried" is a prerequisite to relief. But while that "serious issue" is being finally formulated and supported at trial by evidence, it would be inappropriate, and contrary to the purpose of the remedy and of the statute, to impose a narrow rule obliging the demonstration in every case of a cause of action, fully pleaded and proved. In most cases it may indeed be appropriate to require pleading and proof. But in others (particularly in urgent circumstances) justice and convenience may warrant the issue of an interlocutory injunction without them. In this exceptional type of case, the substantive issues between the parties would normally come to trial and be resolved quite quickly. In the present case, the appellant's recourse to appeal has interrupted that usual course of events.

160 In my view the primary judge and Slicer J in the Full Court[196] erred, in so far as they suggested that establishment of a cause of action was, as a matter of law, a universal fixed requirement for the grant of an interlocutory injunction at the time such injunction issued. To the extent that that was the foundation for the decision of the primary judge, it was erroneous. Without more, this error authorised the Full Court to uphold the appeal and, if it so decided, to enter for itself upon a consideration of whether it should provide the injunction that had been refused at first instance.

161 *Analogy to striking out pleadings*: The foregoing conclusion is supported by a well-known analogy. Where the law is unclear, or in a state of development, the modern approach to applications to strike out a pleading said to disclose no viable cause of action is one of caution. At least this is so where the court concludes that a closer examination of the applicable law and of the facts may

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194 Thomas, "Judging in the Twenty-First Century", (2000) *New Zealand Law Journal* 228 at 228.

195 *Supreme Court Civil Procedure Act*, s 11(12).

196 Reasons of Slicer J at 44,827-44,830; [42]-[50].

reasonably be expected to add "colour and content to the application and development of legal principle"[197]. This is not only the approach of courts in Australia but also in England[198]. Recently, in *Johnson v Gore Wood & Co*[199], Lord Bingham of Cornhill said that "[a]t the strike-out stage any reasonable doubt must be resolved in favour of the claimant"[200].

162 There are, of course, important differences between burdening a defendant with the obligation to answer and defend a case expressed in a pleading (which it asserts rests on an inadmissible cause of action that will involve it in "useless and futile" proceedings[201]) and burdening a defendant with liabilities imposed by an interlocutory injunction. However, there are certain analogies between the two interlocutory orders. The recognition of the fact that in some areas the law is not certain but is in a process of development may make it appropriate, in each case, to preserve the status quo and to protect the rights of the plaintiff until, at trial, the issues of fact and law can be elucidated and a conclusive determination made by a court with power to do so. Where a case is presented that is seriously arguable, and where damages would not be an adequate remedy, that may be the proper course to adopt; and is certainly available to a judge to so decide.

163 *Answering the contrary arguments*: What are the arguments against this conclusion? The appellant advanced three. First, it was said to be settled law that an interlocutory injunction may only be granted where, the other preconditions being established, the applicant can plead and sufficiently demonstrate that it has a legal or equitable right that has been breached. That right may be expressed in terms of a cause of action giving rise to substantive relief which the court in question has power to grant and to which the "interlocutory injunction" is ancillary[202]. As the relief sought is an "injunction", it was suggested that this word imported into the statute the law and practice of the Court of Chancery in England. Moreover, because it is "interlocutory" it was

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197 *Wickstead v Browne* (1992) 30 NSWLR 1 at 5; affirmed by this Court (1993) 10 Leg Rep SL2.

198 *Lonrho plc v Tebbit* [1991] 4 All ER 973 per Browne-Wilkinson VC; affirmed [1992] 4 All ER 280; see Starke, "Practice Note", (1992) 66 *Australian Law Journal* 47.

199 [2001] 2 WLR 72; [2001] 1 All ER 481.

200 [2001] 2 WLR 72 at 95; [2001] 1 All ER 481 at 504.

201 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 84.

202 *The Siskina* [1979] AC 210 at 254; *Associated Newspapers Group plc v Insert Media Ltd* [1988] 1 WLR 509 at 512; [1988] 2 All ER 420 at 422.

incidental to a substantive proceeding. It was not free-standing. By itself, a claim for such relief did not give rise to a cause of action[203].

164 An Australian court is not excused from obeying legislative provisions merely because their meaning appears to be contrary to earlier non-statutory rules[204]. When the words of s 11(12) of the *Supreme Court Civil Procedure Act* are considered in their context, there is nothing in them that warrants imposing on the grant of an interlocutory injunction the preconditions urged by the appellant. The "injunction" referred to is an Australian statutory order. As such, it is not confined to the historical limitations of injunctions in the English Court of Chancery. Whether at the time of enactment or any later or other time, all that the power to grant the injunction as an "interlocutory order of the Court" implies is that it is granted incidentally to the principal object of the proceedings. How such proceedings will be framed may not always be finally decided at the time that such interlocutory relief is sought. If the duty of a judge from whom such relief is claimed is to the statute, the broad language of the legislative text permits the grant of an interlocutory injunction, so long as the party seeking it has a requisite interest to do so and submits to the reasonable requirements imposed by the court for the proper formulation of its claim to final relief.

165 Secondly, the appellant suggested that any other view would be inconsistent with the approach taken in England since the *Judicature Act*. Whilst some English authority, most recently the decision of the House of Lords in *Pickering v Liverpool Daily Post and Echo Newspapers plc*[205], supports the appellant's position, it rests ultimately on their Lordships' interpretation of English legislation. In some respects, this has a history different from that of the Tasmanian provision in question here. Furthermore, contrary views had previously been expressed in England to the effect that the legislation "plainly confers a new and extensive jurisdiction … to grant an injunction. It is far wider than anything that had been known in our courts before."[206] In England, this

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203 *The Siskina* [1979] AC 210 at 256.

204 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 148-150; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342; 181 ALR 307.

205 [1991] 2 AC 370 at 420. See also *The Siskina* [1979] AC 210 at 254; *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24 at 40.

206 *Chief Constable of Kent v V* [1983] QB 34 at 42 per Lord Denning MR. Lord Denning insisted that this had been the approach of Sir George Jessel MR in *Beddow v Beddow* (1878) 9 Ch D 89 at 93 which he applied in *The Mareva* [1975]

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wider view gathered important adherents until the House of Lords imposed its narrower opinion[207]. The judges who favoured the broader view simply looked at the terms of the legislation. They held themselves to be freed from historical presuppositions. They applied the legislative grant of power expressed (as here) in the most ample language. This Court is not bound by the course which English authority has now taken. For my own part, obedient to the legislative text enacted by an Australian parliament, I prefer the broader view.

166 Thirdly, the appellant suggested that the requirement for the respondent to demonstrate that there was a serious question to be tried[208] necessitated, without more, that such question should be formulated in terms of an established cause of action. An interlocutory injunction can have drastic consequences on the rights of the parties affected by it. It can prove greatly disruptive and expose the parties, in the event of breach, to intrusive orders including the possible loss of liberty for contempt of the terms of an injunction. In such circumstances, the appellant argued, no interlocutory injunction could issue without demonstrating a known legal or equitable cause of action[209].

167 *Conclusion: injunctive power available*: I accept the need for care in providing injunctive relief. However, the cases collected by Callinan J[210] demonstrate that no narrow view has been adopted as to the meaning of the expression "a serious question to be tried". Sometimes (as here) when the interlocutory injunction is sought, the *seriousness* of the matter will be plain but the precise *question* to be formulated may not yet be entirely clear. In such circumstances, it may sometimes follow that, in its discretion, a court will refuse the interlocutory injunction. It might do so not being convinced that it is "just and convenient that such order should be made"[211]. Or it might conclude that

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2 Lloyd's Rep 509 at 510; see also his rejection of rigid rules in the grant of interlocutory injunctions in *Hubbard v Vosper* [1972] 2 QB 84 at 96.

207 *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 at 386 per Lord Donaldson of Lymington MR; cf at 394 per Farquharson LJ.

208 *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 at 573. This consideration was referred to in the Full Court in reasons of Wright J at 44,818; [15], reasons of Slicer J at 44,829; [47]-[49], reasons of Evans J at 44,836; [78].

209 The appellant relied on *The Siskina* [1979] AC 210; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501, 516.

210 Reasons of Callinan J at [223]-[224].

211 *Supreme Court Civil Procedure Act*, s 11(12).

damages will, in the circumstances, be an adequate remedy[212]. But to deny a court, such as the Supreme Court, acting under a provision such as s 11(12) of the *Supreme Court Civil Procedure Act* the *power* to grant an injunction in such a case is a proposition I reject. The words of the statute and the status and function of that Court deny such a conclusion. Had such an approach been taken by earlier courts, there would have been no *Mareva* injunctions[213], no *Anton Piller* orders[214] and many cases at the boundaries of injunctive remedies might have been differently decided[215].

The equitable foundation for injunctive relief

168 *Equity meeting new needs*: It is a commonplace that equity is a living force and that it responds to new situations[216]. It must do so in ways that are consistent with equitable principles[217]. If it were to fail to respond, it would atrophy. Where an attempt is made to restrain the use of information that has come into the hands of a party, the basis for the exercise of equitable jurisdiction does not lie, as such, in the proprietary rights of that party over the object containing the information. It lies, in the words of Deane J in *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]*[218]:

> "in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained".

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212 *Lincoln Hunt* (1986) 4 NSWLR 457 at 458.

213 *The Mareva* [1975] 2 Lloyd's Rep 509. *Mareva* injunctions are "not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense": *Mercedes Benz AG v Leiduck* [1996] AC 284 at 306.

214 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

215 eg *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Cardile* (1999) 198 CLR 380.

216 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257-260 [24]-[31]; *Cardile* (1999) 198 CLR 380 at 395 [30]; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [56]-[59].

217 Reasons of Gummow and Hayne JJ at [138]; see also reasons of Gleeson CJ at [10].

218 (1984) 156 CLR 414 at 438.

169 *Equity and modern media*: Commonly, claims for injunctive relief in such cases will involve assertions that publication, in the particular circumstances, would amount to an actionable breach of confidence. Where such a cause of action can be shown to be reasonably arguable, an applicant for an interlocutory injunction will be well on the way to securing such relief. However, it is not only in circumstances where confidential information has been "improperly or surreptitiously obtained or … imparted in confidence [so that it] ought not to be divulged"[219] that courts have restrained such publication. Australian courts have responded to new circumstances that have involved serious affronts to conscience.

170 Such circumstances will arise in a case where information which lacks the quality of confidence has nevertheless been obtained illegally, tortiously, surreptitiously or otherwise improperly. In such cases the preservation of the confidentiality or secrecy of the information may be of substantial concern to the applicant for relief[220]. The jurisdiction to restrain the use of confidential information has long been exercised against third parties who have received the information from someone else[221]. By extension, such jurisdiction may now be exercised, in a case where the information in question has been obtained illegally, tortiously, surreptitiously or improperly, even where the possessor is itself innocent of wrongdoing. The reason for providing the relief is to uphold the obligation of conscience and to prevent publication in circumstances where such publication would be unconscionable.

171 The foregoing is the approach taken by Australian judges experienced in the exercise of equitable jurisdiction. Their approach has responded, in a principled way, to contemporary circumstances. Many of the cases in which the Australian practice has been developed have been cases involving the media.

172 In his reasons, Callinan J has described some of the features of contemporary mass media, including in Australia[222]. A number of those features did not exist at all, or to the same degree, in earlier times when leading cases on injunctive relief in this context were decided. The phenomena of "cheque-book journalism", intrusive telephoto lenses, surreptitious surveillance, gross invasions

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219 *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475 cited in *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50.

220 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438.

221 eg *Prince Albert v Strange* (1849) 1 H & Tw 1 at 23-25 [47 ER 1302 at 1310-1311]; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Sullivan v Sclanders* (2000) 77 SASR 419 at 428.

222 Reasons of Callinan J at [251]-[277].

of personal privacy, deliberately deceptive "stings" and trespass onto land "with cameras rolling"[223] are mainly phenomena of recent times. Such phenomena have produced applications to the courts for relief, including injunctive relief. Adapting the words of Cardozo J used in another context, "[t]he cry of distress is the summons to relief"[224]. In Australia, generally speaking, courts exercising equitable jurisdiction have upheld the entitlement to relief where, to turn their backs, would be seriously offensive to conscience.

173 A common feature of many of the early cases in this category was the uninvited invasion by a media defendant of the private property of the plaintiff. Sometimes the intrusion had been filmed and accompanied by accusatory harassment of the plaintiff or its employees or associates in circumstances designed to occasion surprise, shock or embarrassment and where the responses elicited were likely to present the plaintiff in a bad light. Three cases of this kind are *Lincoln Hunt Australia Pty Ltd v Willesee*[225]; *Emcorp Pty Ltd v Australian Broadcasting Corporation*[226]; and *Church of Scientology Inc v Transmedia Productions Pty Ltd*[227].

174 In the result, only in *Emcorp* was an interlocutory injunction granted. In *Lincoln Hunt*[228] it was declined because damages (and the possibility of exemplary damages) for trespass were considered an adequate remedy. In *Church of Scientology*, it was refused on the merits. But the common thread that runs through each of these cases is the acceptance that an interlocutory injunction was available against the media defendant if the plaintiff could demonstrate that the projected publication would be unconscionable in the circumstances[229].

175 In *Lincoln Hunt*, which has proved the most influential of this series, Young J, now Chief Judge in Equity of the Supreme Court of New South Wales, answered, in words that I would endorse, the sometimes fashionable suggestion

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223 *Lincoln Hunt* (1986) 4 NSWLR 457 at 457.

224 *Wagner v International Ry Co* 133 NE 437 at 437 (NY 1921).

225 (1986) 4 NSWLR 457 per Young J.

226 [1988] 2 Qd R 169 per Williams J.

227 (1987) Aust Torts Rep ¶80-101 per Needham J.

228 (1986) 4 NSWLR 457 at 464-465.

229 *Church of Scientology* (1987) Aust Torts Rep ¶80-101 at 68,642.

"that equity's power to act as a court of conscience is now spent"[230]. His Honour said[231]:

> "[I]t does not mean that when unconscionable situations exist in modern society which do not have an exact counterpart in history, that this Court just shrugs its shoulders and says that as no historical example can be pointed to as a precedent the court does not interfere. This Court still continues both in private and commercial disputes to function as a court of conscience. What is unconscionable will depend to a great degree on the court's view as to what is acceptable to the community as decent and fair at the time and in the place where the decision is made. … [O]pinions may differ as to where the line of unconscionability is to be drawn, but that does not remove from this Court its responsibility to make a decision as to whether conduct is unconscionable in new commercial situations."

176 Against this background, Young J concluded that the Court had[232]:

> "power to grant an injunction in the appropriate case to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved. However, the Court will only intervene if the circumstances are such to make publication unconscionable. …
>
> In the instant case, on a prima facie basis I would have thought that there is a lot to be said in the Australian community where a film is taken by a trespasser, made in circumstances as the present, upon private premises in respect of which there is some evidence that publication of the film would affect goodwill, that the case is one where an injunction should seriously be considered."

177 Apart from the other cases in the trio mentioned, Young J's view has been referred to with approval, and applied, in a number of later Australian decisions[233].

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230 (1986) 4 NSWLR 457 at 463 referring to Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 2nd ed (1984) at 68-69 (see now 3rd ed (1992) at 72 [305]).

231 (1986) 4 NSWLR 457 at 463.

232 (1986) 4 NSWLR 457 at 463-464.

233 *Rinsale Pty Ltd v Australian Broadcasting Corporation* (1993) Aust Torts Rep ¶81-231 at 62,380; *Takhar v Animal Liberation SA Inc* [2000] SASC 400 at [75]-[80].

178 In each of the foregoing cases, the media defendant was the trespasser. Nevertheless, the reasoning adopted by Young J in *Lincoln Hunt*, that equitable jurisdiction exists to restrain the publication of a videotape or photograph made by a trespasser, is in my view equally applicable where such materials have passed into the hands of a third party, itself innocent of the trespass, who threatens to publish it. It was not essential to Young J's reasoning that the publication in *Lincoln Hunt* was by the trespasser. The essence of his reasoning was that the material was acquired in consequence of a trespass upon private property; that its publication would be unconscionable; and that it would affect the material interests (there, as here, the goodwill) of the plaintiff.

179 This principle is also consonant with the approach taken by Hodgson CJ in Eq in *Donnelly v Amalgamated Television Services Pty Ltd*[234], where police had taken a video recording of the plaintiff during execution of a search warrant and powers of arrest. The recording showed the plaintiff, surprised in his underpants, in his bedroom at his mother's house. It was secured by a television broadcaster which promoted a current affairs programme using excerpts from it. The plaintiff sought an interlocutory injunction. He succeeded. Hodgson CJ in Eq held that, arguably, the broadcasting of the recording would involve the defendants in a knowing participation in a serious abuse by police of their powers of search or arrest. The foundation for the relief provided was not expressed in terms of the intellectual property in the videotape. Indeed, his Honour explicitly disclaimed that basis for his decision[235]. Instead, the basis was that an attempt by the police to pass on information, acquired in the exercise of powers of search or arrest, "to other persons for them to use"[236] to their advantage or to the disadvantage of the plaintiff was subject to restraint by interlocutory injunction.

180 Unlike *Lincoln Hunt*, in *Donnelly* an injunction was the only way of sparing the plaintiff irreparable damage and gratuitous public humiliation. The scope of the injunction ordered was confined to the recording made inside the home where the plaintiff was arrested. The fact that the broadcaster had not itself trespassed on that home (or even that the videotape was originally lawfully obtained for police purposes) was not regarded as a reason for denying relief. The fundamental reason for granting it was that use of such videotape would be unconscionable in the circumstances. Unless an injunction were granted, the unconscientious conduct of the police would occur without adequate redress. The law would then withdraw protection from those damaged by unconscionable

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234 (1998) 45 NSWLR 570.

235 (1998) 45 NSWLR 570 at 575.

236 (1998) 45 NSWLR 570 at 575.

conduct. If this were the law, the resulting incapacity of a Supreme Court to provide protection would obviously encourage acquisition (by payment or otherwise) and publication of information obtained by others through illegal, tortious, surreptitious or otherwise improper means.

181 *Remedial law and modern relevance*: I do not believe that the approaches adopted by the experienced judges in the cases mentioned depart from the broad statutory power afforded to Supreme Courts in Australia to grant interlocutory injunctions. Nor do I believe that they depart from a sound application of equitable principles in modern conditions. To remain relevant to meet the new situations presented by the operations of modern media obtaining and using the fruits of criminal and wrongful acts of others, equity is capable of adaptation. Special considerations govern the provision of injunctive relief where the information in question concerns the activities of public bodies or governmental information. In such cases it is necessary for courts to wear "different spectacles"[237]. However, in respect of other information, in determining whether its use would be unconscionable, a court would be obliged to take into account all of the circumstances of the case including competing public interests. Such public interests include both upholding the integrity of private property and personal rights[238] and defending freedom of speech and expression[239].

182 To hold that a superior court in Australia lacks the power to grant an interlocutory injunction to restrain a media defendant from broadcasting information acquired illegally, tortiously, surreptitiously or otherwise improperly simply because it was only a receptacle and not directly involved in the wrongful acquisition of the information would involve an unjustifiable abdication of the large powers afforded to such courts by their enabling statutes[240]. It would also involve a needless departure from a consistent line of decisional authority in Australia, given over the past 20 years. It would inflict an undue narrowing on the availability of interlocutory injunctions to meet modern circumstances. Those circumstances occasionally demand the provision of such relief where the

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237 *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51; see also *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

238 *Lincoln Hunt* (1986) 4 NSWLR 457 at 465; *Emcorp* [1988] 2 Qd R 169 at 176; *Rinsale* (1993) Aust Torts Rep ¶81-231 at 62,381.

239 cf *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291.

240 See eg *Supreme Court Civil Procedure Act*, s 11(12); cf *Hall v Braybrook* (1956) 95 CLR 620 at 642-643; *Witten v Lombard Australia Ltd* (1968) 88 WN (Pt 1) (NSW) 405 at 412 per Walsh JA.

use of the information is shown to be unconscionable and other remedies are judged to be inadequate. It would impose on the practice of Australian courts a needless inflexibility when the applicable principles (as well as actual experience) show that such courts are well able to balance the competing interests at stake.

183 I see no reason why this Court should adopt such a narrow position in this branch of the law of remedies. I see every reason why it should not. Least of all should it adopt a narrow approach out of deference to judicial remarks written long before the features of the modern media and mass communications existed as they do today. To that extent I agree with the reasons of Callinan J[241]. The power of modern media, so important for the freedoms enjoyed in Australia, can sometimes be abused. When that happens, the courts are often the only institutions in our society with the power and the will to provide protection and redress to those who are gravely harmed. Apart from the other cases where a cause of action can be shown to sustain the grant of an interlocutory injunction, in my view a court, such as the Supreme Court, has the statutory power to grant an injunction to restrain the use of information which has been obtained by a trespasser or by some other illegal, tortious, surreptitious or improper means where the use of such information would be unconscionable.

184 To that extent, the Full Court made no error in concluding that power existed to afford relief to the respondent by way of interlocutory injunction. The first question in this appeal should therefore be answered in the respondent's favour.

A tort of privacy?

185 *Common law authority*: As I have accepted two bases for authorising the grant of an interlocutory injunction in favour of the respondent against the appellant, it is strictly unnecessary for me to consider the proposition that such relief might also have been granted on the basis of an actionable breach of privacy.

186 Since the majority decision of this Court in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[242], it has generally been accepted that a cause of action for breach of privacy does not exist in the common law of

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241 Reasons of Callinan J at [278]-[287].

242 (1937) 58 CLR 479; cf *Northern Territory v Mengel* (1995) 185 CLR 307 at 354.

Australia[243], any more than it existed in the common law of England[244]. Some of the values that might be described as aspects of privacy could be defended by invoking other, established, causes of action[245]. But in consequence of *Victoria Park*, a general tort of privacy did not develop in Australia, as it did in the United States of America and elsewhere[246].

187 It may be that more was read into the decision in *Victoria Park* than the actual holding required[247]. However, because of the general understanding of what the decision stood for (encouraged by the wide language in which Latham CJ, at least, expressed his opinion[248]), legislatures[249] and law reform bodies[250] have, for more than 50 years, proceeded on the footing that no

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243 See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) at 112-116 [215]-[222]; Australian Law Reform Commission, *Privacy*, Report No 22, (1983), vol 2 at 21 [1076].

244 *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 372; *Kaye v Robertson* [1991] FSR 62 at 66, 70, 71; (1990) 19 IPR 147 at 150, 154, 155; *R v Khan* [1997] AC 558 at 582-583; Winfield, "Privacy", (1931) 47 *Law Quarterly Review* 23.

245 eg by use of the law of negligence, trespass, passing off, copyright, the specific contracts, duty of confidence and equitable remedies: Australian Law Reform Commission, *Privacy*, Report No 22, (1983), vol 1 at 377-396 [806]-[853]; Phillipson and Fenwick, "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era", (2000) 63 *Modern Law Review* 660 at 671-672.

246 Described in the reasons of Gummow and Hayne JJ at [120]-[128].

247 cf reasons of Gummow and Hayne JJ at [107]-[111].

248 *Victoria Park* (1937) 58 CLR 479 at 495-496. Thus, Fleming, *The Law of Torts*, 9th ed (1998) at 667 criticises its "unnecessarily categorical dicta".

249 See *Privacy Committee Act* 1975 (NSW); *Privacy Act* 1998 (Cth); see also *Privacy and Personal Information Protection Act* 1998 (NSW); *Invasion of Privacy Act* 1971 (Q); *Information Privacy Act* 2000 (Vic); and State legislation providing for freedom of information and regulating the use of surveillance devices.

250 New South Wales, *Report on the Law of Privacy*, Report No 170, February 1973 ("the Morison Report") at 15-16 [11]-[12]; Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) at 114-116 [219]-[222]; Australian Law Reform Commission, *Privacy*, Report No 22, (1983), vol 2 at 21 [1076]. Bills to enact a statutory tort of privacy were introduced in South Australia in 1973 (defeated in the Legislative Council) and Tasmania in 1974.

enforceable general right to privacy exists in the law of this country. Indeed the Australian Law Reform Commission concluded that a general statutory right to privacy, as had been enacted in some places overseas[251], should not be recommended in Australia[252]. Instead, the Commission proposed that specific legislation should be enacted which defined the values to be protected, the circumstances of the protection and the defences that would be applicable[253]. Similar conclusions had earlier been reached in the United Kingdom[254].

188 *Emergence of a tort of privacy invasion*: In recent years, stimulated in part by invasions of individual privacy, including by the media[255], deemed unacceptable to society and, in part, by the influence of modern human rights jurisprudence that includes recognition of a right to individual privacy, courts in several jurisdictions have looked again at the availability under the common law of an actionable wrong of invasion of privacy[256]. It is this course that the respondent invited this Court to take to remove any doubt that the interlocutory injunction it sought was fully justified to defend a cause of action available to it. The respondent claimed that it had suffered an unjustifiable invasion of its privacy, effected by criminal acts, for which the common law now affords redress, sustaining the interlocutory injunction on a third basis.

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251 Privacy Acts providing for a tort of privacy were enacted in British Columbia, Manitoba and Saskatchewan; cf *Lord v McGregor* (2000) 50 CCLT (2d) 206; [2000] BCSC 750.

252 Australian Law Reform Commission, *Privacy*, Report No 22, (1983), vol 2 at 26 [1085].

253 See also Wacks, *Law, Morality, and the Private Domain*, (2000) at 222, 262.

254 Great Britain, *Report of the Committee on Privacy*, (1972) Cmnd 5012 at 202-206 [653]-[666] ("the Younger Report"); *R v Khan* [1997] AC 558 at 571, 582-583; cf *Morris v Beardmore* [1981] AC 446 at 464; Seipp, "English Judicial Recognition of a Right to Privacy", (1983) 3 *Oxford Journal of Legal Studies* 325 at 363-364.

255 eg *Douglas v Hello! Ltd* [2001] 2 WLR 992; [2001] 2 All ER 289.

256 cf India: *Govind v State of Madhya Pradesh* (1975) 62 AIR(SC) 1378; Canada: *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591; New Zealand: *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129; *P v D* [2000] 2 NZLR 591; Tobin, "Invasion of Privacy", (2000) *New Zealand Law Journal* 216.

189 Whether, so many years after *Victoria Park* and all that has followed, it would be appropriate for this Court to declare the existence of an actionable wrong of invasion of privacy is a difficult question[257]. I would prefer to postpone an answer to the question. Upon my analysis, no answer is now required. Even without such a cause of action, the respondent has established two bases in law for the grant of an interlocutory injunction. It would therefore be inappropriate to embark on the resolution of whether an additional basis existed to support such relief.

190 *Privacy and corporations*: The fact that the respondent is a corporation is a further reason for delaying a response to this question. This is because doubt exists as to whether a corporation is apt to enjoy any common law right to privacy[258]. In so far as, in Australia, the elucidation of this aspect of the common law is influenced by the content of universal principles of fundamental rights, Art 17 of the International Covenant on Civil and Political Rights[259] appears to relate only to the privacy of the human individual. It does not appear to apply to a corporation or agency of government[260]. The foregoing view is reinforced by the way in which the right to privacy has developed in the United States, where it has had a long gestation[261].

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257 cf *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1032-1035 [203]-[219]; 180 ALR 145 at 201-206.

258 *R v Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2000] 3 WLR 1327 at 1337 [33]; [2000] 3 All ER 989 at 999; cf *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395 referring to *Hale v Henkel* 201 US 43 at 74 (1906); *United States v White* 322 US 694 at 698-699 (1944).

259 Opened for signature 19 December 1966, 999 UNTS 171; 1980 Australia Treaty Series No 23; 6 ILM 368 (entered into force 23 March 1976) ("ICCPR"). Art 17 provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

260 cf *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

261 Explained in the reasons of Gummow and Hayne JJ at [120]-[128].

191 Because it is unnecessary for me to reach a final conclusion on this question, I will refrain from doing so. Cases from other jurisdictions (and some from Australia) demonstrate that there are many instances of invasions of the privacy of individual human beings that are likely to present the question raised by the respondent in circumstances more promising of success than the present. It appears artificial to describe the affront to the respondent as an invasion of its privacy. The real affront in this case lies in the unimpeded use by the appellant of the videotape procured by illegal, tortious, surreptitious and otherwise improper means in circumstances where such use would be unconscionable.

Constitutional implications: substantive law

192 *Implications for substantive law*: The appellant then submitted that if this point was reached, a reason for refusing the injunction was that an enlargement of the statutory powers to grant the injunction or a recognition of a common law right to privacy would contradict the freedom of communication in respect of governmental and political matters implied in the federal Constitution[262]. To the extent that the *Supreme Court Civil Procedure Act* would permit the Supreme Court to inhibit free discussion and publication of such matters, it would be invalid and should be read down accordingly. To the extent that any rule of the common law, or principle of equity, would have that effect, it would likewise be re-expressed and applied to conform with the constitutional standard. This Court has said repeatedly that the common law must conform to the Constitution[263]. There is no reason to adopt a different rule in the case of the principles of equity, so far as they still influence the grant of interlocutory injunctions provided pursuant to statute.

193 *The holding in Lange*: In his reasons, Callinan J is critical of the decisions of this Court concerning the implied freedom of communication, derived from the text of the federal Constitution[264]. No party to this appeal, including the governmental interveners, suggested that the principle stated in *Lange v Australian Broadcasting Corporation*[265] should be reconsidered. In my view, it should not. *Lange* represents a recent, unanimous statement of the law by this Court. There is nothing exceptional in deriving implications from a written text, especially where that text is a national constitution. From its first days, this

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262 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange* (1997) 189 CLR 520.

263 *Lange* (1997) 189 CLR 520 at 568-569; cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1116 [34], 1135 [142]; 172 ALR 625 at 635-636, 662.

264 Reasons of Callinan J at [252], [338]-[340], [345]-[348].

265 (1997) 189 CLR 520.

Court has found constitutional implications of various kinds. Some of them have survived[266]. Some have been discarded[267]. Others remain in a process of development and elucidation[268].

194 There is therefore no reason to question the correctness of *Lange*, least of all in an appeal where that correctness has not been challenged. *Lange* re-expressed the earlier discourse concerning a "constitutional defence"[269]. It reformulated the applicable rule in terms of the requirements implicit in the Constitution that forbid inconsistent laws. This re-expression affords a wholly orthodox legal foundation for the principle. Statutory provisions inconsistent with the constitutional implication are invalid. Similarly, "the common law rules … must be examined by reference to the same considerations"[270]. The same is true of the rules of equity and of judicial practice. No such rules or practice may burden freedom of communication of the specified kind unless the burden or practice is proportionate to, and compatible with, the Constitution.

195 *Scope of the constitutional implication*: A number of points must be noted concerning the scope of the constitutional implication. It extends to non-verbal conduct. It thus includes images and sounds by which ideas about government or politics may be communicated[271]. Television is "probably the most effective medium in the modern world for communicating with large masses of people"[272]. The use of television to convey ideas about government or politics is thus clearly

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266 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; cf *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (exercise of judicial power).

267 eg the implied immunity of instrumentalities doctrine was expounded in *D'Emden v Pedder* (1904) 1 CLR 91 at 111 and in *Deakin v Webb* (1904) 1 CLR 585 at 616. It was overruled in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 141. See now *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 229.

268 As to an implied right to due process, see *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-489, 501-503. As to the implication of judicial integrity, see *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289-290 [79]-[82], 295-296 [115]-[117]; 176 ALR 644 at 661-662, 670-671.

269 *Lange* (1997) 189 CLR 520 at 575; see *Theophanous* (1994) 182 CLR 104 at 138.

270 *Lange* (1997) 189 CLR 520 at 568.

271 *Levy* (1997) 189 CLR 579 at 594, 613, 622, 638.

272 *Levy* (1997) 189 CLR 579 at 623.

within the protection which the Constitution provides against inconsistent or incompatible laws, provided the other preconditions are established.

196 In *Stephens v West Australian Newspapers Ltd*[273], a majority of this Court held that, because of the integration of politics within the Commonwealth, the implied constitutional freedom of communication, as there expressed, protected political discussion in relation to all levels of government, including State government. Whether that approach is compatible with the constitutional principle expounded in *Lange* has not yet been decided[274]. It is not communication at large, nor communication relevant to politics generally, that is protected by the implication upheld in *Lange*. To be inconsistent, the law must conflict impermissibly with the postulated operation of the Constitution[275].

197 The regulation of animal welfare within Australia is generally a responsibility of State parliaments and courts. On the other hand, the appellant, as a corporation established under federal law[276], has powers and responsibilities that extend to facilitating political and governmental discourse throughout the Commonwealth. Common experience suggests that, in Australia, many of the subjects of such discourse extend across State borders. Modern media of communications have reinforced nationwide discussion of matters of general political concern. The parliaments of the States are provided for in the federal Constitution[277]. Ultimately, they now draw their authority from that Constitution. The States are part of the "indissoluble Federal Commonwealth"[278]. The federal Constitution appears to contemplate that State parliaments, by analogy with the Federal Parliament, will be representative of the people of the State and democratically elected. No other view would be compatible with the exceptional powers afforded to the parliaments of the States in relation to the composition of the Senate[279]. Moreover, the respondent is engaged in an export business and that business would be damaged by the broadcast of the videotape restrained by the injunction.

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273 (1994) 182 CLR 211 at 232, 257; cf at 235.

274 cf *Levy* (1997) 189 CLR 579 at 595-596, 626, 643-644.

275 *Levy* (1997) 189 CLR 579 at 595, 625.

276 *Australian Broadcasting Corporation Act* 1983 (Cth), s 5; see also s 6.

277 Constitution, ss 107, 108, 111.

278 *Commonwealth of Australia Constitution Act* 1900 (Imp), 63 & 64 Vict c 12, Preamble.

279 Constitution, ss 9, 10, 15.

198 In these circumstances, and in respect of the activities of the appellant in this case, I would be prepared to accept, for the purposes of the present appeal, that broadcasting of ideas about government or politics relevant to the activities of the Federal Parliament or of a State parliament would fall within the principle expressed in *Lange*.

199 However, this principle does not uphold an inflexible rule. Australian law does not embrace absolutes in this matter. Many regulatory laws, federal and State, continue to operate in ways that are compatible with the representative democracy established by the Constitution. Restrictions, imposed by law, for limited purposes (even where they may incidentally diminish completely uninhibited discussion of issues of government or politics) may yet be compatible with the Constitution[280]. It is only if the law in question is inconsistent with the intended operation of the system of government created by the Constitution that the implied constitutional prohibition has effect.

200 *Conclusion: no invalid law*: There is nothing in the general language of the Tasmanian legislation, conferring on the Supreme Court the power to grant interlocutory injunctions, that is inconsistent with the representative democracy created by, or implied in, the Constitution[281]. Nor is this power itself incompatible with the representative democracy created by the Constitution. To the contrary, the power is a feature of that democracy.

201 Nor, in my view, is the provision of relief by way of interlocutory injunction to restrain the use of information obtained illegally by a trespasser, where such use would be unconscionable, incompatible with the principle in *Lange*. That principle does not establish a rule expelling all legal restraints. Neither in what this Court said in *Lange*, nor in what it did there or in *Levy v Victoria*[282], is there any support for such an extreme position. It is not one appropriate to the text of, or implications derived from, the Constitution. It is not one compatible with the protection of other values (such as individual reputation) upheld during the entire operation of the Constitution to date. It would not be compatible with the recognition, in statements of fundamental human rights, of values which sometimes compete with free expression (including defence of

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280 *Levy* (1997) 189 CLR 579 at 597-598, 625-627, 648.

281 See Constitution, ss 73, 74.

282 (1997) 189 CLR 579.

reputation and privacy)[283]. It would be incompatible with the approach taken in other representative democracies similar to our own[284].

202 Only in the United States is the rule in favour of free speech as stringent as the appellant appeared to urge[285]. But that rule, which is particularly wide with reference to discussion about public figures, is itself based on an interpretation of an express prohibition in the constitution of that country[286]. It is an express prohibition that has no counterpart in the Australian Constitution. Analogous principles have been rejected by this Court[287] and by courts in the United Kingdom, Canada and South Africa, and by legal bodies[288].

203 I would therefore reject the appellant's argument that the view of the Tasmanian legislation that I favour would be inconsistent with the constitutional principle stated in *Lange*. Similarly, I would reject the argument that a view of the principles governing the grant of such injunctions (whether properly described as equitable principles or otherwise) that would uphold the availability of such relief to restrain the use of information obtained illegally, tortiously, surreptitiously or otherwise improperly where it would be unconscionable to allow such information to be used, would be incompatible with the implications upheld by this Court as deriving from the Constitution.

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283 eg ICCPR, Art 17; see also Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, opened for signature 4 November 1950, as amended by Protocol No 11, ETS No 5 (entered into force 1 November 1998) (known as the European Convention on Human Rights), Art 10.

284 English courts have sought to develop a position compatible with decisions of the European Court of Human Rights as in *Lingens v Austria* (1986) 8 EHRR 407: see *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 203-204, 215.

285 *New York Times Co v Sullivan* 376 US 254 (1964). See also *Rajagopal (alias Gopal) v State of Tamil Nadu* (1995) 82 AIR(SC) 264; Stone and Williams, "Freedom of Speech and Defamation: Developments in The Common Law World", (2000) 26 *Monash University Law Review* 362 at 364.

286 United States Constitution, First Amendment.

287 *Theophanous* (1994) 182 CLR 104 at 134.

288 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) at 77-78 [146], Appendix F.

Constitutional implications: exercise of discretion

204 *Implication and exercise of power*: The foregoing conclusion is not, however, an end to the matter. The *availability* of an interlocutory injunction does not mean that the Full Court was correct to *grant* such relief in the present case as it did. The existence of an unlimited power to enjoin publication of a matter relevant to governmental or political concerns, simply because it appeared "just and convenient that such order should be made" and because publication would be unconscionable in the circumstances, could occasionally endanger compliance with the limits imposed by the Constitution. It could risk the operation of the State Act in a way that contradicted implications drawn from the Constitution.

205 In my view, the way that this consideration is addressed is not by denying, or curtailing, the existence of the *power*. In some cases the exercise of that power will be completely justified. It might be justified either because no relevant political or governmental issue is involved in the case or because, although it is, some countervailing consideration must be given greater weight. Such a consideration might involve the protection of individual reputation or privacy where the invasion of personal rights is gross and the political or governmental interest is trivial or enlisted unpersuasively[289].

206 *Court's duty to conform to the Constitution*: The proper way by which the constitutional principle explained in *Lange* is reflected in a case such as the present is by taking it into account in deciding whether the power that exists will be *exercised* in the circumstances[290]. Because that power is exercised by a court of the Australian Judicature, such exercise must conform to the constitutional setting in which that court functions. The considerations to be taken into account will include those that are implied in the Constitution and that defend the measure of immunity from legal restriction established by the law of this country where the subject matter of discussion concerns governmental and political issues relevant to the operation of the representative democracy envisaged by the Constitution.

207 For many years Australian courts, asked to grant an interlocutory injunction to restrain the broadcast of discussion likely to be damaging to a plaintiff, have observed certain rules of restraint. They have usually declined to

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289 cf *Kaye v Robertson* [1991] FSR 62 at 70; (1990) 19 IPR 147 at 154.

290 cf *Liberty Lobby Inc v Pearson* 390 F 2d 489 at 491 (1968).

provide such relief except in clear cases[291]. They have then done so with care, balancing protection of the individual against the public interest in freedom of speech[292]. This has often meant that interlocutory injunctions have been refused. Those damaged have been left to their remedies at law after the publication has occurred.

208 This approach has been criticised in the reasons of Callinan J[293]. In my respectful view, it is inappropriate to consider such criticism in this appeal because the respondent ultimately conceded that no cause of action in defamation (or injurious falsehood) could be established by it against the appellant.

209 Nevertheless, in the case of discussion (including broadcasts) concerning governmental and political matters, impliedly contemplated in the operation of the representative democracy established by the Constitution, a surer foundation exists in the Constitution for restraint in the provision of an interlocutory injunction. No principle could govern the exercise of such a judicial discretion which was incompatible with the Constitution. In my view, when relevant, the implication spelt out in *Lange* is a consideration to be taken into account when a judge or a court is invited to grant an interlocutory injunction.

210 This is an unsurprising conclusion, given that an interlocutory injunction is a judicial order made under statutory power by a court of the Australian Judicature. Indeed, it would be surprising if such a court, in making such an order, were at liberty to ignore or neglect such a consideration. Were that to be done, the law as applied by the judge might indeed contradict the constitutional requirements. And that is what *Lange* holds cannot occur.

211 *The weighing of competing interests*: This result establishes an approach to the exercise of the power, enjoyed by a judge or the court, in a way more conformable with past practice and less rigid than the appellant urged. The public interest in free speech would not always "trump" individual interests[294].

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291 See *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 349; *National Mutual Life Association of Australasia Ltd v GTV Corp Pty Ltd* [1989] VR 747 at 764.

292 *Wilson v Parry* (1937) 54 WN (NSW) 167 at 169; *Stocker v McElhinney (No 2)* [1961] NSWR 1043 at 1049 per Walsh J; *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 160-161; see also *Bonnard v Perryman* [1891] 2 Ch 269 at 284.

293 Reasons of Callinan J at [351].

294 *R v Central Independent Television plc* [1994] 3 WLR 20 at 30 per Hoffmann LJ; [1994] 3 All ER 641 at 652.

Instead, this approach would require that proper attention be given to the value of free speech, which is necessary for the operation of the polity established by the Constitution, but in a context where other values are also respected. Such other values would include the rights of individuals to protection of the law against arbitrary or unlawful attacks on their reputation and privacy, to the extent that the law upholds those values[295].

212 I agree with Callinan J that what is involved in each case is the weighing of competing interests[296]. Here, that is the way in which the constitutional principle should have been reflected. That principle did not expel the Supreme Court's protective powers, irrespective of the circumstances of the case and regardless of the affront to conscience which the particular publication involved. But it did require that those powers be exercised in a way consistent with the relevant constitutional principle.

213 With all respect, I cannot accept that, so far at least as *Lange* is concerned, it "had the impact of the detonation of a hydrogen bomb upon practitioners practising at the defamation bar"[297]. In practical terms, *Lange* did no more than to oblige a measured reformulation of the existing Australian law on qualified privilege in defamation[298]. Those who perceive its power in such explosive terms will find little support in court decisions in later cases[299]. The principle stated in *Lange* should not be curtailed or confined. Quite apart from its authority as a decision of this Court, it is justifiable as a matter of legal authority, principle and policy. It should not be whittled away.

Conclusion: the Full Court's discretion miscarried

214 *Power and exercise of power*: On this basis, although I disagree with the appellant's denial that the Full Court had the *power* to grant the interlocutory injunction that it did, I agree with its submission that the Full Court's exercise of its *discretion* miscarried. This happened because the injunction was granted without appropriate consideration of the constitutional principle in *Lange*

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295 ICCPR, Art 17.

296 Reasons of Callinan J at [351]; cf *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573 at 589-590; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 at 735.

297 Reasons of Callinan J at [340].

298 Chesterman, *Freedom of Speech in Australian Law*, (2000) at 143-152.

299 Chesterman, *Freedom of Speech in Australian Law*, (2000) at xii-xiii.

protecting freedom of communication concerning governmental and political matters.

215 In his reasons, Wright J, in disparaging words, expressly rejected this consideration[300]. Although Evans J mentioned freedom of communication, he did not consider that it enjoyed relevant force in the circumstances where the injunctive relief was sought to prevent unconscionable conduct[301]. On the other hand, Slicer J, in dissent, considered that the constitutional norm was applicable. Although Slicer J applied it only as a limitation on the *power* to grant an interlocutory injunction, he came closest to the approach which I favour.

216 Mine is an approach that permits the broad language of the *Supreme Court Civil Procedure Act* to operate according to its terms to meet the multitude of cases to which it must apply. But it also permits consideration to be given, in the balancing, where relevant, to the constitutional context in which the powers are exercised. It allows due attention to be paid to the occasional need for protection of parties from the misuse of information illegally and improperly obtained where such misuse would affront conscience. However, it also requires any provision of relief to take into account not only the exceptional and drastic nature of injunctive remedies generally and the availability of other remedies but also the special countervailing considerations which, in Australia, favour the free discussion of matters relevant to governmental and political concerns. Putting it quite bluntly, sometimes the Constitution will prevent the law protecting the dictates of conscience. It will do so by requiring weight to be given to a competing constitutional principle favouring free expression.

217 *Governmental and political discussion of animal welfare*: The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups[302]. The activities of such groups have sometimes pricked the conscience of human beings.

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300 Reasons of Wright J at 44,818; [17]. He said that freedom of speech was a "glib cliché".

301 Reasons of Evans J at 44,836; [80].

302 eg Singer, *Writings on an Ethical Life*, (2000) at 66-70, 293-302; *McDonald's Corporation v Steel* [1997] EWHC QB 366 (19 June 1997) per Bell J at [146]-[160]; see also Morris, "Mclibel: do-it-yourself justice", (1999) 24 *Alternative Law Journal* 269 at 271.

218 Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals[303], in the transport of live sheep for export[304] and in the condition of battery hens[305] followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.

219 If this were a case where the values of free discussion of a matter of general political and governmental concern were promoted at a price of serious personal denigration, humiliation and invasion of the privacy of a given individual, the proper exercise of a court's discretion under statutory powers such as existed in this instance might result in the grant of an interlocutory injunction, as occurred in *Donnelly*[306]. Yet even in such a case, where governmental and political issues of a serious nature were raised, such an invasion of personal rights would not necessarily be sufficient to sustain the provision of injunctive relief. In his reasons, Callinan J mentions the restraint exercised by the media of the United States (and other countries) in publicising the physical impairments of President F D Roosevelt[307]. With hindsight, it is arguable that such restraint was misconceived. The ability and character of the President overcame his physical restrictions. Had they been reported and discussed in the media, this might well

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303 *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51. Legislation has been enacted in several States and Territories: eg *Animal Welfare Act* 1992 (ACT), s 51.

304 The *Australian Meat and Live-stock Industry Act* 1997 (Cth) now imposes restrictions on exporters, following widespread public debate and an official inquiry. See also Marine Orders 1999, O 21, Pt 43 (Cargo and Cargo Handling – Livestock) made pursuant to the *Navigation Act* 1912 (Cth), s 425(1AA).

305 Australia, Productivity Commission, *Battery Eggs Sale and Production in the ACT*, (1998) which followed prohibition of such production and labelling of caged hen eggs in the ACT: *Food Act* 1992 (ACT), s 24A; see also *Egg Industry Act* 1988 (Tas), s 28.

306 (1998) 45 NSWLR 570.

307 Reasons of Callinan J at [344].

have contributed to more informed attitudes to physical impairment generally[308]. At least this would be a legitimate subject to be weighed in the balancing exercise required by an application for the provision of injunctive relief and mandated, in such a case, by the considerations implied from a constitution such as ours.

220 *Conclusion: discretion miscarried*: It follows that I consider that the Full Court erred in the exercise of its discretion in failing to give proper weight to the constitutional consideration favouring discussion in the appellant's television programme of animal welfare as a legitimate matter of governmental and political concern. This was a matter of federal concern in the present case because the product involved was wholly exported and the appellant is the national broadcaster, established by federal law with national functions. It follows that the orders which the Full Court made must be vacated.

221 When the constitutional consideration favouring free discussion of governmental and political issues of animal welfare in this context is given due weight, a proper exercise of the discretion obliges that the interlocutory injunction be refused. The *power* to grant an injunction existed. But the *exercise* of that power miscarried. Such exercise should have upheld free speech. The respondent would then be left to the recovery of damages for any cause of action it could prove against the appellant.

Orders

222 I agree in the orders proposed by Gummow and Hayne JJ.

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308 Neither Prime Minister W M Hughes nor J W Howard made any secret of their hearing impairment and Prime Minister Howard has discussed it openly on national television.

CALLINAN J.

The issue

223 An applicant is entitled to a declaration that a statutory body has acted unlawfully, even though the applicant has no underlying cause of action for damages and can make no case for prerogative or injunctive relief if his reputation has been adversely affected by unlawful (although not criminal) conduct on the part of the statutory body[309]. A person who misuses documents obtained on discovery, that is to say, uses them other than for the purposes of the litigation in which they are discovered, may be punished for contempt and restrained thereby from further misusing them[310]. A court will restrain the publication of confidential information improperly or surreptitiously obtained, or of information imparted in confidence which ought not to be divulged[311]. A mandatory injunction will go against a person who did not himself or herself steal a trade secret but who is in a position to benefit from it, requiring that person to deliver up to its owner the produce that the defendant has cultivated by exploiting the secret[312]. An exclusive occupier of premises may impose a condition, enforceable by injunction, that an entrant not take photographs while the entrant remains upon the premises[313]. In 1910, O'Connor J pointed out that if[314] "money [be] stolen, it is trust money in the hands of the thief, [who] cannot divest it of that character. If [the thief] pays it over to another person, then it may be followed into that other person's hands ... [unless the recipient] shows that it has [been received] *bona fide* for valuable consideration, and without notice, [in which event] it then may lose its character as trust money and cannot be

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309 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. It is important to note that the declaration was not granted as a statutory remedy, the troubled history of which is discussed in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 459-470 [1902]-[1913], but in the exercise of an inherent power possessed by superior courts to grant declaratory relief; all that is required is that there be a legal controversy and that the person seeking relief must have a real interest. See *Ainsworth* at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

310 *Home Office v Harman* [1983] 1 AC 280.

311 *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475; *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50 per Mason J.

312 *Franklin v Giddins* [1978] Qd R 72.

313 *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd* [1916] 2 KB 880 at 883-884 per Horridge J.

314 *Black v S Freedman & Co* (1910) 12 CLR 105 at 110.

recovered. [If, however] it is handed over merely as a gift, it does not matter whether there is notice or not."

224 An injunction was granted against this appellant on another occasion to restrain it from publishing audio-visual material obtained during a trespass by the appellant in flagrant disregard of the plaintiff's property rights[315]. A person who has innocently become "involved" in the tortious acts of another without incurring any personal liability, and therefore against whom no separate cause of action is available, is under a duty, enforceable by order of the court, to provide full information to a party injured by the tortious acts, about the identity and activities of the wrongdoer[316]. A freelance photographer commissioned by a newspaper, initially lawfully present at the scene of a photography session for the production of a cover for a new album of a record for the pop group Oasis, surreptitiously took photographs of the *tableau vivant* devised for that purpose by the group leader, at a time when, as the photographer well knew, further photography was embargoed[317]. The High Court of Justice (Lloyd J) granted an interlocutory injunction to restrain the newspaper from any further publication of the photographs on the grounds that there was a sufficiently arguable case that the taking of the photographs and their publication were a breach of confidence.

225 Despite these decisions, the appellant here contends that it should be free to telecast video footage provided to it for nothing and surreptitiously made on private property during the course of the commission of an offence of trespass, probably following the even more serious offence of breaking and entering, the general nature of which the appellant knows, in circumstances in which such a telecast is likely to do great, indeed incurable financial harm to the occupier of the premises, and is to the financial advantage of the appellant. The large question in this appeal is whether that contention is right.

The structure of these reasons

226 The respondent seeks to maintain an injunction that it has obtained against the appellant, restraining it from telecasting the footage, upon several bases: that the appellant by doing so would be acting in breach of an obligation of confidence it owed to the respondent; alternatively, that the law should recognise a separate tort of intrusion of privacy, of which the appellant was guilty here;

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315 *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169.

316 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 at 174-175 per Lord Reid, and see at 188-190 per Viscount Dilhorne. See also *Totalise plc v Motley Fool Ltd* [2001] TLR 208.

317 *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1.

independently of whether there is an underlying tort, or other currently actionable misconduct on the part of the appellant, the respondent was entitled to an injunction to restrain the appellant from profiting from an illegal activity on the part of others.

227 In addition to seeking to meet these contentions, the appellant submits that the injunction, which should not have been granted, should now be dismissed, because its existence infringes an implied constitutional freedom of expression; and, no special circumstances having been shown to exist, even if the respondent does have a cause of action against the appellant, consistently with the usual practice in defamation actions, an interlocutory injunction should not have been granted by the Supreme Court of Tasmania.

228 These reasons are divided into the following separate sections: first, a statement of the facts; secondly, a summary of the course of the earlier proceedings in Tasmania; thirdly, an outline of the grounds of appeal to this Court; fourthly, a discussion about the test for an interlocutory injunction; fifthly, a commentary on the facts of the case; sixthly, because of their relevance to all of the arguments, to some only of which reference was made by this Court in *Lange v Australian Broadcasting Corporation*[318] and other cases in which the constitutional defence of freedom of expression emerged, an overview of circumstances prevailing today with respect to current means of communication and intrusions upon privacy, and the practices, reach and resources of the modern media; seventhly, a discussion about the possible availability of a "stand-alone" injunction in this case; eighthly, a consideration of the question whether there has been an actionable breach of confidence on the part of the appellant; ninthly, a discussion about the possibility of an Australian tort of intrusion of privacy; tenthly, a consideration of the possibility of a constitutional defence; and, last, an examination of the general practice of withholding interlocutory injunctions in defamation cases and any extension of it to a case of this kind.

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318 (1997) 189 CLR 520.

(i) Statement of the facts

229 At some time prior to March 1998, in breach of ss 14B[319] and 37[320] of the *Police Offences Act* 1935 (Tas), an unknown person or persons almost certainly broke and entered[321], and secretly trespassed upon the respondent's abattoir

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319 "**Unlawful entry on land**

(1) A person shall not, without reasonable or lawful excuse (proof of which lies on him), enter or remain on land, without the consent of the owner or occupier of the land or the person in charge thereof.

(2) A person who is convicted of an offence under this section is liable to a penalty not exceeding:

(a) 10 penalty units or to imprisonment for a term not exceeding 12 months, in respect of entering or remaining in a dwelling-house; or

(b) 5 penalty units or to imprisonment for a term not exceeding 6 months, in respect of entering or remaining on any other land.

…"

320 "**Offences relating to property**

(1) A person shall not unlawfully destroy or injure any property.

…

(2A) A person who contravenes subsection (1) or (2) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 10 penalty units or to imprisonment for a term not exceeding 12 months.

…"

321 *Criminal Code* (Tas):

"**Burglary and Like Crimes**

Interpretation

243. (1) The crime of burglary is a crime committed in relation to the places to which this chapter applies.

(2) Subject to this section, any building or conveyance is a place to which this chapter applies.

(Footnote continues on next page)

where, under licence, the respondent killed and processed brush tail possums for export. The illegal entrant or entrants installed at least two video cameras which recorded on video tape aspects of the respondent's operations. In order to do this the entrants illegally interfered with the fabric of the respondent's building by, for example, cutting holes in its roof and ceiling. A similarly illegal entry must have been made in order to retrieve the cameras and film. The trespass and filming could only have been done with a view to reproducing, in a graphic way, the means by which the possums were killed, because it was upon that aspect of the respondent's operations that the cameras were literally focussed. It is equally apparent, by reason of the same matters, that the trespasser was at least a sympathiser with Animal Liberation Ltd, whose name aptly describes its concerns and which was the other party to the principal proceedings.

230 The processes adopted by the respondent were neither novel nor confined to the slaughter of possums; they are of a kind generally employed in the

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(3) References in this chapter to a building shall be construed as including references to:

(a) any structure or erection attached to or resting on the ground or any other building; and

(b) any building, structure, or erection that is in the course of construction or erection or that is partly demolished.

…

(8) For the purposes of this chapter a person shall be deemed to have entered a place to which this chapter applies when entry thereto is made by the whole or any part of his body or by the whole or any part of any instrument or object that he has with him or that is used by him for the purpose of:

(a) gaining entry to that place;

(b) abstracting or taking anything therefrom or attempting so to do; or

(c) committing any crime therein.

Burglary

244. Any person who enters any place to which this chapter applies as a trespasser, or by means of any threat, artifice, or collusion, with intent to commit a crime therein, is guilty of a crime, which is called burglary."

slaughter of cattle, sheep and goats for meat. It may also be accepted that the killing and processing for export of possums as creatures native to Australia may well be capable of being matters of public interest.

231 A director of the respondent described what was filmed and the effect of its publication in this way:

> "The distribution and publication of this film is likely to adversely and substantially affect the [respondent's] business. The film is of the most gruesome parts of the [respondent's] brush tail possum processing operation. It shows possums being stunned and then having their throats cut. It is likely to arouse public disquiet, perhaps even anger, at the way in which the [respondent] conducts its lawful business. This is no different from any animal slaughtering operation in Australia, which is normally hidden from public view. Presently the vast bulk of brush tail possums processed by the [respondent] are exported to Asian markets, particularly Hong Kong and China. The likely damage to the [respondent] in those market places if this film is shown will be quite severe. These are sensitive markets which the [respondent] has spent between four (4) and five (5) years developing. The [respondent] also wishes to expand into other markets. The likely effect of airing this sought [sic] of graphic video material could be potentially catastrophic for the [respondent's] present business and the business which it may be able to do in the future especially in new markets. It is quite unlikely in my assessment that the [respondent] could be adequately compensated by an award of damages for the airing of this film domestically and in overseas countries. For example, persons who may be potential consumers of the [respondent's] products (but who are unknown to the [respondent]) may simply not purchase."

232 It may have been that the appellant's interest in the respondent's activity was heightened by a belief, or an assumption, that in some way the respondent was acting illegally or unnecessarily cruelly, because the appellant's representative, Ms Tierney, during an interview with the director, interrogated him as to whether the respondent complied with the "Animal Welfare Code of Practice for Processing Brush Tail Possums". There was in fact no evidence of non-compliance on the part of the respondent.

233 Neither what I have quoted nor any other part of the director's evidence was challenged in cross-examination. Nor was evidence adduced by the appellant that the killing and export of possums was a topic of any particular current interest or one which required urgent public consideration.

234 The video-film or a copy of it was provided to the appellant, or to Ms Tierney on its behalf. The appellant is a publicly funded national broadcaster and telecaster. One program of public affairs that it airs on television is the "7.30

Report". Ms Tierney, it may be inferred, from time to time "anchors" that program. Ms Tierney informed the respondent on 16 March 1999 that the appellant intended to telecast parts of the film of the respondent's processing operations as part of the "7.30 Report" on either 30 March 1999 or 31 March 1999. It was common ground between the parties, although there was no evidence as to when, or as to the extent to which it did so, that the appellant did telecast excerpts from the film on a date later than 31 March 1999 and before the decision of the Full Court of the Supreme Court of Tasmania to which I will shortly refer.

(ii)(a) Proceedings in the Supreme Court of Tasmania

235 The respondent commenced these proceedings against the appellant and Animal Liberation Ltd by statement of claim on 29 March 1999 in which the following relief was sought:

> "(a) An interim injunction restraining the First Named Defendant, its servants or agents, from publishing or causing to be published the video or excerpts from it;
>
> (b) A mandatory injunction requiring the First Named Defendant to deliver up to the Plaintiff all copies of the video or excerpts from it in its possession, custody or power;
>
> (c) An injunction restraining the Second Named Defendant from distributing, copying or causing to be published by others the video or excerpts from it or the contents of it.
>
> (d) A mandatory injunction requiring the Second Named Defendant, its servant or agents to deliver up to the Plaintiff all copies of the video in its possession, custody or power;
>
> (e) As against each Defendant damages;
>
> (f) As against each Defendant interim injunctions;
>
> (g) Further or other relief;
>
> (h) Costs."

236 On 29 March 1999, the respondent made application to the Supreme Court of Tasmania (Evans J) for an interim injunction. On that day, the appellant proffered, and the Court accepted, an undertaking by the appellant not to broadcast the film. An injunction was, however, granted against the other defendant restraining it from copying, distributing or publishing a video-film made by a trespasser on the respondent's processing facility. That defendant neither then, nor subsequently, has participated in the proceedings.

237 On 12 April 1999, the appellant requested the Supreme Court to list the application of the respondent for argument. On 22 April 1999, the appellant filed its defence to the statement of claim. The defence consists largely of paragraphs in which the appellant says no more than that it does not admit most of the allegations made in the statement of claim. It raises there no substantive defences, constitutional or otherwise.

238 The grant of an injunction against the appellant was then contested before the Supreme Court (Underwood J) on 3 May 1999, on the appellant's withdrawal of its undertaking not to publish the film. His Honour declined to grant an injunction in lieu of the undertaking given by the appellant on 29 March 1999. It was presumably after his Honour's decision, and as a result of it, that the excerpts to which I have referred were telecast by the appellant.

(ii)(b) The appeal to the Full Court of the Supreme Court of Tasmania

239 The respondent appealed to the Full Court of the Supreme Court. The appeal was upheld by a majority (Wright and Evans JJ, Slicer J dissenting) and an injunction restraining the telecasting of the video-film granted.

240 Wright J said this[322]:

> "For my part, I would be content to acknowledge the proposition for which the appellant contends, viz, that as part of its auxiliary jurisdiction the Court has power to issue an injunction to prevent the use of material obtained unlawfully in such a way as to cause harm to the individual against whom the unlawful act was committed, whether or not that individual can establish a cause of action in tort or equity against the person sought to be enjoined (cf *White v Mellin*[323]). However, it seems to me that in circumstances such as the present, it is at least arguable that an actionable tort would be committed by the ABC were it to publish the relevant video tape."

241 His Honour later said this[324]:

> "Nonetheless it seems clear enough that the granting of an injunction is not dependent upon the existence of an enforceable cause of

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322 *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* [1999] TASSC 114 at [7].

323 [1895] AC 154.

324 [1999] TASSC 114 at [10].

action by the appellant against the individual to be enjoined and this much was conceded by counsel for the respondent."

242 The other member of the majority, Evans J, said this[325]:

"Unconscionability is at the core of the Court's equitable jurisdiction in relation to both confidential information and information which is the product of a trespass. This strongly suggests that the equitable jurisdiction that is invoked in relation to each is the same and I cannot discern any reason for concluding otherwise. The jurisdiction invoked is the Court's exclusive jurisdiction in equity and this jurisdiction is not auxiliary to a cause of action. Just as relief can be obtained against a third party innocently in receipt of the confidential information, *Butler v Board of Trade*[326], *Malone v Metropolitan Police Commissioner*[327] and *Wheatley v Bell*[328], so it should, in appropriate circumstances, be available against a third party innocently in receipt of information which is the product of a trespass.

I am satisfied that the Court's exclusive equitable jurisdiction to grant relief may be invoked when it can be established that it would be unconscionable to allow a person in possession of a video tape which is the product of a trespass, to publish that tape. In my respectful view, the learned primary judge erred in concluding that as the statement of claim did not disclose a cause of action in trespass against the ABC, the plaintiff could not establish an entitlement to the relief sought."

(iii) The appeal to this Court

243 The appellant appeals to this Court upon the following grounds:

"(a) The Full Court wrongly proceeded on the basis that the Court had jurisdiction to grant an injunction to restrain media publication based on unconscionability in the absence of claims in trespass or defamation or breach of confidence against the Applicant.

(b) The Full Court wrongly extended the remedy of an interlocutory injunction to a party on the basis of unconscionability which that

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325 [1999] TASSC 114 at [75]-[76].

326 [1971] Ch 680 at 690.

327 [1979] Ch 344 at 361.

328 [1982] 2 NSWLR 544.

party alleged did not arise from any tortious or unlawful conduct or breach of confidence of the Applicant, but as a result of a trespass by an unknown person who was not a party to the proceedings.

(c) The Full Court so invoked the exclusive jurisdiction as to circumvent the general rule which does not permit injunctive relief to prevent media publication of matter capable of causing injury to reputation, whether by way of defamation or injurious falsehood, other than in the most exceptional circumstances.

(d) The Full Court failed to have regard to whether, when applying the equitable principle of unconscionability to the media, concepts of public interest in freedom of the press need to be applied in deciding whether or not to grant the injunction.

(e) The Full Court failed to apply the settled principles with regard to the granting of injunctions to restrain the publication by the mass media capable of causing damage.

(f) The Full Court in the judgment of Wright J wrongly asserted that a broadcaster which published material capable of causing harm but which did not defame could be liable in negligence, and that this provided an alternative basis for the grant of an injunction in the auxiliary jurisdiction."

244 Each party to the appeal presented extensive argument addressed, not only to the issues directly raised by the pleadings and the notice of appeal, but also to questions of law which were either not argued or not pressed in the Full Court, without any objection by the other. In these reasons, I propose to deal with that extensive argument on the basis that the parties sought resolution of all of the issues presented by them to this Court.

(iv) <u>The test for an interlocutory injunction</u>

245 It is important to keep in mind that the order against which the appellant appeals is an interlocutory injunction, an order to preserve the status quo until the hearing of the main action. It is convenient at this point to respond to a practical difficulty asserted by the appellant, that, because the only final relief the respondent seeks, or could conceivably obtain, is an injunction, it has no incentive, and would be unlikely, to bring the action on for trial. There are two answers to this. The appellant could itself bring the action on for hearing. It could also apply for a dissolution of the injunction at any time if it were so advised.

246 Because the proceedings are interlocutory "the Court does not undertake a preliminary trial, and give or withhold interlocutory relief upon a forecast as to the ultimate result of the case."[329] Just what measure of success an applicant for an interlocutory injunction must establish is not completely settled[330]. In my opinion, the correct test is whether the applicant can demonstrate either a reasonably arguable case on both the facts and the law, or that there is a serious question to be tried. These tests it seems to me are to the same effect. There is no issue here as to the balance of convenience. It clearly lies, if the respondent can otherwise make out a case for interlocutory relief, with the respondent. There is nothing to suggest that any greater or lesser significance or importance attaches to an earlier rather than a later, that is, post-trial telecasting of the film. Further discussion of the considerations relevant to the grant of injunctions may be deferred to the discussion of the appellant's argument that the telecasting of the film is protected by the Constitution.

(v) Commentary on the facts

247 Before considering the arguments of the parties, I should make reference to a number of particular matters, because they are of relevance to all of the appellant's arguments.

248 The respondent's activities were private, albeit in a qualified sense. The nature of the respondent's activities and how they were carried out may have been of interest to many people from time to time. They may well have been, and might well be the subject of much public discussion. However, it was not discussion that the respondent sought to restrain. What it wished to prevent was the telecasting of images on moving film: moving film, illegally obtained, with or without a voiceover, and with or without cutting, the insertion of commentary and other sound, editing and splicing. The introduction of other images from other sources interspersed with parts of the film is of an entirely different quality and kind from a bare recitation of the facts, either orally or in print, or indeed even an emotive description of them without accompanying images.

249 The appellant must have at least suspected the possibility that the film had been made as a result of a trespass as soon as it obtained it. The film was sent to the appellant with a letter on the letterhead of the other defendant to the principal proceedings. It defies belief that the appellant would not have appreciated the unlikelihood of the respondent's permitting anyone to make the film. By the time

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329 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622 per Kitto, Taylor, Menzies and Owen JJ.

330 See the discussion in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies,* 3rd ed (1992) at 593-596 [2172]-[2173].

that Ms Tierney interviewed the respondent's director on 16 March 1999, on the pretext, as he describes it, a description which was unchallenged, of seeking his views about possum processing and sustainable wildlife utilization for commercial purposes in Australia, Ms Tierney must have understood beyond any doubt that the respondent objected to the making of the film, that it had been made on its premises and as a result of an unlawful entry. On service of the affidavit upon which the respondent relied for its application, any matters – I can conceive of none – of doubt in these respects must have been dispelled.

250 The uncontradicted evidence was also that the telecasting of the filmed matter would do the respondent irreparable commercial, that is financial, harm, much of it incalculable, for various reasons including that much of it would be suffered overseas. There was a hint in the appellant's submissions that the appellant, as a public broadcaster funded from the public purse, stood apart from other broadcasters and should therefore be treated differently from other broadcasters. I would reject any such suggestion[331]. That the appellant is not a commercial broadcaster does not mean that the film is not of value to it. It competes for audiences with commercial broadcasters. Its continuing funding may well be affected by the way in which it successfully competes with commercial broadcasters. If it does not utilize the film it would need to make another substitute film (at a cost) or buy product from another film maker. Furthermore, it may from time to time sell or syndicate its own product (including perhaps this film if unrestrained) to other broadcasters.

(vi) <u>An overview of the circumstances prevailing today</u>

251 I embark upon a consideration of, and use the expression, "circumstances prevailing today" because it was recently, as will appear, used as a justification for the implication of a Constitutional right which had apparently been lying dormant for 90 or so years.

252 Judges sometimes make assumptions about current conditions and modern society as bases for their decisions. Great care is required when this is done. An assumption of such a kind may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it. That is why judges prefer to, and indeed are generally required to act on evidence actually adduced, and are conservative about taking judicial notice of

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331 See *Attorney General for New South Wales v Australian Broadcasting Corporation* unreported, Court of Appeal of New South Wales, 11 October 1990. In contempt proceedings against the appellant, the Court of Appeal of New South Wales rejected a submission by the appellant that it ought not to be fined because it was a public body, and that to fine it would be to fine the taxpayer.

matters of supposed notoriety. It is not without significance to this appeal, however, that in a case on the related topic of defamation, three Justices of this Court referred to "the very different circumstances [prevailing] today"[332] from 100 years before, and presumably had regard to them in reaching the decision which their Honours did, although the joint judgment does not identify the circumstances said to have changed. A unanimous High Court made a similar observation in *Lange*[333]. There the only relevant considerations that were identified were those referred to by McHugh J in *Stephens v West Australian Newspapers Ltd*[334], who noted that bureaucracies are vast, intrusive upon daily life and affairs, and publicly funded[335]. I should point out that in neither of these cases was any evidence called which bore upon the nature and size of modern bureaucracies, and, how in number, authority, power and intrusiveness, they differed from bureaucracies in earlier times. Indeed it is not immediately apparent how evidence of this kind could have been called in respect of the issue ultimately involved, whether the defendant in each case had an arguable defence to a defamation action. Nor was any reference made to legislation establishing the bureaucracies that their Honours had in mind which might have gone some way towards making the relevant point. Had some such reference been made it might have provoked consideration of these matters: of other, modern legislation to which I later refer and which is designed to counter untoward intrusions, arbitrariness, secrecy and capriciousness on the part of bureaucracies; and whether, within the legislation by which such bureaucracies are established, there are provisions to ensure the propriety and transparency of their conduct.

253 Accordingly, just as members of this Court in *Stephens* and *Lange* referred to perceptions and matters not in evidence, I, too, intend to refer to a number of the realities of the modern publishing, entertainment and media industries, as well as the activities of members of the Executive branch of government in this country. These are to some extent inseparably intertwined.

254 Early newspapers were primarily vehicles for the conveyance of news and comment, the latter desirably and responsibly divorced in expression from the former. Since the Industrial Revolution and the continuing expansion in the production of consumer goods, and certainly by the time of Federation, newspapers (and successive other forms of media) have become a major vehicle

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332 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 128 per Mason CJ, Toohey and Gaudron JJ.

333 (1997) 189 CLR 520 at 570 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

334 (1994) 182 CLR 211.

335 (1994) 182 CLR 211 at 264.

for advertising, the proprietors looking equally or more to advertisers for their profits than to their subscribers[336]. The new word "infotainment" captures the essence of the blurring of a distinction between reportage and entertainment, just as "infomercial" and "advertorial" aptly capture the essence of disguised advertising. And distinctions between the roles of journalism and the Executive

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336 The administration of criminal justice in the United States may also have been affected by the way in which crime is reported. In her paper "Economic pressures and internal structure shape the US media's treatment of crime – Do they also shape US criminal justice policy?" (delivered to the International Society for the Reform of Criminal Law in Canberra on 29 August 2001) Professor Sara Sun Beale of Duke University said this:

> "The news media are not mirrors, simply reflecting events in society. Rather, media content is shaped by economic and marketing considerations that often override traditional journalistic criteria for newsworthiness. This trend is apparent in local and national television's treatment of crime, where the extent and style of news stories about crime are adjusted to meet perceived viewer demand and advertising strategies (which frequently emphasize particular demographic groups with a taste for violence). In the case of local news, this results in virtually all channels devoting a disproportionate part of their broadcast to violent crimes, and to many channels adopting a fast-paced high crime strategy based upon an entertainment model. In the case of network news, this results in much greater coverage of crime, especially murder, with a heavy emphasis on long-running tabloid-style treatment of selected cases in both the evening news and the newsmagazines. Newspapers also reflect a market-driven reshaping of style and content …
>
> Economic factors have also reshaped the newspaper industry and the reporting of crime. In newspapers, as in television, we are in an era of market-driven journalism. In general, newspapers are publicly owned, and they face pressures to generate high profit margins for shareholders at a time of declining readership and intense competition from other media sources. In response to these pressures, newspaper owners and top management have emphasized cost cutting and content designed to attract readers, and as a result the traditional wall between the editorial and marketing/advertising departments in newspapers has come tumbling down. The most famous example is that of the *Los Angeles Times*, where CEO Mark Willes reorganized the newsroom on the lines of a consumer products company, with brand managers and profit-and-loss statements for each section of the paper. Newspaper editors are increasingly expected to consider marketing as well as traditional journalistic considerations." (footnotes omitted)

See also Underwood, *When MBAs Rule the Newsroom: How the marketers and managers are reshaping today's media* (1993) at xix.

branch of government can also at times be difficult to discern as each seeks to use the other for its own purposes. One aspect of this symbiosis is the frequency with which some journalists move backwards and forwards between positions as advisers to members of the Executive branch and positions as reporters and pundits on daily and other newspapers and on radio and television channels.

255 The means and sources of information (both legitimate and unlawful) available to the media are more numerous and diverse today than ever before: spy cameras, telephone interception devices, access to satellites, night vision equipment, thermal imaging[337], parabolic listening devices, telephoto lenses, and concealable video cameras to name only some. The means of instantaneous communication have been greatly enhanced in the last century. That taken with the great financial and other resources available to media organisations should, if anything, enable the margin for factual error to be much reduced. It should also be pointed out that photographs, and video-films and other reproductions can be very valuable in the hands of many branches of the media, especially the syndicated media.

256 As populations expand, privacy becomes more elusive[338]. The right to grant or refuse access to, and to allow to be published, accounts, or records whether by way of film, sound recording, drawings, or otherwise, of what is occurring at a location at a particular time are rights for which very large sums of money can be demanded. These rights, however they might be described in proprietary terms, can be very valuable indeed. Some understanding of all of these matters is necessary for any discussion about, and a statement of the law with respect to, freedom of expression, privacy, new forms of property and defamation.

257 I intend in these reasons to avoid as much as possible the making of assumptions about so-called "common knowledge". Almost all that follows has been the subject of proceedings in courts or may be learned from reported cases and participation in defamation and contempt proceedings, reports and findings by parliamentary committees, findings by statutory tribunals, published commentaries and legislation enacted to deal with aspects of the media and other matters. The resolution of defamation and related cases has, of course, inevitably required the making by judges of some value judgments with respect to public

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337 *Kyollo v United States* 69 USLW 4431 (2001) was a case in which thermal imaging by law enforcement of a suspect's home was considered by the Court's majority to be an unreasonable search and seizure under the Fourth Amendment.

338 The modern threat to privacy is discussed at length in Jeffrey Rosen's *The Unwanted Gaze: The Destruction of Privacy in America* (2000).

perceptions and the division between public and private affairs, and the evaluation of the impact of a publication upon a person affected by it.

258 Ownership of the media is concentrated in fewer hands than it was 100 years ago. This is so notwithstanding that the current means of publication are immensely more diverse and penetrating than in the past: on paper, on radio, on television, on the Internet and by motion pictures. Indeed, ownership of these often extends across international boundaries and all aspects of the means of publication. Clearly, concentration of media ownership is a matter of great public concern. This appears, for example, from the enactment of cross-media laws governing limits on ownership of media within a local area, within the nation and by foreigners and overseas corporations[339].

259 The capacity and power to publish carry with them the occasionally overlooked but equally important power not to publish, a power effectively of censorship. As Viscount Radcliffe writing extra-curially said[340]:

> "A man may glitter with new and valuable ideas or burn with wise thoughts or passionate feeling, but if he is to communicate them to any circle wider than that of his own immediate friends he has got to render them acceptable to the real licensors of thought today, the editors, the publishers, the producers, the controllers of radio and television."

260 People who are the subject of intrusive and offensive media attention have only one real, effective, and complete remedy, a vindicatory verdict (with or without an apology) in defamation proceedings[341]. Recently, Lord Justice Sedley noted the absence of any right to reply, or of preventing selective reporting in the United Kingdom. His remarks (except for their references to the European Convention and the First Amendment) are relevant to Australian conditions also. He wrote[342]:

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339 See the relevant Commonwealth Acts governing media ownership: *Broadcasting Services Act* 1992 (Cth), *Foreign Acquisitions and Takeovers Act* 1975 (Cth), *Trade Practices Act* 1974 (Cth).

340 "Censors", the Rede Lecture at Cambridge University, 4 May 1961, republished in *Not in Feather Beds* (1968) 161 at 162.

341 For a discussion of the deficiencies of an alternative, and still incomplete, remedy, see the report by the Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media*, April 2000 at 25-32.

342 Sedley, "The right to know", *London Review of Books*, 10 August 2000 at 13-14.

> "Our newly patriated human rights instrument, the European Convention, contains no express right to information. Nor do any of the other international or constitutional instruments of which I am aware. Even the most recent and most meticulously liberal, that of South Africa, dropped an enforceable right of reply from its original draft. In the United States, legislative attempts to secure a legal right of reply have been struck down under the First Amendment – logically enough, since the necessary premise of the prohibition on the abridgment of free speech is the possession of it, and ex hypothesi those who need a right of reply don't possess it. *There remains in general no way in the developed world of making the media carry the other side of an argument if they don't want to; nor of preventing the dissemination by them of disinformation; nor of stopping them from imposing selective information blackouts*." (emphasis added)

261 The expression "marketplace of ideas"[343] has been used as a justification for "free speech", as if the two expressions were synonymous. The concept of a marketplace is of a place to which access is readily available to everyone. The notion of a "marketplace of ideas" conveys an idea of an opportunity for everyone with ideas to put these into currency for entry into the public domain, and for them to be exchanged for other ideas. The concentration of media control and the absence of rights of reply to which I have referred deny these opportunities in practice. And, in any event, in modern journalism, as I explain in these reasons, frequently little attempt is made to distinguish between ideas and facts[344]. The matter was well put by Adrienne Stone[345]:

> "Some American commentators, who value freedom of speech for its capacity to promote public deliberation, have argued that the current American approach is not consistent with that ideal. In particular, it neglects the distorting effect of existing inequalities in access to information and the capacity to communicate. Consequently, protecting speech from regulation may hinder rather than advance public debate by excluding the voices of some and emphasising the voices of others. A truly full and fair discussion of public affairs may actually *require* government intervention." (emphasis in original)

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343 See *Abrams v United States* 250 US 616 at 630 (1919); *Lamont v Postmaster General* 381 US 301 at 308 (1965).

344 The directive of C P Scott, long-time editor of the *Manchester Guardian*, that "comment is free, facts are sacred", is not generally followed today.

345 Stone, "Freedom of Political Communication, the Constitution and the Common Law", (1998) 26 *Federal Law Review* 219 at 234-235 (footnote omitted).

262 A publisher or broadcaster may take weeks or even months to find and assemble material, often secretly, and then demand the right to publish it and comment upon it, as and when it is ready to do so, professing for the first time an urgency (not attendant upon its own efforts to that point) in the public interest. So much appears from one of the cases upon which the appellant relies, *New York Times Co v United States*[346], in which a North American publisher "conducted its analysis of the 47 volumes of [purloined] Government documents over a period of several months and did so with a degree of security that a government might envy"[347]. Burger CJ (dissenting) was moved to say this of the pressure that the publisher's conduct imposed upon the Court[348]:

> "Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue."

263 Later, his Honour said this[349]:

> "It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's 'right to know', has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged 'right to know' has somehow and suddenly become a right that must be vindicated instanter."

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346 403 US 713 (1971).

347 403 US 713 at 749, footnote 1 (1971) per Burger CJ.

348 403 US 713 at 749 (1971).

349 403 US 713 at 750 (1971).

264 In a footnote to his judgment, the Chief Justice noted this irony[350]:

> "[T]he Times has copyrighted its material and there were strong intimations in the oral argument that the Times contemplated enjoining its use by any other publisher in violation of its copyright. Paradoxically this would afford it a protection, analogous to prior restraint, against all others – a protection the Times denies the Government of the United States."

265 Selection by media of a date for publication that suits their ends or convenience is not just a North American practice. Not infrequently, in this country, after taking a considerable amount of time to prepare a story, a publisher will leave it to the eve of publication to attempt to contact, or make a gesture of attempting to contact, a person adversely named in it to seek his or her comment about it. Sometimes, that person may not be able to be contacted. This was the situation in *Griffiths v Queensland Newspapers Pty Ltd*[351], in which the Court of Appeal of Queensland listed, as examples only, the categories of (uncontradicted) evidence adduced in that case from which the absence of good faith on the part of the broadsheet publisher there could be inferred[352]:

> "(i) *although the subjects of the allegations substantially related to events much earlier and had been under consideration by the respondent for a period of months, publication took place peremptorily and without any sufficient attempt to provide the appellant with an opportunity to put forward his side of the story*;
>
> (ii) even having regard to information actually held by the respondent, there was a lack of balance;
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> (iii) there were significant unexplained inaccuracies in the articles including one headline;
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> (iv) a journalist employed by the respondent acquiesced in the deception of a potential witness after the publication;
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> (v) witnesses who were available who might have provided explanations were not called;
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> (vi) relevant documents were not discovered or, when discovered, not produced; and

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350 403 US 713 at 750, footnote 1 (1971).

351 [1993] 2 Qd R 367.

352 [1993] 2 Qd R 367 at 372.

(vii) there was a refusal to apologise or even admit error throughout and, on the contrary, the respondent robustly defended the articles." (emphasis added)

266 At best incompetently, at worst deliberately, a journalist did not speak to the subject of his "investigative article" in *Copley v Queensland Newspapers Pty Ltd*[353]. There, the journalist claimed to have telephoned the plaintiff barrister's chambers at a telephone number that had long ceased to exist and at a time when the plaintiff was on circuit in Roma in western Queensland. The journalist also alleged that he had made another attempt to contact the plaintiff in Roma by leaving a message for him with a partner, whom he named, in the firm of solicitors instructing the plaintiff. The difficulty for the defendant, the journalist's employer, was that the partner in question had been deceased for many years[354].

267 These examples show how exaggerated the claimed need for urgency of communication to the public has on occasions been. They also show that the assertion that news is a perishable commodity often lacks foundation[355] and the ends to which publishers may be prepared to go in pursuit of their own interests. The asserted urgency as often as not is as likely to be driven by commercial imperatives as by any disinterested wish to inform the public. It would be naive to believe that the media's priorities would be otherwise[356]. If the presses and the video tapes have to roll at a certain hour, they will because large sums of money for space and time have changed hands between the publishers or broadcasters and advertisers whose contracts require that there be a newspaper published or a program presented, on time, so that their advertisements will be shown, rather than for any altruistic motives on the part of the publisher or broadcaster. It will be rare in fact that the public interest will be better served by partial truth and inaccuracy this Tuesday than balance and the truth on Friday week.

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353 Unreported, Supreme Court of Queensland, 30 July 1992.

354 *Copley v Queensland Newspapers Pty Ltd* unreported, Supreme Court of Queensland, 30 July 1992 at 26-28 per Dowsett J.

355 Contrast *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153 at 191.

356 The experienced Anglo-Australian journalist Phillip Knightley put it this way in his memoir *A Hack's Progress* (1997) at 160:

> "[J]ournalists write to length. A book ends when the author has said all he wants to say. An academic paper ends when the point has been made. Except in rare circumstances, the length of an article written by a journalist is determined by the amount of white space left on a particular page or pages after the advertisements have been allocated."

268 From time to time, the journalists' *Code of Ethics*[357] finds its way into evidence in defamation cases. One of its requirements is that journalists use fair, responsible and honest means to obtain material and identify themselves and their employer before embarking on any interview for publication or broadcasting. That there should be such an ethical requirement is not surprising. To fail to comply with it might, in some situations, involve criminal or quasi-criminal conduct, by way of trespass, unlawful entry, theft, breach of copyright or otherwise. There was no evidence given in this case of the *Code of Ethics* but it would not be unreasonable to expect that well-intentioned, properly instructed and responsible journalists would act consistently with a requirement of that kind. Another reason why this is to be expected is that in those States in which exemplary damages may be recovered for defamation, dishonest or improper conduct in contumelious disregard of a defamed person's rights may provide a basis for an award of them, as it did in *Griffiths v Queensland Newspapers Pty Ltd*[358], in which the jury brought in a verdict of $50,000 under this head.

269 If journalists and publishers may not improperly obtain matter for publication, why should they be permitted, it may be asked, to publish material improperly, in this case criminally, obtained by others? I cannot accept that the nature of the source and the reprehensibility, especially criminal, of the conduct by which information and matter have been obtained may not be a highly relevant consideration to a determination whether its publication should be permitted.

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357 The journalists' *Code of Ethics* is set out in the report by the Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media*, April 2000, Appendix 6. Clauses 1, 8 and 11 of the *Code* provide:

> "1. Report and interpret honestly, striving for accuracy, fairness, and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis. Do your utmost to give a fair opportunity for reply.
>
> 8. Use fair, responsible and honest means to obtain material. Identify your self and your employer before obtaining any interview for publication or broadcast. Never exploit a person's vulnerability or ignorance of media practice.
>
> 11. Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude."

358 [1993] 2 Qd R 367.

270 John Milton was one of the first people in a common law country to campaign for free speech[359]. Unlike in his times, there is today in this country no danger of the suppression or censorship of books and pamphlets. In due course, concerns of the kind that Milton expressed were to find expression in the First Amendment to the Constitution of the United States[360].

271 Since Milton's time, great changes have occurred in the means and character of the press. In his book *Make No Law*[361], the Pulitzer Prize-winning journalist and legal commentator Anthony Lewis spoke of that changing character in these terms[362]:

> "[T]here were lots of papers in the old days; what *The World* said might be contradicted by *The Tribune*. Now there are fewer papers, weightier and more self-important. 'The establishment press takes itself so seriously,' [Professor] Smolla wrote. It 'seems to dispense not merely news but Truth, and juries may be reflecting a general public backlash against that oracular role.'
>
> Television is even more of an oracle. Its pervasive reach has made national eminences of the network anchor men and women and the top reporters. To the public, that looks like power – and power sometimes exercised in an unaccountable, even arrogant way. The networks, big newspapers and magazines ask questions and demand answers, but when anyone wants to know about their business, they wrap themselves in the First Amendment and refuse to answer. So it often appears to the public."

272 These North American conditions are far from unknown in this country. Much news is in any event provided by overseas services and multinational companies. Wholesale comment, speculation, informed and uninformed, on the part of the authors of articles in daily newspapers seems to be encouraged. There are few articles today reporting what people have said that are free from the

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359 See John Milton, *Areopagitica* (1644), which in turn owes much to the work of the orator Isocrates (436-338 BC), whose "Logos Areopagiticos" aimed during the times of the Spartan and Theban hegemonies over Athens, at re-establishing the old democracy of 5th century Athens by restoring the Court of the Areopagus.

360 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

361 Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991).

362 Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991) at 207.

author's interpretation of, or, to adopt the parlance of the media, "spin" on it. This may be a consequence of the fact that almost all reporters, even the most inexperienced, are given a by-line, a practice almost unknown a generation or so ago.

273 Another point that is sometimes overlooked that Anthony Lewis makes is that the First Amendment was not intended to protect journalism as such[363]:

> "The press sometimes aggravates the public perception of arrogance by the way that it speaks of its constitutional rights. Phrases such as 'freedom of the press' or 'First Amendment rights' have taken on the air of dogma, and exclusivist dogma at that. Some editors and publishers act as if the press clause of the First Amendment were designed to protect journalism alone, and to make that protection superior to other rights in the Constitution – propositions that have no support in logic or history."

274 There are other factors operating. The same zest as the media bring to the reporting of political and public affairs is often brought to the discovery and revelation of private but interesting, sometimes salacious matters[364]. No one seriously doubts the importance of the media's role in the former, and the great contribution to the improvement in public affairs that, from time to time, the media make. They have frequently been at the forefront of worthy causes[365]. No

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363 Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991) at 208.

364 Simon Jenkins (a former editor of *The Times*) wrote this in "My objection to garbage", *The Spectator*, 15 April 1995, cited in Wacks, *Privacy and Press Freedom* (1995) at 171:

> "My objection is not to the gun but to its aim, the archaic obsession of the tabloids with sex. All but two of the 17 scalps that Fleet Street claims to have cut from the heads of senior Tories of late are for sexual 'misbehaviour'. The misbehaviour is usually of a sort that none of the journalists would recognise as such in themselves or their colleagues. No politician is hounded from office for incompetence or wasting public money. It simply does not happen. The thinnest of justifications for sexual intrusion is that the victims are 'hypocrites', that those who preach family values and back-to-basics lay themselves open to intrusion, even if they are doing nothing that impinges on their public duties. That is garbage."

365 For example, *The New York Times* in its campaign against segregation and racism as discussed in Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991). This appellant and the broadsheet publisher referred to in *Griffith* and *Copley* were both instrumental in revealing and publicising corrupt police practices

(Footnote continues on next page)

doubt most reporters do strive for accuracy. They remain obliged, however, to meet the imperious deadlines to which I have referred, and to submit to the changes and headlines imposed by their sub-editors and editors.

275 Parliaments, and not just Executives, have however recognised that some matters are so sensitive, or so sensitive for a period at least, such as, for example, some investigations of complaints of impropriety in public office, because of the damage that premature disclosure might cause either to the subject of the complaint, to fair process, or to the investigation itself, that disclosure should be prohibited or prohibited for a time[366]. Other government records containing information obtained under compulsion by governments for public purposes, such as financial information for the levying of income tax, although of interest no doubt to the general public, are similarly protected[367] from public dissemination. On the other hand, Parliaments have recognised that there may be occasion for the safe reporting of misconduct by officials and others, such that provision for the protection, by "whistleblower" legislation, of people who do report misconduct of that kind is necessary[368]. I mention these matters simply to make the point that it is ultimately for the Parliaments, and not the media, to draw the borders between confidentiality and disclosure, and to decide the extent to which protection should be given to people who reveal matters, the revelation of which might otherwise be illegal.

276 It is only to be expected that there will be disagreement as to where the lines should be drawn and as to what is, or is not, a public affair. It is equally unsurprising that many in the media would take the view that the public has the right to know everything, or most things that the media think newsworthy; that the media should be the only gatekeepers to public access; that they should be the final arbiters of what is private, public, tasteless, newsworthy, or in their absolute discretion, so contrary to their own viewpoint that something should not be published, whether in a truncated form or at all. In short, adapting what Burger CJ said in *New York Times Co v United States*[369], the media would have it that they should be the sole "trustee[s] of the public's 'right to know'". And in

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in Queensland in 1987 which led to a major commission of inquiry. See G E Fitzgerald, *Report of a Commission of Inquiry*, July 1989 at 1-3 [1.1].

366 See *Criminal Justice Act* 1989 (Q), ss 90, 98 and 99.

367 *Privacy Act* 1988 (Cth), ss 17, 28.

368 See *Public Service Act* 1999 (Cth), s 16; *Parliamentary Service Act* 1999 (Cth), s 16. See also *Protected Disclosures Act* 1994 (NSW); *Whistleblowers Protection Act* 1994 (Q).

369 403 US 713 at 750 (1971).

Australia, Mahoney JA in *Ballina Shire Council v Ringland*[370] did not overstate the position when he said this[371]:

> "The media may, by the exercise of this power, influence what is done by others for a purpose which is good or bad. It may do so to achieve a public good or its private interest. It is, in this sense, the last significant area of arbitrary public power."

Members of the Executive branch would wish for the borders between what may and what may not be published to be drawn beyond the outer marches of the most trivial of government activities. Where the borders are to be drawn between what may and what may not be published is not for the media or for governments of the day but for Parliament. And perceived ends, however desirable, of open government and public discourse, do not justify the use of any means at all, whether by breaking the law, inciting others to break it, or knowingly accepting the benefits of illegal conduct by others.

277 All that I have said is not intended in any way to diminish the media or their role in modern society: it is merely to place them in context and proportion. Free speech, although it may sometimes have the ring of a slogan, is not to be disparaged. Despite what Wright J said in the Full Court of the Supreme Court, it is not a mere "glib cliche"[372]. It is a matter of fundamental importance in a democratic society. Any court which failed to appreciate that in any case in which a proposal to publish is threatened would be failing in its duty.

(vii) A stand-alone injunction?

278 It is with the matters I have discussed in mind, that I turn to the appellant's arguments, the first of which is that an injunction will not lie in the absence, as here, of any known legal or equitable cause of action.

279 In aid of that argument, the appellant pointed out that the business activities and processes of the respondent were in no way novel and the viewing or filming of any aspect of them would not infringe any patent or copyright or trade secret possessed by the respondent. Nor was it suggested that the respondent could have feelings, as a corporation, of the kind that a natural person has. Furthermore, the appellant argued that the respondent's abattoir could not be regarded as a private place in the same way as, for example, a householder's bedroom. Customers, licensing officials, carriers, suppliers, workers, and others

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370 (1994) 33 NSWLR 680.

371 (1994) 33 NSWLR 680 at 725.

372 [1999] TASSC 114 at [17].

would all visit the respondent's premises from time to time, and some or all of these would observe what now appears on the video-film in the appellant's possession.

280 But that does not mean that the respondent has forgone a right to exclude whom it pleases from its premises or to prevent anyone (apart perhaps from officials) from viewing the whole or part of the respondent's activities on them. And it certainly does not mean that the respondent may not insist that there be no filming or indeed reproduction in any form of anything that is taking place on the premises. The respondent may, in its discretion, withdraw permission granted to anyone who has been permitted to come upon the premises. Once the permission is withdrawn, a person formerly lawfully there becomes a trespasser, and in Tasmania commits an offence[373]. The respondent could, if it wished, also insist upon the payment of an admission fee by an entrant, or a fee for the "right", that is to say, permission, to film or otherwise record or reproduce activities taking place upon its premises.

281 The appellant relies upon *Cardile v LED Builders Pty Ltd*[374], in particular a passage in the joint judgment (Gaudron, McHugh, Gummow and Callinan JJ)[375]:

> "However, in England, it is now settled by several decisions of the House of Lords[376] that the power stated in Judicature legislation – that the court may grant an injunction in all cases in which it appears to the court to be just and convenient to do so – does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights[377]. The situation thus confirmed by these authorities

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373 See *Police Offences Act* 1935 (Tas), ss 14B, 37; *Criminal Code* (Tas), ss 243, 244.

374 (1999) 198 CLR 380.

375 (1999) 198 CLR 380 at 395-396 [31].

376 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 979-980, 992; *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24 at 40; *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 at 420-421. See also *Mercedes Benz AG v Leiduck* [1996] AC 284 at 298, 300-301.

377 The common injunction, whereby the Court of Chancery manifested its primacy, in some respects, over the courts of common law, was directed to maintaining what was then the structure of the English legal system and, thus, to the administration

(Footnote continues on next page)

> reflects the point made by Ashburner that 'the power of the court to grant an injunction is limited by the nature of the act which it is sought to restrain'[378]."

282 The rules that the joint judgment lays down were stated with particular reference to the interlocutory remedy of a *Mareva* injunction[379] which is still one of rather recent origin[380]. It was a further development of other, less efficacious remedies for the preservation of assets pending trial. Certainly, until the decision in *Cardile*, the law in relation to the remedy had been evolving. It is extensive in scope. Clearly this Court in *Cardile* saw a need to ensure that orders against third parties in particular went no further than was necessary and were not oppressive. Also there may be discerned in the reasons a concern that the remedy may too readily have been granted in cases which did not call for, or justify its grant. These are the reasons why the judges who were parties to the joint judgment stated the strict rules to govern the grant of relief that they did.

283 The *Mareva* injunction was, nonetheless, as I have pointed out, and as the joint judgment in *Cardile* acknowledges, the invention of the courts, even though it may not be granted absent an underlying cause of action. As an invention of the courts, it was a far-reaching and radical one in English law. In his foreword to the first edition of *Mareva Injunctions and Anton Piller Relief*[381], Lord Denning said the remedy was as revolutionary an invention as the Action on the Case was long ago[382]. In his foreword to the fourth edition of the same publication, Lord Hoffmann identified the truly final nature of the relief that a *Mareva* provided in many cases[383]:

> "The *Mareva* was a response to the use of the one-ship company registered in Liberia with directors in Sark and a bank account in Zurich.

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of justice in a broad sense having some affinity to the ends furthered by asset preservation orders of the *Mareva* variety.

378 *Principles of Equity*, 2nd ed (1933) at 335.

379 See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

380 The first such case was in 1975: *Nippon Yusen Kaisha v Karageorgis* [1975] 2 Lloyd's Rep 137.

381 Gee, *Mareva Injunctions and Anton Piller Relief*, 4th ed (1998).

382 Gee, *Mareva Injunctions and Anton Piller Relief*, 4th ed (1998) at xxi.

383 Gee, *Mareva Injunctions and Anton Piller Relief*, 4th ed (1998) at xiii-xiv.

> The *Norwich Pharmacal* order could be used to try to penetrate the veil of secrecy behind which financial transactions had taken place. These developments created a new form of litigation. Instead of the interlocutory process being ancillary to a trial, it became in many cases an end in itself. Often it was extremely unlikely that the matter would come to trial at all. If the interlocutory orders were successful in securing the goods or freezing the assets, the defendant submitted to judgment and that was an end of the matter. The judge granting the orders, usually *ex parte*, acted more in the role of a *juge d'instruction*, controlling a privatised police inquiry, than the referee of traditional English justice. This represents a radical change of role and it is therefore not surprising that judges over the past 25 years have been feeling their way to an adequate system of rules and guidelines."

284 Donaldson LJ in *Bank Mellat v Nikpour*[384] described the *Mareva* injunction and *Anton Piller* orders as the law's "two 'nuclear' weapons". Neither *Mareva* nor its progeny could on any view be regarded as a charter for judicial timidity. Furthermore, the peculiar nature of the *Mareva* remedy means that judicial observations about it will usually have a relevance to it alone.

285 It is true that an underlying cause of action against the person sought to be restrained, is generally necessary to support the grant of an injunction[385], but there are exceptions. A Registrar-General may be restrained from registering a document in the interests of justice although the plaintiff has no independent cause of action against the Registrar-General[386]. *Norwich Pharmacal Co v Customs and Excise Commissioners*[387], in which the plaintiffs obtained orders against Customs and Excise officers, which I have already mentioned, provides another example.

286 In *Mercedes Benz AG v Leiduck*[388], Lord Nicholls of Birkenhead (echoing what was said of modern conditions in *Theophanous* in a passage that I earlier referred to[389]) said this:

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384 [1985] FSR 87 at 92.

385 See *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 433-436 per Gibbs J.

386 *Williams v Marac Australia Ltd* (1985) 5 NSWLR 529.

387 [1974] AC 133. See also *Totalise plc v Motley Fool Ltd* [2001] TLR 208.

388 [1996] AC 284 at 308.

389 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 128 per Mason CJ, Toohey and Gaudron JJ.

> "The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of *Mareva* injunctions itself gives the lie to this. *As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions*. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year." (emphasis added)

287 There does not appear to me, therefore, to be any strong reason, in principle, modern authority, or in the interests of justice, why an injunction, without more, should not be granted to restrain the enjoyment of property unlawfully obtained, certainly when the person sought to be enjoined knows or ought reasonably to know of its illegal genesis.

(viii) Unconscionability and breach of confidence

288 At this point, without reaching any concluded opinion, however, as to the correctness of the appellant's first argument, I will turn to the appellant's second argument, that there is no cause of action of unconscionability alone known to the general law of Australia, because I am satisfied that that argument cannot be sustained in this case.

289 The appellant's starting point is a passage from the speech of Viscount Simonds in *Campbell Discount Co Ltd v Bridge*[390]:

> "I must dissent … from the suggestion that there is a general principle of equity which justifies the court in relieving a party to any bargain if in the event it operates hardly against him. In particular cases, for example, of expectant heirs or of fiduciary relationship, a court of equity (and now any court) will if the circumstances justify it, grant relief. So also if there is duress or fraud 'which unravels all'. In the present case there is nothing which would justify the court in granting relief".

290 That case is of no assistance to the appellant. It was a case, as Lord Radcliffe also makes plain[391], in which one competent party to a contract tried to invoke a non-existent rule of equity to adjust the unfortunate bargain that he had made. Nothing was said in that case which would preclude the grant of relief in this case.

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390 [1962] AC 600 at 614.

391 [1962] AC 600 at 626.

291 *Mareva* and *Anton Piller* orders are certainly not the only recent innovations in equity. Until the decision of this Court in *Waltons Stores (Interstate) Ltd v Maher*[392] it was generally said that equitable estoppel could serve only as a shield and not a sword.

292 As Meagher, Gummow and Lehane say[393]:

> "There are a number of areas in which equitable intervention is well established but in such a manner as to defy reduction to any specific principle."

293 Equity is astute to afford relief to a person to whom another owes a fiduciary duty in circumstances in which that other has derived some advantage from his or her position as a fiduciary[394]. In *Hospital Products Ltd v United States Surgical Corporation*[395], Mason J described fiduciary relationships in this way[396]:

> "The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v Boardman*[397]), viz, trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the

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392 (1988) 164 CLR 387.

393 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 341 [210].

394 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 132-145 [504]-[524].

395 (1984) 156 CLR 41.

396 (1984) 156 CLR 41 at 96-97.

397 [1967] 2 AC 46 at 127.

fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal."

294 Meagher, Gummow and Lehane say that[398]:

"The distinguishing characteristic of a fiduciary relationship is that its essence, or purpose, is to serve exclusively the interests of a person or group of persons; or, to put it negatively, *it is a relationship in which the parties are not each free to pursue their separate interests.*" (emphasis in original)

295 In this case, had there been a pre-existing relationship between the appellant and the respondent it would no doubt have been governed by these conditions: that if the respondent were to allow the appellant to enter its premises, it would be upon the basis that the respondent control what might be done, filmed or otherwise reproduced there by the appellant and the use to which any film or reproduction might be put. Any relationship between the unknown entrant and the respondent, if it had previously existed, would be governed by the same conditions. The appellant argues that because there was no relationship of confidence, of a fiduciary type, or indeed of any kind between it and the respondent, the appellant is free to do whatever it wishes with a film illegally obtained by another who also had no lawful relationship with the respondent: in short, that it should be in a stronger position to resist a claim for relief against it because, fortuitously, it had no relationship with the respondent. Another way of putting the appellant's case is to say that because of the criminal conduct of unidentified persons, it escaped, and was entitled to escape, the necessity that would otherwise have been imposed upon it, of entering into a relationship with the respondent or someone else who did have a lawful relationship with the respondent. The appellant says this, even though it gave no value for the film and even though, before it sought to use it for its own advantage, it became aware of the likely circumstances of its making. It also says this despite its concession in argument that until the moment that it obtained possession of the film, the respondent could, if it had been able to ascertain the identity of the maker, have restrained him or her from using or showing the film.

296 The appellant's argument is fallacious for these reasons. The making, use and custody of the film place the parties in a relationship with each other. Once the appellant came into possession of the illegally obtained film, it necessarily did come into a relationship with the respondent. It came to hold, without giving value for it, an item of property that neither it nor anyone else could have legitimately made or acquired without the respondent's permission. There was

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398 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 130-131 [501] (footnote omitted).

no need for the respondent to post a sign saying it occupied and controlled its own premises. The film is an item of property that came into existence in infringement of one of the most important aspects of the respondent's proprietary rights, its right to exclusive possession of its abattoir and to control what might be done inside it. It is an item of significant value to the appellant for the reasons I have stated. It is a tangible item of property. It has a value, like any reproduction, over and above the value of a mere spoken or written description of the respondent's activities. If it were otherwise, the appellant would surely have been content to describe, as it is still free to do, without telecasting images of, what took place at the respondent's abattoir. It is an item of property that has parallels with stolen property and the appellant is in a position that can be compared with that of a receiver of stolen property. It is, in that sense, complicit.

297 Equity should, and in my opinion is right to, indeed it has no choice but to, regard the relationship created by the possession of the appellant of a tangible item of property obtained in violation of the respondent's right of possession, and the exploitation of which would be to its detriment, and to the financial advantage of the appellant, as a relationship of a fiduciary kind and of confidence. It is a relationship that the appellant could immediately terminate by delivering up the film to the respondent. The circumstances are ones to which equity should attach a constructive trust. In *Jacobs' Law of Trusts in Australia*, the matter is put this way[399]:

> "In the case of a constructive trust, the inquiry is not as to the actual or presumed intentions of the parties, but as to whether, according to the principles of equity, it would be a fraud for the party in question to deny the trust. As Cardozo CJ put it[400], 'When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee'. The trust is constructive in the sense that equity construes the circumstances by explaining or interpreting them; equity does not construct the trust, it attaches legal consequences to the circumstances. Moreover, the constructive trust demands the staple ingredients of the express and resulting or implied trust: subject matter, trustee, beneficiary and personal obligation attaching to the trust property."

The film was brought into existence, and the appellant acquired it, in circumstances in which it cannot in good conscience use it without the permission of the respondent. If the facts remain at the trial as they appear to be

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399 Meagher and Gummow, *Jacobs' Law of Trusts in Australia*, 6th ed (1997) at 306 [1301] (footnotes omitted).

400 *Beatty v Guggenheim Exploration Co* 122 NE 378 at 380 (1919).

now, the appellant should then be obliged to deliver up the film to the respondent. There is therefore an underlying remedy sufficient to support an interlocutory injunction. And, as I have already said, the balance of convenience lies heavily with the respondent. The only other suggested impediment to the continuation of the injunction granted by the Full Court is the so-called constitutional defence and to that I will go in due course.

298 There is no case in this Court which compels me to reach a different conclusion as to unconscionability from the one that I have reached. It is a conclusion that should ensure that in any future such cases an item of valuable property obtained in violation of a person's proprietary right to exclusive possession in circumstances in which the defendant knows or ought to know of the violation, is to be regarded as unconscionably obtained and to be delivered up on demand to the person whose rights have been violated.

299 The conclusion does not depend upon the fact that the violation was a quasi-criminal offence (and, incidentally, probably also the more serious offence of breaking and entering). Nor does it depend upon the fact that the appellant gave no value at all for the film or that it might have very considerable value in its hands. These three factors are simply ones that serve to highlight the injustice of any denial of relief to the respondent. The conduct of the appellant here is certainly no less serious and unconscionable than the conduct of the trustee in *Keech v Sandford*[401]. The harm that might be caused to the respondent by the exploitation of the tape is plainly greater than any loss to the beneficiary on the renewal of the lease in *Keech v Sandford* in circumstances in which the lessor declined, and could not be compelled to renew the lease for the benefit of the beneficiary. Indeed, on one view it could be said that once the lessor refused to renew the lease for the benefit of the beneficiary, the trustee had no relevant relationship with the beneficiary with respect to any further lease of the premises. And the use of valuable property that could not have been obtained but for the violation of a most important proprietary right is little different from the receipt of stolen money.

300 It is consistent, therefore, with what O'Connor J said in *Black v S Freedman & Co*[402]:

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401 (1726) Sel Cas T King 61 [25 ER 223].

402 (1910) 12 CLR 105 at 110; see also at 108-109 per Griffith CJ, 110 per Barton J. *Black v S Freedman & Co* has been approved in *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426 at 432 per Griffith CJ; *Spedding v Spedding* (1913) 30 WN (NSW) 81 at 82; *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584 at 589; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 565-566; *Cashflow Finance Pty Ltd (in liq) v Westpac Banking Corporation* [1999] NSWSC 671 at [464]; *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278 at [74]; *Menzies v Perkins*

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> "Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands. If, of course, that other person shows that it has come to him *bona fide* for valuable consideration, and without notice, it then may lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not."

301 The conclusion is consistent with the reasoning in *Franklin v Giddins*[403], so far as that case was concerned with the defendant wife there. The only differences are that the defendant husband stole cuttings from the plaintiff's orchard as well as trespassed upon it. That the property of value that came into the female defendant's possession consisted of a trade secret, as well as physical objects owned by the plaintiff, is of no relevant significance. The facts could still have been analysed and the case decided in the same way as this one, and with the same consequences for the wife who did not participate in the theft but came to know of and gain from it. The case has been described, rightly in my opinion, as the beginning of the demise of the need for a prior relationship for the imposition of an obligation of confidence[404].

302 It is also consistent with the compelling minority opinion of Rehnquist CJ (with whom Scalia and Thomas JJ joined) in *Bartnicki v Vopper*[405], a case in which an injunction was sought and ultimately refused by the Supreme Court of the United States to restrain the broadcasting of illegally intercepted telephone conversations and in which Rehnquist CJ likened the fruits of the interception to the receipt of stolen property. His Honour also made the point that, paradoxically, not to discourage by injunction (albeit that there was earlier criminal conduct involved rendering the culprits criminally liable) the use of the criminally obtained material was itself likely to have a "chilling effect" on free speech by inhibiting frankness in private conversations. His Honour put it this way[406]:

[2000] NSWSC 40 at [9]-[10]. In *Gertsch v Atsas* (1999) 10 BPR [97855], Foster AJ thought that the law may have evolved since *Black v S Freedman & Co* so as to recognise defences available to a volunteer. However, the general principle in *Black v S Freedman & Co* was not questioned.

403 [1978] Qd R 72.

404 Braithwaite, "The secret of life – a fruity trade secret", (1979) 95 *Law Quarterly Review* 323 at 323-324.

405 69 USLW 4323 (2001).

406 69 USLW 4323 at 4335 (2001).

> "These statutes undeniably protect this venerable right of privacy. Concomitantly, they further the First Amendment rights of the parties to the conversation. 'At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'[407] By 'protecting the privacy of individual thought and expression,'[408] these statutes further the 'uninhibited robust, and wide-open' speech of the private parties[409]. Unlike the laws at issue in the *Daily Mail*[410] cases, which served only to protect the identities and actions of a select group of individuals, these laws protect millions of people who communicate electronically on a daily basis. The chilling effect of the Court's decision upon these private conversations will surely be great".

303 The conclusion also recognises the reality of the value of images. If they have value, the right to control the making of them plainly also has value. If there is no right to control the making of them, that is, for example, if they can be made in, or from a public place or places upon which their maker may go, then on the current state of the law, the maker will not be able to be restrained from using them. But if the position, as here, be otherwise, then an occupier should not be denied rights in respect of them because their maker has been able, surreptitiously, to violate the occupier's rights[411]. It may also be that the law should and may come to recognise that the creator of a spectacle has a property right in respect of it but it is unnecessary to decide whether that is so in this case.

304 The conclusion fits comfortably within the line of cases that are referred to in the first paragraph of these reasons. It is consistent with two decisions of the Supreme Court of New South Wales: *Lincoln Hunt Australia Pty Ltd v Willesee*[412] and *Donnelly v Amalgamated Television Services Pty Ltd*[413]. In the

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407 *Turner Broadcasting System Inc v Federal Communications Commission* 512 US 622 at 641 (1994).

408 *United States v United States District Court for Eastern District of Michigan* 407 US 297 at 302 (1972).

409 *New York Times Co v Sullivan* 376 US 254 at 270 (1964).

410 *Smith v Daily Mail Publishing Co* 443 US 97 (1979).

411 *Franklin v Giddins* [1978] Qd R 72.

412 (1986) 4 NSWLR 457.

413 (1998) 45 NSWLR 570.

former, the telecaster was also the trespasser but there can be little if any difference in principle between a trespasser and one who knowingly seeks to exploit the fruits of the trespass. The facts in *Donnelly* are closer to these here. In that case, Hodgson CJ in Eq, correctly, in my respectful opinion, held that a telecaster that had not itself unlawfully or personally created a video-film, which had in fact been made by police officers in an abuse of their powers, should be restrained by interlocutory injunction from telecasting the film, because, as a practical matter, there was no other satisfactory remedy[414].

305 No relevant distinction, certainly in this case, is to be made between matter obtained by an abuse of coercive power and matter otherwise illegally obtained. The success of the appellant in this appeal would send a clear signal that, so long as a publisher does not itself personally soil its hands by committing a crime, or by otherwise acting illegally to obtain what it considers newsworthy, the publisher will be free to publish the matter as it sees fit. Why send a reporter to put a foot in the front door when the publisher can be confident that a trespasser with an axe to grind or a profit to be made will be only too willing to break and enter through a back window?

306 What I have decided also conforms to the reasoning of Lord Goff of Chieveley in the *Spycatcher* case[415]:

> "[A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice … that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

307 The conclusion is justifiable on policy grounds. It should serve as a deterrent to others who might be minded to obtain illegally, or to use illegally obtained material for their own financial or other benefit to the detriment of people whose rights have been infringed. It pays due regard to the long-established common law principle that people are entitled to secure and protect their property and to deny access to it to whom they please[416].

308 The approach that I have adopted also avoids the need for the procedural contortions to which plaintiffs may be moved in seeking to adapt, to circumstances in which they have been humiliated by offensive behaviour, or to circumstances in which some of their rights have been infringed, inappropriate or

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414 (1998) 45 NSWLR 570 at 575-576.

415 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.

416 *Entick v Carrington* (1765) 19 St Tr 1029 at 1066 per Lord Camden CJ.

inflexible causes of action. In *Kaye v Robertson*[417], a case of an invasion of a hospital room by a news photographer in which a celebrity actor was being treated for a serious head injury, the actor alleged libel, malicious falsehood, trespass to the person (by the sudden illumination of a flashbulb on the camera) and passing off, but, not, it may be noted, trespass upon the room, as a basis for an injunction to restrain publication of the photographer's images. The English Court of Appeal (Glidewell, Bingham and Leggatt LJJ) was of the opinion that the only arguable cause of action was libel and that no interlocutory injunction to restrain that should go[418].

309 The conclusion also avoids any need to seek to apply, somewhat uneasily, to circumstances to which it may be applicable (being circumstances of the kind which exist here), Pt IV (ss 84-113) of the *Copyright Act* 1968 (Cth) as a basis for holding an infringement of copyright on the part of the appellant. I respectfully agree, however, in this connexion, with what Gummow and Hayne JJ have said in their reasons for judgment[419].

310 Even if the conclusion I have reached does involve an extension of principle, or a change in the law (which I do not think it does[420]), I would not baulk at it on that account. It certainly would not represent, to adopt the imagery of Donaldson LJ, in describing the advent of *Mareva* and *Anton Piller*, "a nuclear detonation" or a "pre-emptive strike on" any existing principle. On any view, it would still represent an incremental change at most, a lesser change than several that have been made by relatively recent decisions of this Court and to which I refer in my discussion of the appellant's claim to a constitutional defence.

311 There is no reason why the claim in an appropriate case should not be framed as a claim for breach of confidence, being the misuse of a relationship arising out of the acquisition or retention or use by the defendant of a film made in violation of the plaintiff's right of exclusive possession of which the defendant knew or ought to have known and to which a constructive trust should be

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417 (1990) 19 IPR 147.

418 (1990) 19 IPR 147 at 153 per Glidewell LJ, 154 per Bingham LJ.

419 Reasons of Gummow and Hayne JJ at [101]-[103].

420 Sedley LJ in *Douglas v Hello! Ltd* [2001] 2 WLR 992; [2001] 2 All ER 289 was of the opinion that there was a powerfully arguable case that English law already recognises as a category of the law of confidence, a right to privacy: see [2001] 2 WLR 992 at 1022-1025 [113]-[124] and esp at 1025 [125]; [2001] 2 All ER 289 at 317-320; see also [2001] 2 WLR 992 at 1035 [165] per Keene LJ; [2001] 2 All ER 289 at 329-330.

attached. The ultimate remedy, to which the plaintiff would be entitled, is delivery up of the film, and an account of any profits made from it.

312 What I have said in relation to the appellant's second argument provides an answer to the appellant's third argument also, which is in substance no more than that *Lincoln Hunt*, *Donnelly* and *Emcorp*[421] are distinguishable or should neither be applied nor extended.

(ix) A new tort of intrusion of privacy?

313 It is not necessary, because of my conclusion as to unconscionability, to deal with the respondent's alternative claim for relief based upon an intrusion upon its privacy but out of deference to the careful arguments of the parties, I will express some tentative views about it.

314 It is correct, as the appellant submits, that in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[422] (Latham CJ, Dixon and McTiernan JJ; Rich and Evatt JJ dissenting), the Court held that a racecourse owner and operator could not prevent the observation and broadcasting of, from a tower on land adjoining the course, the progress and results of races conducted on the racecourse; and that the case has been regarded as authority for the proposition that there is no tort of intrusion of privacy in this country.

315 But several things should be noted about that case.

316 It was decided by a narrow majority. The decision was a product of a different time, a time when sporting events and sporting people did not, as today, attract large payments from sponsors and advertisers, a time before statutory corporations and public companies conducted remunerative, on- and off-course and off-site betting businesses on sporting events, and a time when television was in its infancy, and the regular payment of vast sums of prize and other money to sports people whose public profile enabled them to earn further income by associating their names and images with advertisers of goods and services, was unknown. Those different conditions of that very different era may go some way to explaining why Latham CJ was so dismissive of a "quasi-property" in a spectacle[423]. His Honour's view would hardly, however, have been shared by a Roman emperor outlaying denarii for a circus at the Colosseum, or by travelling troupes of the *commedia dell'arte*, theatre managers and owners, racing clubs, or

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421 *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169.

422 (1937) 58 CLR 479.

423 (1937) 58 CLR 479 at 496. See also at 508-510 per Dixon J.

anyone else down through the ages bearing the responsibility and expense of mounting, and enjoying the financial benefits of, a popular spectacle. It may be that the time is approaching, indeed it may already have arrived, for the recognition of a form of property in a spectacle. There is no reason why the law should not, as they emerge, or their value becomes evident, recognise new forms of property[424]. Since the enactment of the *Copyright Act* 1968 (Cth) there have been amendments designed to protect emerging forms of intellectual property: for example, in 1984, computer programs; and in 1989, new statutory licensing reforms for the handicapped. And last year, in *Grain Pool of Western Australia v The Commonwealth*[425], this Court accepted, in a case concerned with rights to breeds of plants, that the Constitution was flexible enough to recognise and protect new varieties of plants in the same way as other intellectual properties. The joint judgment (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) said this[426]:

> "[W]hat follows in these reasons does not give effect to, any notion that the boundaries of the power conferred by s 51(xviii) are to be ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trade mark. No doubt some submissions by the plaintiff would fail even upon the application of so limited a criterion. However, other submissions, as will appear, fail because they give insufficient allowance for the dynamism which, even in 1900, was inherent in any understanding of the terms used in s 51(xviii)."

317 Even if there be no, or there is to be no, tort of intrusion of privacy as such, the law may need to devise a remedy to protect the rights of the "owners" of a spectacle, at least against unauthorised reproduction of it by broadcast, telecast or publication of photographs, or other reproductions of it, under the rubric of nuisance or otherwise.

318 The conservative views of the three Justices in the majority in *Victoria Park* have the appearance of an anachronism, even by the standards of 1937, especially when they are compared with the worldly views of Rich J, which strike a chord with a modern reader. Those views are stated in a passage of

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424 In *Childrens Television Workshop Inc v Woolworths (NSW) Ltd* [1981] 1 NSWLR 273 at 281-282, Helsham CJ in Eq, in an action for passing off, took a broad view of a legitimate business interest in respect of images and a spectacle presented on television and products created from them.

425 (2000) 74 ALJR 648; 170 ALR 111.

426 (2000) 74 ALJR 648 at 653 [23]; 170 ALR 111 at 118.

relevance to what I have already concluded in relation to the unconscionability of the appellant's conduct also[427]:

> "Courts have always refrained from fettering themselves by definitions. 'Courts of equity constantly decline to lay down any rule, which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights, or redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence'[428]. 'The common law has not proved powerless to attach new liabilities and create new duties when experience has proved that it is desirable. That this was so in the older days was due to the wide scope of the action upon the case. The action upon the case was elastic enough to provide a remedy for any injurious action causing damage … When relationships come before the courts which have not previously been the subject of judicial decision the court is unfettered in its power to grant or refuse a remedy for negligence …'[429] … This case presents the peculiar features that by means of broadcasting – a thing novel both in fact and law – the knowledge obtained by overlooking the plaintiff's racecourse from the defendant's tower is turned to account in a manner which impairs the value of the plaintiff's occupation of the land and diverts a legitimate source of profit from its business into the pockets of the defendants. It appears to me that the true issue is whether a non-natural use of a neighbour's land made by him for the purpose of obtaining the means of appropriating in this way part of the profitable enjoyment of the plaintiff's land to his own commercial ends – a thing made possible only by radio – falls within the reason of the principles which give rise to the action on the case in the nature of nuisance."

319 Particularly prescient are some later remarks of his Honour[430]:

> "Indeed the prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognize that protection against the complete exposure of

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427 (1937) 58 CLR 479 at 500-501.

428 *Story's Equity Jurisprudence,* 1st English ed (1884) at 625-626, §959b.

429 *Salmond on Torts*, 9th ed (1936) at 18-19.

430 (1937) 58 CLR 479 at 505.

> the doings of the individual may be a right indispensable to the enjoyment of life."

320 *Victoria Park* is distinguishable from this case. But in any event, Dixon J, by adopting a citation with approval of Brandeis J from *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd*[431], makes it clear that the decision in *Victoria Park* is unlikely to apply in a case in which there has been physical interference with a plaintiff's property[432]:

> "Brandeis J[433] cites with approval *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd*[434], a decision of Horridge J (affirmed by the Court of Appeal[435]), which he describes as follows[436]: 'The plaintiff, the assignee of the right to photograph the exhibits at a dog show, was refused an injunction against the defendant, who had also taken pictures of the show and was publishing them. The court said that, except in so far as the possession of the land occupied by the show enabled the proprietors to exclude people or permit them on condition that they agree not to take photographs (which condition was not imposed in that case), the proprietors had no exclusive right to photograph the show and could therefore grant no such right. And, it was further stated that, at any rate, no matter what conditions might be imposed upon those entering the grounds, if the defendant had been on top of a house or in some position where he could photograph the show without interfering with the physical property of the plaintiff, the plaintiff would have no right to stop him'."

321 It is well recognised in the United States how fragile privacy, if unprotected by a legal remedy, can be. In *The Unwanted Gaze*[437], Jeffrey Rosen offers this contemplation[438]:

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431 [1916] 2 KB 880 at 883-884 per Horridge J.

432 (1937) 58 CLR 479 at 509-510.

433 Note that Brandeis J was in dissent in this case: *International News Service v Associated Press* 248 US 215 (1918).

434 [1916] 2 KB 880.

435 [1917] 2 KB 125.

436 *International News Service v Associated Press* 248 US 215 at 255 (1918).

437 Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000).

438 Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000) at 11.

> "A liberal state respects the distinction between public and private speech because it recognizes that the ability to expose in some contexts parts of our identity that we conceal in other contexts is indispensable to freedom. Privacy is necessary for the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, a precondition for friendship, individuality, and even love. In *The Unbearable Lightness of Being*, Milan Kundera describes how the police destroyed an important figure of the Prague Spring by recording his conversations with a friend and then broadcasting them as a radio serial. Reflecting on his novel in an essay on privacy, Kundera writes, 'Instantly Prochazka was discredited: because in private, a person says all sorts of things, slurs friends, uses coarse language, acts silly, tells dirty jokes, repeats himself, makes a companion laugh by shocking him with outrageous talk, floats heretical ideas he'd never admit in public, and so forth.'"

322 Rosen concludes his work by saying that invasions of privacy in the United States, where there is, as will appear, some protection of privacy by legal process, have reached a point of crisis[439]:

> "The invasions of privacy I have discussed in this book are part of a larger crisis in America involving the risk of mistaking information for knowledge in a culture of exposure. We are trained in this country to think of all concealment as a form of hypocrisy. But we are beginning to learn how much may be lost in a culture of transparency: the capacity for creativity and eccentricity, for the development of self and soul, for understanding, friendship, and even love. There are dangers to pathological lying, but there are also dangers to pathological truth-telling. Privacy is a form of opacity, and opacity has its values. We need more shades and more blinds and more virtual curtains. Someday, perhaps, we will look back with nostalgia on a society that still believed opacity was possible and was shocked to discover what happens when it is not."

323 In the United States, a tort based upon the right to privacy has been developed and is still evolving in response to encroachments upon privacy by the media and others. The history of its development is traced in *Prosser and Keeton on the Law of Torts*[440]. As early as 1960, William Prosser[441] said:

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439 Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000) at 223-224.

440 5th ed (1984) at 850-851.

441 "Privacy", (1960) 48 *California Law Review* 383 at 389.

> "It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

Prosser's categorisation has been accepted by the United States Supreme Court[442] and the *Restatement of the Law Second, Torts*[443].

324 In *Cox Broadcasting Corporation v Cohn*[444], White J, delivering the opinion of the Supreme Court of the United States, said this[445]:

> "More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy. In 1967, we noted that '[i]t has been said that a "right of privacy" has been recognized at common law in 30 States plus the District of Columbia and by statute in four States'[446]. We there cited the 1964 edition of *Prosser's Law of Torts*. The 1971 edition of that same source states that '[i]n one form or another, the right of privacy is by this time recognized and accepted in all but a very few jurisdictions'[447] …

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442 *Time Inc v Hill* 385 US 374 at 383 (1967); *Cox Broadcasting Corporation v Cohn* 420 US 469 at 488 (1975).

443 Section 652A.

444 420 US 469 (1975).

445 420 US 469 at 488-489 (1975).

446 *Time Inc v Hill* 385 US 374 at 383 (1967).

447 Prosser, *Law of Torts*, 4th ed (1971) at 804.

These are impressive credentials for a right of privacy".

And in *Dietemann v Time Inc*[448], Hufstedler J said that "[t]he First Amendment is not a license to trespass"[449].

325 In New Zealand, a tort of invasion of privacy has been recognised[450]. The *New Zealand Bill of Rights Act* 1990 (NZ) does not confer a right to privacy but does ensure freedom of expression[451]. The *Privacy Act* 1993 (NZ) is limited to the disclosure of information by government officers. The most recent decision in New Zealand is that of Nicholson J in *P v D*[452] in which his Honour accepted that a tort of breach of privacy is part of the common law of New Zealand despite the guarantee of freedom of expression in the *New Zealand Bill of Rights Act* in circumstances in which there has been a public disclosure of private facts. It was his Honour's view that a balancing of interests was necessary[453]. Nicholson J seems to have accepted[454] that the elements of the tort are as stated by Prosser and Keeton.

326 In the United Kingdom, a right of privacy of a corporation has recently been held to exist[455], but the decision turned, in part at least, upon the provisions of the *Broadcasting Act* 1996 (UK). And as I have already pointed out, the strongly arguable likelihood of the existence of such rights in private persons was adverted to in the case of *Douglas v Hello! Ltd*[456].

327 Linden describes the Canadian position in this way[457]:

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448 449 F 2d 245 (1971).

449 449 F 2d 245 at 249 (1971).

450 See the discussion in Tobin, "Invasion of privacy", (2000) *New Zealand Law Journal* 216.

451 Section 14.

452 [2000] 2 NZLR 591.

453 [2000] 2 NZLR 591 at 599.

454 [2000] 2 NZLR 591 at 601.

455 *R v Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2000] 3 WLR 1327; [2000] 3 All ER 989.

456 [2001] 2 WLR 992; [2001] 2 All ER 289.

457 *Canadian Tort Law*, 6th ed (1997) at 56 (footnotes omitted).

> "One Canadian court has recognized a general right to privacy. Several trial judges have refused to dismiss actions for the invasion of privacy at the pleading stage on the ground that it has not been shown that our courts will not create a right to privacy. Recently, Chief Justice Carruthers has stated 'the Courts in Canada are not far from recognizing a common law right to privacy if they have not already done so'. Furthermore, courts have been willing to protect privacy interests under the rubric of nuisance law. We seem to be drifting closer to the American model."[458]

328 For my own part, I would not rule out the possibility that in some circumstances, despite its existence as a non-natural statutory creature, a corporation might be able to enjoy the same or similar rights to privacy as a natural person, not inconsistent with its accountability, and obligations of disclosure, reporting and otherwise. Nor would I rule out the possibility that a government or a governmental agency may enjoy a similar right to privacy over and above a right to confidentiality in respect of matters relating to foreign relations, national security or the ordinary business of government notwithstanding the single Justice decision in *The Commonwealth of Australia v John Fairfax & Sons Ltd*[459]. The legal system cannot lightly countenance that worthy ends justify any, including any illegal means. That a broadcaster or another might, with impunity, publish or use for its own purposes, material illegally obtained would only serve to encourage others with an "axe to grind" or who seek to make gains, to break the law. And, as Rehnquist CJ (joined by Scalia and Thomas JJ) pointed out in *Bartnicki v Vopper*[460]:

> "Without such receivers [of stolen property], theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out theft in its various forms."

329 If a new tort of invasion of privacy were to be recognised in this case, then, it may be asked, how would it apply to the facts and what defences are available? There was an unlawful intrusion upon the property of the respondent and film was obtained as a consequence, by persons unknown. A copy of that film is in the possession of the appellant. The first tort, adopting the Prosser classification, has prima facie been committed. People in our society, rightly, expect that their homes, offices and factories will not be broken into with

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458 See *Motherwell v Motherwell* (1976) 73 DLR (3d) 62; *Burnett v The Queen in right of Canada* (1979) 94 DLR (3d) 281; *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449; *Aubry v Duclos* (1996) 141 DLR (4th) 683.

459 (1980) 147 CLR 39 per Mason J.

460 69 USLW 4323 at 4334 (2001).

impunity. The law so provides. Although the appellant was not a party to that intrusion, the film which it seeks to broadcast was obtained as a result of it.

330 There is a United States Court of Appeals decision, which is a little surprising even given the First Amendment: *Pearson v Dodd*[461]. In that case, the employees of a United States Senator unlawfully removed from his office some of his files, made copies of them and replaced the originals. A copy was given to the defendant, a gossip columnist, who published articles about what was in the files. The articles suggested that the Senator had behaved improperly. The Senator failed in an action before the District Court because of a recognised defence of publication in the general public interest[462]. The Senator appealed to the United States Court of Appeals for the District of Columbia. The appeal was dismissed. The publishers were not party to the intrusion and, moreover, the Court held that it is a defence to the tort of publication of private facts that the matter published is "of public interest" and hence the publication itself could not constitute an invasion of privacy[463].

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

332 The recognition of a tort of invasion of privacy as part of the common law of Australia does not involve acceptance of all, or indeed any of the jurisprudence of the United States which is complicated by the First Amendment. There is good reason for not importing into this country all of the North American law particularly because of the substantial differences in our political and constitutional history. Any principles for an Australian tort of privacy would need to be worked out on a case by case basis in a distinctly Australian context.

333 In New Zealand, a public interest defence is recognised when, for example, misconduct is exposed as a result: *TV3 Network Services Ltd v Fahey*[464].

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461 410 F 2d 701 (1969).

462 410 F 2d 701 at 703 (1969).

463 410 F 2d 701 at 705-706 (1969).

464 [1999] 2 NZLR 129 at 135.

334 Ultimately the questions involved are ones of proportion and balance[465]. The value of free speech and publication in the public interest must be properly assessed, but so too must be the value of privacy. The appropriate balance would need to be struck in each case. This is not an unfamiliar exercise for all courts in all constitutional democracies[466].

335 It seems to me that, having regard to current conditions in this country, and developments of the law in other common law jurisdictions, the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made[467]. Any consideration of that matter should be undertaken with regard to the separation of the roles of the judiciary and the legislature but having regard to what I said in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[468] with respect to judge-made changes in the law[469]:

> "Legislators can, and usually do enact transitional provisions when they change the law. The courts have so far found and provided no like means of cushioning the impact of decisions which effect significant changes. It may ultimately turn out to be an inescapable concomitant of any role that a final court may arrogate to itself to change the common law markedly, that it do so only in a way which is sensitive to the affairs and expectations of those who have acted upon the basis of what they reasonably took to be the legal status quo. If the proposition that judges do not change the law is to be acknowledged as a fiction, then something may have to be done to displace the effect of the other legal fiction, that the law as found by the Court has always been so, and those who may

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465 In Australia and the United Kingdom, questions as to what is and what is not in the public interest were the subject of detailed consideration in the respective decisions of the Supreme Court and Court of Appeal of New South Wales and the House of Lords in litigation over the publication of the book *Spycatcher*, a work concerned with the intrigues of, and alleged deceptions practised by, the intelligence services of the United Kingdom and the United States.

466 See *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573 at 590 per McIntyre J.

467 The *Privacy Act* 1988 (Cth) as amended in 2000 protects only personal information and does not provide for substantive remedies which would be of any utility to this respondent.

468 (1999) 201 CLR 49.

469 (1999) 201 CLR 49 at 104-105 [164].

> have acted upon a different understanding in the past are nonetheless bound by the Court's most recent exposition of the law. Merely to state the problems is to expose the difference between the legislative and curial roles. Certainty, predictability, the desirability of a gradual and incremental development of the common law only, and respect for the knowledge, wisdom and experience of those who made the earlier decision are very important considerations. The last of these matters will always however invite the question whether those who made the decision under challenge themselves paid due deference to those who in the past held a different opinion."

336 There have, however, been many recent instances of judge-made changes in the law, a summary (necessarily incomplete) of which has been made in an article comparing common and civil law approaches to privacy law and which, except perhaps for the epithets applied to some of them, I would generally adopt[470]:

> "The Australian common law experienced many changes introduced by judges in the last two decades of the 1900s. The doctrine of privity was modified, at least in relation to insurance contracts[471]. The distinction between mistakes of fact and mistakes of law in the law of restitution was abandoned[472]. Native title was invented[473]. Liability for the escape of dangerous non-natural substances from land, previously a small realm of its own, became part of the vast empire of negligence[474]. Battery manslaughter was abolished[475], and the implied consent to sexual intercourse derived from the relationship of marriage was declared dead[476]. This list could easily be extended.
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> Similarly, Australian constitutional law changed considerably in those two decades despite the lack of any change to the express words of

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470 Taylor, "Why is there no common law right of privacy?", (2000) 26 *Monash University Law Review* 235 at 235-236.

471 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

472 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

473 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

474 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

475 *Wilson v The Queen* (1992) 174 CLR 313.

476 *R v L* (1991) 174 CLR 379.

the Constitution since 1977. Decades of refusal to reconsider the constitutionality of the states' taxes on alcohol and tobacco gave way to a declaration of unconstitutionality[477]. The interpretation of s 92 was changed and placed on a rationally defensible basis[478]. Discrimination by the states against residents of other states was finally recognised as obnoxious to the spirit of the Australian federation and not as something that was to be saved at any cost, including, if necessary, at the cost of twisting the words of the Constitution[479]. The interpretation of Commonwealth powers, and, more generally, the permissible methods of interpretation were hammered out in a series of cases[480]. An immunity from laws that unduly restrict communication about governmental and political matters was identified in the Constitution[481], joining the separation of powers and the *State Banking*[482] doctrines as the third judicially approved general implication from the terms of the Constitution. At the intersection of public and private law, this immunity was found to affect the common law of defamation so as to widen the availability of the defence of qualified privilege[483].

Again, the list could easily be extended. Looking at these two lists, and at possible additions, from the perspective of comparative law, there is, however, one notable omission: there is still no 'right of privacy' properly so called in the Australian common law."

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477 *Ha v New South Wales* (1997) 189 CLR 465.

478 *Cole v Whitfield* (1988) 165 CLR 360.

479 *Street v Queensland Bar Association* (1989) 168 CLR 461.

480 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

481 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*") (1992) 177 CLR 106.

482 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

483 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See even more recently *Brodie v Singleton Shire Council* (2001) 75 ALJR 992; 180 ALR 145 in which the Court effectively abolished the distinction between misfeasance and non-feasance in cases against highway authorities.

(x) A constitutional defence?

337 I come then to the appellant's last argument which is two-pronged: that the implied constitutional freedom afforded the appellant a defence in this case; alternatively, and in any event, if an interlocutory injunction were available in a case of this kind, a court, in considering whether to grant it, should exercise the same reticence as courts have traditionally exercised in deciding whether to grant interlocutory injunctions in defamation cases.

338 In order to deal with the first proposition it is necessary to attempt to identify the limits of, and to ascertain the basis for the implied constitutional freedom. Two bases for such an implication have been propounded. I deal first with the one that relies upon a judicial perception of changes in circumstances. With the greatest of respect to the very experienced Court (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) which unanimously put beyond doubt in *Lange*[484] that there was an implied constitutional freedom of communication which would serve as a defence in some defamation cases, I would not myself have reached the same conclusion. In my opinion, modern conditions to which the Justices referred but did not identify in *Theophanous*[485] did not require it[486]. Additionally, the authors of the Constitution were well aware of the First Amendment to the Constitution of the United States and most deliberately must have chosen not to incorporate such a provision in our

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484 (1997) 189 CLR 520.

485 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

486 In the text of this judgment, I discuss the implied freedom of communication, particularly as it has been applied to the law of defamation. As will become evident, I respectfully agree with this powerful criticism of the entire basis of the implied freedom developed in *ACTV* and subsequent cases:

> "The 'lion in the path' of any argument that judicial enforcement of freedom of political speech is practically necessary for the effective operation of our representative democracy is that while extensive free speech is necessary, a judicially enforceable freedom is obviously not … It is obviously not necessary, because Australia had an effective representative democracy for nearly a century, as did Canada until 1982, and many other western nations still have such democracies, in the absence of a judicially enforceable freedom."

See Goldsworthy, "Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue", (1997) 23 *Monash University Law Review* 362 at 372.

Constitution[487]. Indeed, the argument for it in the United States was by no means a one-sided one. The eminent constitutional draftsman Alexander Hamilton opposed the insertion into the Constitution of the United States of any express guarantee of freedom of the press, preferring to leave the content of liberties to the legislature and to the people. He wrote to those who clamoured for such a guarantee the following[488]:

> "What signifies a declaration that 'the liberty of the press shall be inviolably preserved'? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights."

339 The second basis for the implication is that the Constitution makes provision for a democratically elected Parliament, that ss 7, 24, 64 and 128 of the Constitution and its structure, which recognise representative and responsible government, are the source of the implication. The system of government enshrined by the Constitution, to which reference was made by Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills*[489] and Mason CJ, Deane, Toohey and Gaudron JJ in *ACTV*[490], was chosen by the Founders who were well acquainted with the law of privilege and qualified privilege. They saw no need for a constitutional provision to ensure freedom of political discourse. There was nothing novel in 1901 about democratically elected Parliaments. There are no features of the Australian Constitution requiring any special arrangements

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487 On the Framers' rejection of express constitutional guarantees, see *ACTV* (1992) 177 CLR 106 at 136 per Mason CJ, 182 per Dawson J, 228-229 per McHugh J; Douglas, "Freedom of Expression under the Australian Constitution", (1993) 16 *University of New South Wales Law Journal* 315 at 319-321; Aroney, "A Seductive Plausibility: Freedom of Speech in the Constitution", (1995) 18 *University of Queensland Law Journal* 249 at 261-262; Craven, "The High Court of Australia: A Study in the Abuse of Power", (1999) 22 *University of New South Wales Law Journal* 216 at 227; Meagher, "Civil Rights: Some Reflections", (1998) 72 *Australian Law Journal* 47 at 51.

488 Hamilton, "Federalist No 84", in Hamilton, Madison and Jay, *The Federalist Papers* (1788).

489 (1992) 177 CLR 1 at 69-72.

490 (1992) 177 CLR 106 at 138-141 per Mason CJ, 168-169 per Deane and Toohey JJ, 208-210 per Gaudron J.

(implied or express) to ensure the accountability of Parliament or that of the State legislatures and executives. In short, responsible and representative government is no more under threat from any inhibitions upon freedom of political expression today than it was 100 years ago. Current defamation laws (the constitutional implication aside) allow ample latitude for political debate.

340 The defamation law, both statutory and common, with respect to defences of qualified privilege had functioned very well throughout the 96 years that had elapsed since Federation. A defence of qualified privilege is a very difficult defence for plaintiffs to overcome. No narrow view, rightly, is taken of public interest. It may extend to "the actions or omissions of a person or institution engaged in activities that either inherently, expressly or inferentially invited public criticism or discussion."[491] And, a defence of fair comment (absent malice) will prevail unless "no fair minded [person] could honestly hold [the] opinion [expressed]"[492]. Proof of a defendant's absence of good faith by a plaintiff is necessary to overcome a defence of qualified privilege, which imposes a very heavy burden upon a plaintiff, a proof in effect of a negative. Those who practised, particularly, in turn, for plaintiffs and publishers in defamation cases, were generally satisfied that that body of law was sensitive both to the need for free speech and to defamed plaintiffs. To continue the nuclear imagery adopted by Donaldson LJ, the bracket of decisions in *ACTV*, *Theophanous* and *Lange* had the impact of the detonation of a hydrogen bomb upon practitioners practising at the defamation bar.

341 By comparison, geographical and a degree of cultural proximity to the United States have not impelled the Canadian courts to embrace any notion of completely unabridged freedom of speech, despite the express guarantees of freedom of expression and opinion contained in s 2(b) (the "fundamental freedoms") of the Canadian Charter of Rights and Freedoms[493]. Writing for the

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491 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 215 per Dawson, McHugh and Gummow JJ.

492 *London Artists Ltd v Littler* [1969] 2 QB 375 at 393 per Lord Denning MR.

493 "2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association."

majority of the Supreme Court of Canada in *Hill v Church of Scientology of Toronto*[494], Cory J stated[495]:

> "Certainly, defamatory statements are very tenuously related to the core values which underlie s 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. *Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society*." (emphasis added)

I would agree also with what was said by Cory J[496] in adopting a passage from *Gatley on Libel and Slander*[497] that excessive (and inaccurate) political expression will "deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation."[498]

342 In my respectful opinion, factors currently operating, a number of which I have already identified, strongly argue against a significant addition to the armoury of defences, indeed armadillo-like defences available to the media by way of the discovery of an implied constitutional right. The fact is that publishers who act honestly and with ordinary diligence in the compilation and dissemination of matter of public interest have nothing to fear from the law of defamation as it existed before the discovery of the constitutional implication. It is not as if there is anything remarkable or novel about the, usually futile, attempts of politicians and officials to manipulate the media. In the middle of the 19th century, Lord Palmerston was famous for it[499]. In addition to those conditions of contemporary society which I have earlier discussed in these reasons, there are others which militate against the tilting any further of the balance in favour of publishers, including measures both curial and otherwise, unheard of in earlier times: the availability of the modern remedy provided by

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494 [1995] 2 SCR 1130.

495 [1995] 2 SCR 1130 at 1174.

496 [1995] 2 SCR 1130 at 1174-1175.

497 4th ed (1953).

498 4th ed (1953) at 254, footnote 6.

499 Brown, "Compelling but not Controlling?: Palmerston and the Press, 1846-1855", (2001) 86 *History* 41.

legislation for freedom of information[500]; the expansion of remedies for the review of administrative action[501]; the greater willingness of the courts to accord status to those who seek the intervention of the court in public affairs[502]; recourse to ombudsmen under ombudsmen legislation throughout the country[503]; the influence that can be exerted by media owners whose interests span international borders and all or most forms of communication; the work of boards and tribunals which regulate, inquire into, or supervise industrial and professional conduct[504]; the advent and proliferation of "cheque book journalism" and the payment of "cash for comment"[505]; the extensive use of commissions of inquiry armed with significant powers to inquire into and report on misconduct by government and officials[506]; and the huge resources deployable by major media organisations enabling them to probe more deeply and to have more time and opportunity to avoid error than in the past. There has been, moreover, in recent times a reinvigoration of the committee system of the Parliament of the

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500 *Freedom of Information Act* 1982 (Cth).

501 *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

502 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257-267 per Gaudron, Gummow and Kirby JJ.

503 See *Ombudsman Act* 1976 (Cth); *Ombudsman Act* 1989 (ACT); *Ombudsman Act* 1974 (NSW); *Ombudsman (Northern Territory) Act* (NT); *Parliamentary Commissioner Act* 1974 (Q); *Ombudsman Act* 1972 (SA); *Ombudsman Act* 1978 (Tas); *Ombudsman Act* 1973 (Vic); *Parliamentary Commissioner Act* 1971 (WA).

504 See, for example, the Australian Broadcasting Authority, established by the *Broadcasting Services Act* 1992 (Cth); the Australian Securities and Investments Commission, established by the *Australian Securities and Investments Commission Act* 1989 (Cth); the Australian Prudential Regulation Authority, established by the *Australian Prudential Regulation Authority Act* 1998 (Cth).

505 See *Report of the Australian Broadcasting Authority hearing into Radio 2UE*, February 2000; *Report of the Australian Broadcasting Authority investigations into 3AW Melbourne, 5DN Adelaide and 6PR Perth*, August 2000.

506 See, for instance, New South Wales, Independent Commission Against Corruption, *Report on investigation into aspects connected with an alleged indecent assault at Parliament House on 14/15 September 2000*, December 2000; Queensland, Criminal Justice Commission, *The Shepherdson Inquiry: An investigation into electoral fraud*, April 2001. See also *Independent Commission Against Corruption Act* 1988 (NSW) and *Criminal Justice Act* 1989 (Q).

Commonwealth for the continuing scrutiny of Executive activity. In *House of Representatives Practice*[507], this appears:

> "The principal purpose of parliamentary committees is to perform functions which the Houses themselves are not well fitted to perform, that is, finding out the facts of a case, examining witnesses, sifting evidence, and drawing up reasoned conclusions. Because of their composition and method of procedure, which is structured but generally informal compared with the Houses, committees are well suited to the gathering of evidence from expert groups or individuals. In a sense they 'take Parliament to the people' and allow direct contact between members of the public by a representative group of Members of the House. Not only do committee inquiries enable Members to be better informed about community views but in simply undertaking an inquiry committees may promote public debate on the subject at issue. The all-party composition of most committees and their propensity to operate across party lines are important features. This bipartisan approach generally manifests itself throughout the conduct of inquiries and the drawing up of conclusions. Committees oversight and scrutinise the Executive and can contribute towards a better informed administrative and government policy-making process. In respect of their formal proceedings committees are microcosms and extensions of the Houses themselves, limited in their power of inquiry by the extent of the authority delegated to them and governed for the most part in their proceedings by procedures and practice which reflect those which prevail in the House by which they were appointed."

In the same work[508], the author points out that in September 1987 the House of Representatives established a comprehensive system of committees and refers to the very broad ambit of their activities. Since 1970, the Senate also has made extensive use of both standing and select committees[509]. Nor should s 75(iii) and (v)[510] of the Constitution, which enable citizens and others to challenge and

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507 3rd ed (1997) at 583.

508 *House of Representatives Practice*, 3rd ed (1997) at 621.

509 *Odgers' Australian Senate Practice*, 9th ed (1999), Ch 16.

510 "**Original jurisdiction of High Court**

In all matters:

…

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(Footnote continues on next page)

correct misbehaviour by Commonwealth bureaucracies and officers in various respects by prerogative writs, be left out of the equation. Furthermore, almost always the media have the advantage of resources, money and endurance over those who would seek vindication by proceeding against their members.

343 Any discussion about bureaucratic intrusion is incomplete without reference to such matters. They are all examples of relevant modern conditions. Most of the responses and measures to which I have referred, singly and in combination, are relatively recent and powerful antidotes to any expansion of, and intrusion by, government bureaucracies into human affairs. That expansion and intrusion should not, however, be overstated. Bureaucracies wax and wane. In times of crisis they no doubt expand. Currently, much that was done by governments and their officials is now "outsourced". It was obvious, at Federation, and as a result of it that three tiers of government would continue to exist and that there would be numerous large bureaucracies in this country. It was not thought necessary, then, and experience has, in my opinion, proved, that the law of qualified privilege did not need or would not come to need the addition of a further species of defence based on a constitutional implication.

344 Moreover, there is no reason to believe that the media today labour under greater constraints, whether self-imposed or otherwise than in the past. The distinguished Anglo-American journalist and commentator on United States affairs, Alistair Cooke, writing on the contrast between the sensitivity shown in the past by newspapers to President Franklin Delano Roosevelt's affliction with poliomyelitis, by voluntarily not publishing photographs of the President on crutches or in a wheelchair, and current tabloid journalism, said this[511]:

> "As for the taboo that kept it there, a taboo that was faithfully observed by the national press for over twelve years, it is inconceivable that today it would be maintained for a week or a day. Some British tabloid would be sure to offer a fortune to the first to break it."

345 There are, in my opinion, very great difficulties involved in making constitutional implications. They are not readily susceptible to the tests that the law imposes with respect to the implication of contractual terms. Indeed, if those tests were to be applied so far as they could be, in constitutional discourse, then

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(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction."

511 Cooke, "FDR", in *Memories of the Great & the Good* (1999) 47 at 56.

they could never satisfy the test of the hypothetical officious bystander. In asking of the Framers of the Constitution whether a term should be implied, the question is what the parties would have inserted had attention been drawn to a matter for which they had made no provision *at the time when they made their constitution*. What question would the bystander have asked: "What about free speech in a federal democracy? Have you, the draftsmen, in writing the Constitution, thought about that?" The draftsmen's response would have been: "Of course we have. This is not a matter with which the Constitution should be concerned. The law of qualified privilege, common or as articulated in the Colonies' enactments, deals with that." If an implication may be made long after the composition of the instrument into which it is to be implied, the question arises as to when, and at what intervals, the implication can be made or amended thereafter. How does this Court know when the time has arrived for the making of an implication? What proof is required of the circumstances which make the implication, suddenly, to use the language of Mason CJ, "necessary"[512]?

346 If the necessity is thought to arise because, for example, of an impression formed by judges about the powers and activities of unidentified bureaucracies, those who have an interest in contradicting the consequences of the formation of that impression should be given an opportunity to bring forward facts and other materials to demonstrate that it might be a flawed and incorrect impression. The fact that a debate of that kind would have the appearance of a parliamentary debate rather than one of a kind customarily conducted in judicial proceedings, is in itself an indication of the inadvisability of a court's drawing implications from a written constitution.

347 A constitution is not a business document. It is, no matter what view revisionism might seek to take of it, the fundamental law upon which the democratic government of a federal nation rests. Even if it be assumed that, to use the conventional language of contract, a court is entitled to consider whether its express terms promote federal or federal democratic, as opposed to some other form of efficacy, it could not be said that the Constitution was not achieving that purpose because of an absence from it of a term having the effect of protecting freedom of speech, or expression, however it is formulated. And it gives rise to a further problem of formulation, or, to put it another way, of giving real content to the implication. A head of power of the kind expressed in s 51 of the Constitution has real content, albeit that as time passes what constitutes, for example, defence, or what may be the subject of copyright or a like protection, may change. At least there will always be the formulation and yardstick for the measuring of the extent of the power, in words actually written in the Constitution. Section 92 is protective, among other things, of interstate intercourse. That is a reasonably concrete concept although minds may differ as

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512 *ACTV* (1992) 177 CLR 106 at 135.

to what is, for example, genuine interstate intercourse. Chapter III accords special status to, and protects, Commonwealth judicial power. It may be that there will often be dispute about what constitutes an exercise of judicial power, but there are nonetheless the written lodestars of the Constitution that make it clear that its exercise is wholly separate from that of the executive and legislative powers, whatever the reality of the fusion of the latter two powers in a parliamentary system. By contrast, nothing explicit or otherwise is to be found in the Constitution with respect to freedom of expression. It is not a head of power under s 51 of the Constitution pursuant to which legislation may be enacted. The way in which the implied freedom of communication is to be given effect and protection has, therefore, to be constructed by this Court. All the rules and conditions for its invocation have to be stated for the first time[513], and will continue to need formulation by the Court, and to some that might have the appearance of legislative activity. In short, the Court will have to devise and set the standards. Adrienne Stone warns that in practice standards will come to be set by lower courts[514]:

> "The broadly formulated terms of the new rule left much discretion in the hands of the courts who were to apply and develop it. Although not unheard of, the standard embodied in the recklessness and reasonableness requirements would have to be defined in the context of freedom of political communication by the courts. The notion of a 'reasonable' publication was particularly unclear. One important outstanding issue was whether this required that the defendant establish an honest belief in the truth of the matter published. The little clarification given by the Court raised further questions. Although the Court indicated that '[t]he publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps', it was not at all clear what kinds of steps are necessary or when a publisher is justified in disregarding them. These kinds of judgments were for later development, principally by the lower courts."

The same author goes so far as to argue, convincingly in my opinion, that the judicial method which *Lange* requires is unsustainable[515]:

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513 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

514 Stone, "Freedom of Political Communication, the Constitution and the Common Law", (1998) 26 *Federal Law Review* 219 at 237 (footnotes omitted).

515 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 707-708.

> "The unsustainability of the *Lange* method can be seen by considering how the High Court should choose between the proportionality test and other more defined tests, of which strict scrutiny is one example. This choice itself cannot be made without reference to ideas beyond the text and structure of the *Constitution* and, moreover, the future development of such tests requires departure from that method. More value-laden reasoning in the freedom of political communication doctrine might be unpalatable, even daunting, for the High Court, but it is the inevitable result of the course on which the Court set itself when it first recognised the freedom of political communication."

348 As such, even if implications may be inferred from the Constitution, the occasions for doing so could only be ones of the greatest necessity, and "any implication must be securely based"[516]. I do not for myself think that any such necessity dictated the implication which the Court found in *Lange*, or the other earlier cases to which I have referred. Whether, to adapt the words of Deane J in *Stevens v Head*[517], I should hold to my opinion as this is a matter of fundamental constitutional importance, it is unnecessary for me to decide in this case but I would certainly at least resist any expansion of the doctrine for which *Lange* stands. To apply it to the facts of this case would involve a considerable, and therefore unacceptable, expansion of it.

(xi) Why should an interlocutory injunction not be granted?

349 The last point of the appellant is that the Court should be as cautious here as it would be in deciding whether to grant an interlocutory injunction in a defamation case.

350 The whole basis for preferred treatment of the defence in defamation cases when applications for interlocutory injunctions are made is highly questionable. I C F Spry in *The Principles of Equitable Remedies*[518] refers to the reluctance of courts to grant interlocutory relief in defamation cases and to an early misconception upon which this reluctance is founded, in terms with which I find myself in general agreement[519]:

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516 *ACTV* (1992) 177 CLR 106 at 134 per Mason CJ.

517 (1993) 176 CLR 433 at 461-462.

518 6th ed (2001).

519 Spry, *The Principles of Equitable Remedies*, 6th ed (2001) at 20-22 (footnotes omitted).

"A further example of the manner in which judges trained in a common law rather than an equitable tradition may misunderstand the nature of equitable discretions, and hence attempt to describe them in terms of inflexible rules, is seen in a series of cases that are concerned with the right to obtain injunctions restraining the publication of libels. In such cases the right to obtain an interlocutory injunction ought, on general equitable principles, to depend simply on whether, in the special circumstances in question, the balance of justice inclines towards the grant or refusal of relief; and such matters should be taken into account as considerations of hardship in relation to the parties, any special considerations of unfairness that may arise, the undesirability that a defendant should be prevented from making statements the legality or illegality of which will only subsequently be established with certainty, the extent to which third persons or the public generally may be interested in the truth of those statements, the degree of probability that the alleged libel will be published and will be wrongful, the degree to which the plaintiff will be injured in the event of its publication, and any other material considerations. Probably the observations of Jessel MR in *Quartz Hill Consolidated Gold Mining Co v Beall*[520] were not intended to depart from these general principles. In the course of these observations, after giving an example of cases where an injunction would be granted, he went on to say, 'But on the other hand, where there is a case to try, *and no immediate injury* to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory injunction.' Properly understood, this statement was unexceptionable. Five years later, however, Lord Esher expressed an opinion that the jurisdiction to restrain a libel 'ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the court would set aside the verdict as unreasonable'. It is important to notice that in this statement Lord Esher apparently intended to lay down, as a definite condition of the grant of relief, rather than merely as a discretionary consideration, proof of a state of facts such that no jury could reasonably conclude otherwise than that the publication sought to be enjoined was libellous. At law, of course, a state of facts of this kind is a condition on which certain rights do indeed depend. It is not necessary here to do more than to note that, for example, in a trial of an action with a jury, various rights of the parties both before the entry of judgment and on appeal depend on whether a jury could reasonably reach the conclusion that it has in fact reached. In equity, however, different considerations apply. The fact that the absence of a libel could not reasonably be found may be relevant, and indeed may be of great weight. So if it appears that the only conclusion that may be reasonably reached is

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520 (1882) 20 Ch D 501 at 508.

> that the proposed publication will be libellous, exceptional circumstances must be shown in order to justify the view that it would be inequitable to grant an injunction. But on general equitable principles it may in some circumstances be unjust to deny interlocutory relief merely because this condition is not satisfied. So if, for example, the prospective injury to the plaintiff were overwhelming, the detriment to the defendant through any delay of publication small, and the probability of the wrongfulness of the proposed publication high, although not such as to be beyond the possibility that a jury might, especially in view of any fresh evidence that might subsequently be adduced, reasonably find in favour of the defendant, an interim or interlocutory injunction might well appear to be appropriate. Whilst equity lawyers tend thus to express principles in terms of general discretionary considerations, common lawyers tend to express themselves in terms of rules with specific and inflexible criteria. Hence it has been largely in the formulations of common law judges that the rule laid down by Lord Esher has received subsequent support, and, in the absence of a full analysis in the courts, there has come to be a risk that it will be regarded as orthodox, contrary as it may be to fundamental equitable principles. Similar comments may be made as to suggestions that an interlocutory injunction will not issue if the defendant proposes to rely upon justification or fair comment or some other such defence. Such considerations as an intention to plead justification, for example, are always of importance and are often decisive. But it is clearly contrary to principle that they should be treated as inflexible bars to relief, so that other countervailing considerations are not given due weight." (emphasis added)

351 The rationale offered for judicial caution is usually that free speech is precious beyond all other things, or that the defendant might be able to justify, or that the defendant might otherwise find a defence in qualified privilege, in short that the plaintiff might ultimately fail. There is nothing special about any of these matters except, perhaps, the first. Apart from it, they are possible outcomes in almost all contested proceedings. To give all weight to the first matter, free speech, is to overlook, or to give insufficient weight to the continued hurt to a defamed person pending trial; the greater resources generally available to a defendant to contest proceedings; the attrition by interlocutory appeals to which a plaintiff may be subjected; the danger that by the time of vindication of the plaintiff's reputation by an award of damages not all of those who have read or heard of the defamation may have become aware of the verdict; the unreasonableness of requiring the plaintiff, in effect, at an interlocutory stage, unlike in other proceedings for an interlocutory injunction, to prove his or her case[521]; and, the fact that rarely does a publication later, rather than earlier, do

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521 cf *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 163-165.

any disservice to the defendant or to the opportunity to debate the issues in an informed but not defamatory way, and therefore to free speech.

352 I am unconvinced as to the need for the continued operation of the doctrine of judicial restraint with respect to interlocutory injunctions adopted by judges – it is entirely a judge-made doctrine. In any event, it can have no operation in a case of this kind. There is no reason here why the respondent should not have its injunction continued.

Orders

353 The appeal should be dismissed with costs.