Communications LAW B•U•L•L•E•T•I•N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED

Print Post Approved PP: 234093/00011 EDITED BY ANDREW LAMBERT AND JASON MACARTHUR Vol. 17 No. 2 1998

True Blue v Blue Sky Australian Content Standards in Doubt

Jacqueline Brosnan looks at the recent High Court decision involving the Australian Content Standard and Project Blue Sky.

In a controversial decision the High Court has found that the Australian Content Standard ("**Standard**") was unlawfully made because it breached Australia's obligations under the "Protocol on Trade In Services" ("**Protocol**") between Australia and New Zealand. Leaders of the Australian film and television industries and members of True Blue (a local interest group) were quick to respond to the decision calling on the Federal Government to amend the *Broadcasting Services Act* 1992 ("**BSA**") to ensure the validity of the Standard and the viability of the industry. The Australian Broadcasting Authority ("**ABA**") is currently reviewing the Standard and preparing a discussion paper about standards for Australian content.

The case centred on the operation of a number of key provisions in the BSA including sections 122 and 160. Section 122 imposes an obligation on the ABA to determine standards for commercial telecommunications broadcasting licensees in relation to the Australian content of programs. Section 160 requires the ABA to carry out its functions in accordance with the directions given by that section, including in a manner consistent with Australia's obligations under any agreement between Australia and a foreign country.

AUSTRALIAN CONTENT STANDARD

The Standard, determined by the ABA on 15 December 1995 sets an overall transmission quota and minimum quotas for specific types of programs. The transmission quota sets an overall annual minimum level of 50% Australian programming between 6.00 am and midnight (as of 1 January 1998 this increased to 55%). Annual quotas for minimum amounts of first release Australian programs in the categories of drama, documentaries and children's programs are also prescribed.

Project Blue Sky, a consortium of companies involved in the New Zealand film and television production industry, argued that the Standard was invalid as it gave television programs made by Australians preferential treatment over programs made by New Zealand nationals, in breach of Australia's obligations under the Protocol. The Protocol requires Australia to grant rights, and accord treatment to, New Zealanders and services provided by New Zealanders, no less favourable than those granted or accorded to Australians and services provided by Australians.

THE HIGH COURT DECISION

The majority High Court judgment held that:

- Section 122 must be read with section 160. Accordingly, the ABA must determine standards relating to the Australian content of programs only to the extent that those standards are consistent with the objects of the BSA, the regulatory policy described in section 4, any general policies of the Government notified by the Minister, any directions given by the Minister, and Australia's obligations under a convention or agreement with a foreign country.
- There was nothing in the objects of the BSA which required the ABA to give preferential treatment to Australian nationals over New Zealand nationals in determining standards to be observed by commercial television broadcasting licensees.
- The transmission quota was plainly in breach of Australia's obligations under the Protocol. New Zealand programs had less favourable access rights to the market for television programs than Australian programs. Under the quota Australian programs had an assured market of at least 50%

INSIDE THIS ISSUE

CONTENTS

of broadcasting time (rising to 55% in 1998) while New Zealand programs had to compete with all other programs, including Australian programs, for the balance of broadcasting time.

- The words "relate to" in section 122 are extremely wide. A Standard will relate to the Australian content of programs if it prohibits, regulates, promotes or protects the Australian content of television broadcasts. A Standard can relate to the Australian content of programs although it also regulates other matters. A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians, if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians. However, a Standard made under section 122 is not required to give preference to Australian programs nor does it require that such programs should be under Australian creative control.

Although the High Court held that the transmission quota was unlawful, it was not ruled invalid. The main reason for the finding that the transmission quota was not invalid was the public inconvenience which would result.

According to press reports, the ABA is currently reviewing the Standard and plans to consult with interested parties to develop a number of options for a new program standard which conforms with the High Court decision. The ABA has indicated that one option is to change from an "Australian - produced" program standard to an "Australian - subject matter" program standard. Under this requirement, to gain equal access to the Australian market, television programs (including those from New Zealand) must have Australian subject matter to come within the transmission quota. A discussion paper about standards for Australian content is expected to be released by the ABA around early July.

Jacqueline Brosnan is a lawyer at Blake Dawson Waldron, Sydney office.

STOP PRESS

1998 Communications Research Forum, 24-25 September, Old Parliament House, Canberra

The Communications Research Forum, organised by the Communications Research Unit of the Department of Communications and the Arts (formerly of the Bureau of Transport and Communications Economics) is Australia's premier annual conference on communications policy and research.

A feature of this year's event will be the inaugural award of a $1000 prize for the *Best Student Research Paper*.

For all of the latest information and details on how to register visit the interactive CRF website at www.dca.gov.au/crf or contact Adrian Walker at the BTCE on Tel: 02 6271 1000 Fax: 02 6274 6816 or Email: bseminar@email.dot.gov.au

The Blue Skies Decision and International Law

Extract from a paper presented by the Chairman of the ABA, Professor David Flint, presented a paper at a recent International Law Association conference about the High Court decision and its consequences.

In the "Blue Skies" case, the High Court found that the ABA's requirements for minimum Australian content on commercial TV were unlawful because they conflict with the *Closer Economic Relations* (CER) treaty with New Zealand. It would be useful to say a few words about the economic context before returning to the case and its consequences

THE ECONOMIC CONTEXT

It's worth pointing out that the High Court did not look at the fundamental economic context. It was after all a question of legal interpretation. But economically, it raises a far bigger issue than selling New Zealand TV programs in Australia.

The importance of the US entertainment industry is sometimes overlooked. The value of American entertainment exports is exceeded only by her aerospace exports. And three quarters of the world's television exports are American. This is because of her rich and large domestic market which permits her TV studios to have huge budgets, and to set up an effective worldwide distribution system. This is reinforced because US viewers don't seem to care much for foreign films or TV programs. So a few American firms enjoy the advantage of a highly concentrated market. And unlike France or Argentina, Australia, as an English speaking country, has no natural protection through language.

That said, why shouldn't Australian producers be left to compete with American programs? After all, isn't that what we expect from our manufacturers and our farmers?

The fact is that if an American shoe manufacturer unfairly attempts to sell shoes here at less than cost, Australian producers have a remedy. The American exporter is guilty of dumping.

So it is claimed that in the TV export business, the equivalent of dumping is the norm. Programs are routinely sold below the cost of production. But cost may be the wrong measure. Even in the American domestic market programs are frequently sold at less than cost. That is because selling films, or rather the intellectual property in films, is different from selling shoes. Only restricted rights to use the film are sold - say for a year, and only in a geographic area. In the US, drama typically costs US$1.2 million per hour, and is sold to US networks for US$800,000. A better way to measure dumping may be by reference to this domestic price. Now the best rating US programs sell here for something approaching AUS$30,000 per hour. Price depends on how much the market will pay - in one small Caribbean island US$80 to US $100! So even when Australian TV drama programs cost say one tenth of the US figure, they still cannot compete on price.

THE LAW

Now for the legal context. The making of a binding treaty is a matter for the Crown, i.e. the executive government. It does not require parliamentary approval, although as a matter of courtesy parliament is kept informed or even involved. The only way to give a treaty internal legal effect in Australia is by legislation incorporating the treaty.

Other countries, for example the United States, require parliamentary involvement in treaty making, so that ratification gives both external and internal effect. As a result the US has ratified a substantially lower number of treaties than Australia.

This is not to say that treaties have absolutely no internal effect in Australia. If the common law is unclear, the court may be inclined to find that solution consistent with international law, including treaty law. Three years ago in the *Teoh* case the High Court had astounded observers when it told officials that, before coming to a decision, they must have due regard to any relevant treaties ratified by Australia (there are about 900). Until then, the view was that treaties had no internal effect without legislation. After all, treaties are ratified by the Crown. Any parliamentary involvement, federal or state, is only a matter of courtesy.

In that case the Chief Justice, Sir Anthony Mason, and the present Governor General, Sir William Deane, stated that:

> *"Ratification is not to be dismissed as a merely platitudinous or ineffectual act ....rather (it) is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention ...."* (Mason C J and Deane J)

The legislators disagreed. The decision is being reversed by legislation.

So incorporation by legislation is necessary for a treaty to have any legal effect in Australia. Incorporation can be specific. It can also be done generally, as in s. 299 of the *Radiocommunications Act, 1992*. Alternatively, it can empower a Minister to declare a treaty obligation to be binding (eg. s.366 of the *Telecommunications Act, 1997*).

So we come to the *Broadcasting Services Act, 1992*. Among the objects of the legislation are these:-

> s.3(d) to ensure that Australians have effective control of the more influential broadcasting services; and
>
> (e) to promote the role of broadcasting services in developing and reflecting a sense of *Australian identity, character and cultural diversity;* and
>
> (g) to encourage providers of commercial and community broadcasting services to be responsive

to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance".

Section 122 specifically provides that the ABA must:-

determine standards that are to be observed by commercial television broadcasting licensees

These are to relate to programs for children; and the Australian content of programs (s.122).

THE AUSTRALIAN CONTENT STANDARD

Under this an *Australian Content Standard* was developed to take effect from 1 January 1996, replacing an earlier standard. Its principle requirement is that at least 55% of commercial television broadcasting between 6pm and midnight be Australian programs. There are also subquotas for children's programs and drama.

Clauses 5 and 7 define "an Australian program" as one that was "produced under the creative control of Australians who ensure an Australian perspective...."

The principle form of program allowable under the standard is one where Australians are primarily responsible. In addition the program must be produced or post produced in Australia, unless this is impractical.

So there is a clear mandate to require Australian programs. But tucked away towards the end of the Act in section 160 is a requirement that the ABA is to perform its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

Well how do you relate what seems to be an insignificant provision against the object of promoting the role of broadcasting in developing and reflecting a sense of Australian identity, character and diversity, and in mandating a local content standard?

Now the CER with New Zealand requires that each Member State shall grant to persons of the other Member State and services provided by them access rights and treatment in its market no less

favourable than those allowed to its own persons and services provided by them.

Whatever did the government and Parliament intend in 1992? In the Explanatory Memorandum, the Minister was quite explicit:

> *It requires the ABA to perform its functions in a manner consistent with various matters, including Australia's international obligations or agreements such as Closer Economic Relations with New Zealand.*

And the Minister wrote to the ABA on 2/12/92 expressing his concerns that the former standard may have been in breach of the CER.

THE CASE

Being dissatisfied with the Australian standard, New Zealand interests took the ABA to court. The trial judge agreed with them, but the full Federal Court found the ABA standard lawful:-

> *"Parliament has given the ABA two mutually inconsistent instructions. It has said, first, that the ABA is to provide for preferential treatment of Australian programs, but, second, that it is to do so even-handedly as between Australia and New Zealand."* (Wilcox & Finn JJ).

The High Court disagreed. And they were unanimous, except that the Chief Justice thought the standard illegal, and therefore of no effect, while the majority held it unlawful. This means the ABA must, by revision or replacement, ensure a lawful standard.

> *"With great respect to their Honors, the parliament has done no such thing. The parliament has not said that the ABA must give preferential treatment to Australian programs. It has said that the ABA must determine standards that "relate to.... the Australian content of programs". The words "relate to" are extremely wide. They require the existence of a connection or association.*
>
> *Nor is there anything in the act - including the combined effect of s. 160 and the trade agreement - which prevents the ABA from determining a standard relating to the Australian*

content of programs" (McHugh, Gummow, Kirby & Hayne JJ)

The High Court did express some sympathy with the ABA, pointing out that Australia has 900 treaties. Will there, for example, be a flow-on from the CER to the NARA treaty with Japan? Other treaties may be relevant, even the *Convention on the Rights of the Child*, which protects a child's right to freedom of expression.

Of course Parliament could now change s.160 (d). But it would probably have a major diplomatic battle on its hands. Ironically, one it would not have had if the legislation had been framed differently in 1992. Perhaps s. 160(d) could be limited to the CER. But that is a matter for Parliament.

A NEW STANDARD - THE OPTIONS

So the ABA must develop a new (or revised) standard. The ABA proposes to issue a Discussion Paper on which it will write submissions and hold consultations before a new or revised standard is issued.

One option, the most simple, is to extend the current standard to New Zealanders. Another is to have two quotas, one Australian and one New Zealand. For example, requiring 30% of every station's programs to be Australian, and 30% New Zealander. This would be most beneficial for the New Zealand industry. Would broadcasters and more importantly viewers want this?

Yet another is an "Australian look" test. The Court hinted at a resolution:

> *"...Australian content of programs in s.122 is a flexible expression that includes, inter alia, matter that reflects Australian identity, character and culture a program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians or if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians"*

Other tests could be based on expenditure, on whether a program is a first release, or on a mixture of various tests.

THE CULTURAL EXCEPTION

Is international trade in culture no different from say international trade in shoes or computers. Should the same rules apply?

There are those who say there is a difference. That culture goes to the hearts and souls of people. That it is too important not to be treated differently.

It is true that for a long time national cultures - at least from the coming of talking pictures - were protected from Hollywood. But let us not forget that that quaint essentially American town is the creation of mainly Jewish European immigrants who found themselves on the periphery of American culture.

In any event, technology has overcome the natural protection of language, and everywhere American cinema and TV programming seems triumphant. Three quarters of the world is TV reports are American. Next to aerospace, entertainment is her largest export industry.

As an essentially European civilisation, which shares many of the same values, and speaks the same language, Australia would seem to be more susceptible to US cultural imports than most.

Yet it has been France and Canada who have made the most of the running in proposing that cultural industries be excepted from developing international trade law.

In the Uruguay Round the US sought, without success, to have the protective *European Union 'Television sans frontieres' Directive* declared contrary to the provisions of the GATS. France sought, also without success, to have a cultural exception declared. Under the GATS member states themselves choose which industries ("sectors") they wish to include in their offers of national treatment. Therefore, those who want to exempt their cultural industries are in the stronger position.

Notwithstanding the US position in the GATS, the *US Canada Free Trade Agreement of 1989*, as well as NAFTA, exclude 'cultural industries' - no doubt due to Canadian insistence. The US administration can be expected to campaign against a cultural exemption in future negotiations.

The question of a cultural exemption was put on the agenda of the London based International Law Association the 68th conference of the International Law Association, held in Taipei, Republic of China, 24-30 May 1998. It recommended that its Cultural Heritage Committee prepare a "blueprint" for the future development of cultural heritage law, in particular by establishing what aspects need further development, in what way, and by whom; noting, for example, that one such area would involve a study of the "cultural exemption" from international economic agreements, which might produce a set of recommendations designed to advance consideration of the way states may promote their industries which are relevant to their cultural heritage consistent with their obligations under international law; and emphasising that this work proceed in consultation and cooperation with other International Law Association committees as appropriate.

THE FRENCH EXPERIENCE

But I should not leave you to conclude that all is rosy at the heart of cultural protection, France. In a blistering exposé timed to coincide with the Cannes Film Festival, *The European* of 18-24 May 1998 claimed that while EU annual subsidies for film exceed US$850 million... but that only half of the 700 EU films made get a cinema showing.

It claimed there was clear correlation between the size of the subsidy and the degree a French film will bomb at the box office. 85% of French film directors, it said, are over 50, and subsidies have not stopped a 50% decline in French cinema audiences.

Yet the official response in France and elsewhere in Europe is to demand even more subsidy and protection.

The European reported that actress Sophie Marceau gave this reason for going to work in Hollywood:

> *"French films follow a basic formula:*
>
> *Husband sleeps with Jeanne because Bernadette cuckolded him by sleeping with Christophe and in the end they all go off to a restaurant.*
>
> *How many times can you act in that kind of film?"*

As Paul Johnson argued recently (*Spectator*, 2 May 1998):

> *"No one has done more than the French, in the last half-century, to guard their culture from invasion, and they have spent more per capita on the arts than any other country on earth; but can anyone name an outstanding French novelist, poet, painter, composer, playwright or architect of today?"*

Professor David Flint is the Chairman of the Australian Broadcasting Authority.

The 'Not So Neat' Treaty Provision

John Corker examines the effect of section 160(d) of the *Broadcasting Services Act* in the light of the *Project Blue Sky* decision.

INTRODUCTION

One of the key messages that should be taken from the High Court's *Blue Sky* judgment is not only that great care needs to be taken by Australia when signing treaties[1] but also that great care should be taken when drafting the provisions that incorporate Australia's international obligations into domestic law. There are three quite different formulations for taking into account Australia's international obligations just within Australia's communications Acts, the *Broadcasting Services Act 1992* (**'the BSA'**), the *Telecommunications Act 1991* and the *Radiocommunications Act 1992*.

I have searched all the Commonwealth Consolidated Acts and have not found any provision which is as sweeping as s.160 (d) of the BSA in imposing on a government agency a direct requirement to comply with all of Australia's international obligations. Other Commonwealth Acts require the relevant government agency to simply 'have regard to' Australia's obligations[2] and specify the actual agreements which are to be had regard to[3], or give power to a Minister to make regulations[4] which allow specified international agreements to be incorporated into domestic law.

Section 160 (d) of the BSA requires the ABA:

> *when performing any of its functions, to perform them in a manner consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.*

In this way all Australia's obligations pursuant to these agreements are imposed directly on the ABA. This can be contrasted with the situation under the *Radiocommunications Act 1992* where the Australian Communications Authority (ACA) has to only have regard to international obligations when carrying out its functions.

To highlight the difficulty of the task faced by the ABA, the following passages from the High Court *Blue Sky* majority judgment are illustrative.

> *"Even those with experience in public international law sometimes find it difficult to ascertain the extent of Australia's obligations under agreements with other countries."*[5]

> *"While the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language and often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed."*[6]

However, it is not as if the ABA has been idle in trying to ascertain which of the 900 odd treaties and agreements to which Australia is a party have any direct bearing on its functions. Arguably there are a number. But ascertaining what that obligation might be and how the ABA should exercise its function in a manner consistent with that obligation can be complex.

When the ABA issued its planning priorities for new television and radio services in Australia in 1993, six agreements and conventions were cited as having been observed. On the planning and technical side, the provisions of such international agreements are relatively clear and can be observed.

However, on the content regulation side it is much more complex. For example, the often-quoted Article 19(2) of the *International Convention on Civil and Political Rights* (ICCPR) provides:

> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or* ***through any other media of his choice.*** *[Emphasis added].*

The ICCPR recognises that this right may be subject to domestic laws necessary for the respect of the rights or reputations of others, or for the protection of national security, public order, health or morals, but not otherwise.

QUESTIONS RAISED BY S160(D)

What then of the ABA's obligation in registering industry codes of practice or determining standards for 'promoting accuracy and fairness in news and current affairs programs'[7]? Should the ABA refuse to register codes of practice that don't specifically provide for rights of reply, rights of freedom of expression to persons who are the subjects of news and current affairs programs? Should the ABA make standards to require such avenues of freedom of expression so as to carry out its function of 'assisting broadcasting service providers to develop codes of practice' or 'to develop program standards relating to broadcasting in Australia' in a manner consistent with Australia's international obligations pursuant to Article 19 of the ICCPR[8]?

These are just some of the difficult questions that s.160(d) of the BSA raises and, I think one can confidently say, not questions that would have been within the contemplation of those who drafted the BSA in 1992 nor within the contemplation of Parliament or the Minister for Communications and the Arts at the time, Senator Bob Collins.

What was within the contemplation of the Minister and those who drafted the BSA was a desire to have the ABA comply with the *Closer Economic Relationship Trade in Services Protocol* with New Zealand in setting the *Australian Content Standard* for commercial television. The letter from the Minister to then chairman of the ABA, Mr Brian Johns, evidences this. Brennan J cited this letter in his judgment. The Minister had written:

> *"Having consulted with the Minister for Trade and Overseas Development, I am aware that Australia's present treatment of New Zealand produced*

programming in Australian Content Standard TPS14 may be in breach of Australia's Services Protocol obligations. I would hope that the ABA can quickly reconsider the Australian Content Standard."

The ABA argued in the Federal and High Courts that this intention had not been adequately translated to law. The Full Federal Court agreed but the High Court did not.

CONCLUSION

It is particularly appropriate that the regulation of broadcasting has regard to Australia's international obligations because broadcasting is a globalized industry. For example, for the ABA to have regard to the number of international agreements that address the use of satellites for international communication is entirely appropriate, but to be instructed to carry out a diverse range of functions in a manner consistent with 900 odd treaties is not.

A considerable period of time and effort has been invested over the past five years in determining a matter that could have been clearly spelt out in legislation. The Protocol to the CER could have been mentioned or a regulation power put in place which allowed treaties to be specified which the ABA had to either observe or have regard to. Then again, if it had been, the provision may not have made it through the Parliament because the real effect of the provision may have been clear. But this is entirely the point. Parliament should be able to clearly know the implications of laws that it considers passing. The implications of the effect of s.160 (d) of the BSA were not capable of being known in advance. Section 160 (d) of the BSA is a swingeing provision the implications of which are yet to be fully explored. It will continue to be a fertile ground for lawyers.

The High Court decision provides an opportunity for Government to amend s.160 (d) to bring it into line with the way Australia's international obligations are dealt with in other Commonwealth legislation. In future, it is hoped that our draftsmen and women, when incorporating Australia's international obligations into domestic legislation, do so in a more measured and specific way than was done by inserting s.160 (d) into the BSA.

1 Angela Bowne, Barrister, 'Treaties can transform local law', *AFR*, 1 May 1998, pp.30 and 31 and Professor David Flint, Chairman, Australian Broadcasting Authority, *AFR*, 1 May 1998, p.31 both make this point.

2 S.580 *Telecommunications Act 1997* requires ACA to have regard only to those agreements notified by the Minister. S.299 of the *Radiocommunications Act 1992* requires the ACA to have regard only to those agreements that relate to radio emission. S.70(2) of the *Nuclear Non Proliferation (Safeguards) Act 1987* requires a person exercising powers under the Act to have regard to specified agreements and indicates that decisions made inconsistent with Australia's obligations have no effect.

3 The *Civil Aviation Authority Act* is an Act that requires the CAA to act in a manner consistent with agreements but restricts these to any agreement relating to *the safety of air navigation.*

4 S.69 of the National Parks and Wildlife Conservation Act 1975 gives power to make regulations giving effect to a specified agreement.

5 High Court judgment, para. 98

6 Ibid. para. 96

7 S.123(2)(d) of the BSA - a matter for a code of practice to address, or a standard if a code is not operating to provide appropriate community safeguards.

8 S.158 (h) and (j), which set out the ABA functions in these areas.

John Corker is a legal officer at the Australian Broadcasting Authority.

First Impressions - Lessons From Chakravarti

How do ordinary people 'read' the media? How is meaning construed by the reasonable reader or viewer? Anne Flahvin considers some recent judicial pronouncements which offer an insight into how judges think this process works, and detects an increasing willingness to hold the media responsible for harm to reputation caused by the audience jumping to hasty conclusions.

In its attempt to tread a tightrope between protection of reputation and freedom of the press, the law of defamation has tended to imagine the ordinary person as a fair minded individual, unlikely to jump to conclusions without reading the whole of an article, and not inclined to conclude that the laying of criminal charges necessarily suggests a likelihood of guilt. Those more jaundiced observers of human nature might have concluded that this was less a reflection of reality than a recognition that a free and robust press must be given some latitude if it is not to be chilled unduly.

That recognition was reflected in two principles of defamation law which, in practice if not in theory, would seem to be under attack.

The first, which came under the spotlight in the High Court earlier this year in *Chakravarti v Advertiser Newspapers Ltd* (unreported, High Court 20 May 1998) is that the ordinary reader is taken to read material as a whole - not just a headline, for example - before forming a view about its meaning. The second principle is that a media report that charges have been laid does not, without more, give rise to an imputation of guilt. Ordinary readers or viewers are taken to eschew the 'where there is smoke there is fire' view of the world in favour of the presumption of innocence. To hold otherwise would, of course, severely restrict media reporting of the criminal justice system.

MATERIAL TAKEN AS A WHOLE

The principle, confirmed by the High Court in *Mirror Newspapers v World Hosts Pty Ltd* (1979) 141 CLR 632, that in assessing whether material carries a defamatory meaning it is taken to have been read, heard or listened to as a whole, is an illustration of the fiction on which defamation law is based. As with many other areas of the law, the law of defamation is to a large extent normative. Whether or not 'ordinary' people are likely to jump to conclusions on the barest glance at a headline, the law has operated on the assumption that they take a little more care than this. So while account is able to be taken of the likely impact of a sensational headline in forming a view

about what meaning is being conveyed, the better view has been that the reader must be taken to have read to the bitter end. The question then becomes whether taken as a whole any sting contained in the headline or first few paragraphs is sufficiently neutralised by the context when viewed as a whole.

This approach to assessing meaning is thought by some - Kirby J amongst them - to defy the reality of consumption of the media in the 1990's in which many readers, "including not a few judges", will fail to take in more than the headlines and photographs and in which channel surfing has been raised to an art form.

In *Chakravarti*, the plaintiff sued on the headline, a heading on the second page, a graphic and parts of an article. Gaudron and Gummow JJ, with whom Brennan CJ and McHugh agreed, held that the Advertiser was correct in its contention that even if, standing alone, the graphic conveyed a meaning defamatory of the plaintiff, the article must be read as a whole. Kirby J, on the other hand, declared that it should not be, and in fact was not, a principle of the common law - in Australia at least - that a publication must be read as a whole and that a headline or photograph if defamatory in isolation but not in context was incapable of grounding an action in defamation. The classic English statement of the principle that material must be read as a whole, *Chalmers v Payne*, was out of step with the modern age. *"It ignores the realities of the way in which ordinary people receive, and are intended to receive, communications of this kind"* according to Kirby J.

Kirby was also critical of the House of Lords decision in *Charleston v News Group Newspapers* [1995] 2 AC 65 in which the court declined to accept that it was legitimate to identify a group of readers who read only part of a publication and allow a plaintiff to sue for meanings conveyed in this way. In *Charleston,* the publication complained of was a photograph of a man and woman nearly naked with a headline: *Porn Shock for Neighbours Stars.* The photograph was a digitally altered composition of the heads of the plaintiffs - actors in the soapie Neighbours - attached to the naked bodies of somebody else. In deciding whether the material was capable of being defamatory the court held that it was impermissible to take into account the meaning which would have been apparent to a reader who had read the headline and seen the photograph but read no further.

In argument before the Court, McHugh J joined Kirby J in the charge against the defendant on this point - admitting *"I must be the most unreasonable reader in the community because 90 per cent of articles I read, I just look at the headlines and maybe the first paragraph and if it does not interest me I do not read any more"* - although he did not address the question in his joint judgment with Chief Justice Brennan. Having suggested during argument that if most people in the community read newspapers in the same superficial way he had admitted to himself, then *"newspapers have got to wear [the consequences]"* in the form of liability for headlines and graphics detached from their context. McHugh J, except for two reservations not relevant to this question, agreed with the judgment of Gaudron and Gummow JJ.

WHAT MEANING ARISES WHEN CHARGES ARE REPORTED?

The principle, established by the High Court in *Mirror Newspapers v Harrison* (1982) 149 CLR 293, that a report that charges have been laid does not, without more, give rise to an imputation of guilt is another illustration of the juggling act undertaken by the courts in respect of reputation and freedom of the press. While it would seem quite clear that many 'ordinary' readers and viewers *would* in fact conclude from a report that someone had been charged that they are probably guilty, it is equally clear that if effect were given to this by the courts the public interest in being informed about the workings of the criminal justice system would be severely undermined. The compromise reached by the court in *Harrison* was to hold that a report which does no more than state that an arrest has been made and charges laid is incapable of bearing an imputation of guilt, but that such an imputation could arise if the report contained material which suggested the charges were well founded.

The difficulty for the media is that while this *principle* remains good law, in applying it the NSW Court of Appeal - like Kirby in *Chakravarti* - would seem intent on extracting a price from the media for reporting which exceeds a sedate statement of the bare facts. The material complained of in *Harrison* - a report of charges laid against suspects in the bashing of Labor MP Peter Baldwin - included a picture of Mr Baldwin clearly worse-for-wear, described his suffering and outlined the detective work which had led to the arrests. Notwithstanding that the report was more than simply a 'bare statement of the charge', it was held to be incapable of giving rise to an imputation of guilt.

In *Rigby v John Fairfax Group Pty Ltd* (unreported, Supreme Court of NSW Court of Appeal 1996) the court considered whether a report in the *Sydney Morning Herald* that two school teachers had - after a lengthy police investigation - been charged with sexually assaulting students and suspended pending the hearing of the case against them, was capable of imputing guilt. The *principle* in Harrison was approved by the court, but journalists could be forgiven for thinking that in its *application* it has been rendered quite useless.

In *Rigby*, Kirby J indicated impatience with *"the complaint that this approach would unduly impede the reportage of matters of public interest, specifically in court proceedings of criminal cases." In many "civilised countries reports of arrest may be given but, until the accused is convicted, he or she is described only by initials."* Such societies, according to Kirby J, put a greater store than we do upon defending the presumption of innocence and confining trials to court-rooms. Kirby agreed with Priestly J that 'embellishments' in the *Herald* article before the court in *Rigby* - including the report that the allegations stretched back to 1983, that there had been a lengthy investigation by police and that the plaintiff had been transferred from a boys school to a girls school - were enough to take the report outside the bounds of the *Harrison* principle.

LESSONS FOR THE MEDIA?

In both *Rigby* and *Chakravarti*, Kirby J vents his distaste for the sensational excesses of the mass media. In *Rigby*, he suggests that a price should be extracted for reporting of charges which exceeds the most sedate statement of the bare facts. In *Chakravarti* he suggests that ordinary readers are doing anything but reading - looking at the pictures more like it. Should alarm bells be ringing in newsrooms?

Certainly they should be - and they are - ringing in relation to the Court of Appeal's decision in *Rigby* which has injected considerable uncertainty into the decision as to what is safe to publish in relation to the laying of charges. There might be those who think that this is no bad thing. But uncertainty about the limits of the law relating to prohibited

publications carries a cost in terms of freedom of the press.

As for the views expressed in *Chakravarti* about the way meaning is extracted from media reports, Kirby J's views should be - with respect - of great concern to the media. While his was only one voice among five, given the strong terms in which he doubted the correctness of what was thought to be a firmly entrenched principle, the failure of his brethren to elaborate on this point is to be regretted. It is difficult enough for the media to employ irony or satire and remain within the bounds of the law of defamation without being held responsible for defamatory meanings arising in the mind of a reader glancing over the shoulder of another at a headline or simply looking at the pictures.

Anne Flahvin is an Associate at Baker & McKenzie and teaches law part time.

E-commerce and Mankind's Last & Greatest Hope on Earth

Ira Magaziner, President Clinton's Special Advisor for policy development for the Internet outlines the issues facing e-commerce, the development of the Internet and the principles governments' should adopt to deal with them.

I would like to talk to you about a study that we released in the United States which documents the impact that information technology and electronic commerce are already beginning to have on our economy.

We have had quite a good economy in the United States these past couple of years, and what we have found is the building out of the Internet - which has gone from four million users to about a hundred million users - already accounts for about a third of the real growth of the US economy.

THE IT INDUSTRY

Information technology industries have gone from 4 to 8 percent of our economy in the past decade, even though prices in those industries have fallen dramatically. And when you look at just the direct contribution of these industries to our economic growth, they account for over a third of our real economic growth, not including any indirect effects.

IT industries are also creating significant jobs. We now have over seven million information technology related jobs in the United States. On average, those jobs are paying about $46,000 a year, compared to an average of only $28,000 a year for private sector jobs in the US economy, meaning the jobs being created are high wage jobs.

We are also finding now that 45 percent of all business equipment investment in the United States is in information technology, up from 3 percent just fifteen years ago.

THE GROWTH OF THE INTERNET ECONOMY

The development of the building out of the Internet has given new life to the information technology industries, and that is now giving our economy a significant boost. As the Internet goes from having a hundred million people to a billion people over the next decade, we think the importance of information technology industries in our economy is only going to accelerate.

In addition to the information technology industries themselves, we have this new phenomenon of electronic commerce which only began a couple years ago. It is just beginning to have an impact but the impact is dramatic. When we speak about electronic commerce, we mean a couple of things. The first is business-to-business use of electronic commerce. These are cases where companies' purchasing, supply team management, inventory, management, customer relations and logistics are made available on the Internet.

That piece, we now believe, will grow from $6 billion to $300 billion by the year 2002 just in the United States alone. I think the reason why there is so much disparity seen among projected growth figures for the Internet is the projections themselves become outmoded after three or four months. As we have observed over the past couple of years, they have to be adjusted upward because things are growing so quickly.

BUSINESS-BUSINESS

We think these business-to-business applications will grow to over $300 billion in the United States alone. Companies like General Electric that just went on to the Internet about a year ago already are doing about a billion dollars in business-to-business commerce. They're realizing significant productivity improvements and, therefore, driving the use of e-commerce throughout their corporations.

Not including sales to consumers, GE alone expects to do $5 billion of business on the Internet by the year 2000 in business-to-business commerce doing things like putting its purchasing online. You'll hear similar reports from companies like Cisco, Federal Express and IBM and they too are experiencing very dramatic growth rates. These growth rates are now spreading throughout the economy because the productivity improvements of business-to-business commerce are so great.

RETAIL OF GOODS VIA THE NET

The second area of electronic commerce - which has grown much more rapidly than any of us predicted - is the retailing of physical goods. That is where the sale is made on the Internet but the goods are then physically delivered to the buyer. I'm sure you're all aware of the stories about how the Internet has changed the way people buy books, automobiles, flowers, clothing and a whole range of other products.

Amazon.com, for example, went from selling $16 million in books its first year up to a $150 million company its second year. Its major competitors are now going online as well. By the year 2000, we

expect close to 20% of all books sold in the United States to be sold online. We're seeing similar growth across a whole range of other product areas.

DIGITAL DELIVERY

The third area of electronic commerce which is just beginning but will eventually be the largest area, is the digital delivery of products and services across the Internet, where the sale and the delivery is made on the Internet. We're seeing already this in the actual sale and delivery of software. Eventually it will spread to music, movies and video games.

We're seeing this type of e-commerce in other areas such as:

- financial services, where we expect over a billion dollars of insurance policies to be sold and delivered on the Internet;
- banking, where we expect about fifteen million Americans will be doing their retail banking online within a year or two;
- areas like professional business consulting, engineering consulting, educational services, medical diagnostic services, news services and the like,

all of which will be sold and delivered across the Internet.

MERCHANDISING

A final area has to do with the creation of a new series of businesses which are revolutionizing direct marketing and advertising. These are companies where affinity groups have come together and then created a good pool of customers for merchandising.

For example, when we released our strategy at the White House last summer, a representative from a company called "Parent Soup" was present. Parent Soup began as a discussion group of new parents who found themselves up at odd hours of the night and started talking with each other over the Internet. It formed into a business which is growing at over 300% a month and has brought together now almost a hundred thousand parents.

Now another business of merchandisers is interested in selling products to new parents going online. They pay for advertising and sell consulting services and advice to new parents who have questions about health care and other issues. Something similar is happening in the gardening industry between gardening businesses and people who like to grow flowers, as well as a variety of other industries. We think this new type of direct marketing business will also experience much growth.

Now the sum total of all this - the building out of the Internet, the information technology industries, the business-to-business e-commerce, the online retailing of physical goods, the development of digital delivery services and these new kinds of marketing businesses - could well drive the growth of the world economy for the next quarter-century if we can set the right framework for it to occur.

Because it will drive and affect all sectors of the whole economy, we do not think it is hyperbole to say that its impact will be as great as the Industrial Revolution.

In order to realize this potential, we believe certain issues must be addressed in order to facilitate the development of the Internet and we've identified nine of these key issues. There are also five principles that we think ought to be kept in mind as we go through these nine issues.

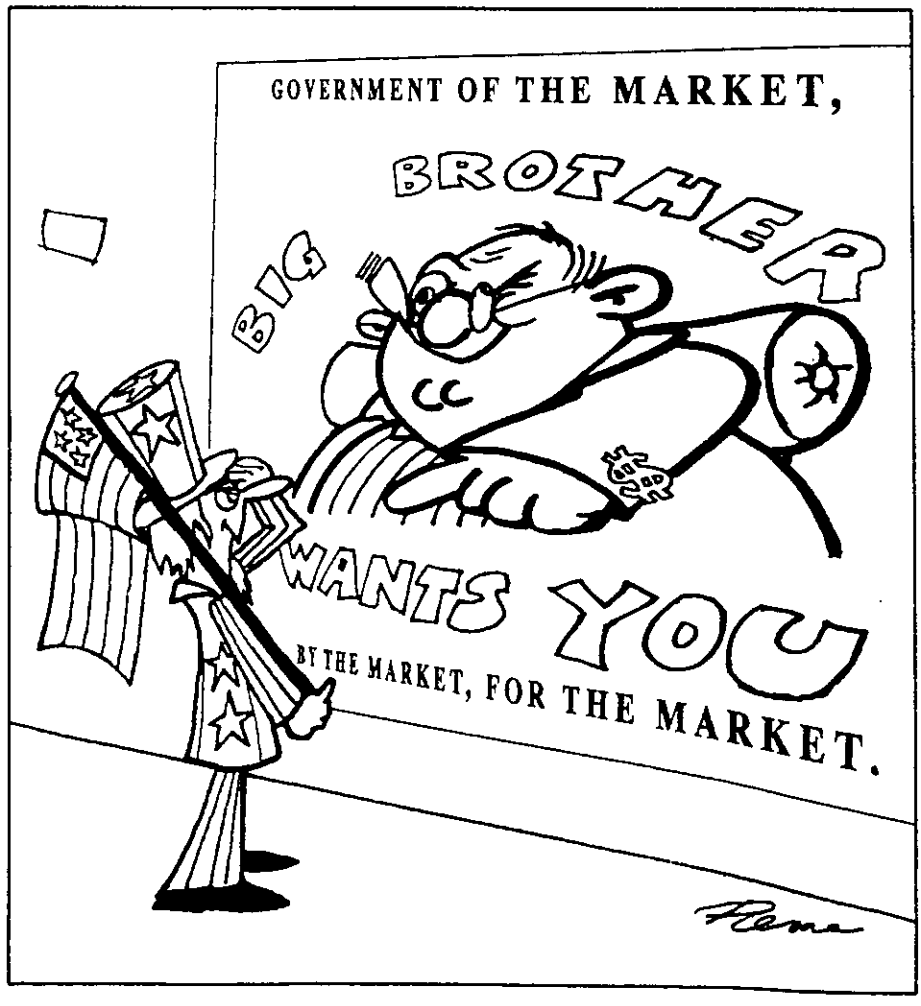
PRIVATE SECTOR LEADERSHIP

The first principle is the private sector should lead the growth of the Internet, not governments. The Internet should develop as a private sector-led medium and even where collective action is necessary, private collective action should be preferable to government regulation.

The reasoning behind this principle is not ideological. We're Democrats. We believe in government in the United States. But we believe that the Internet moves too quickly for governments. Governments inherently are too slow and too bureaucratic for the pace of the Internet. Therefore, private collective action can be more flexible and faster-moving than government regulation.

MARKET DRIVEN MEDIUM

As a second principle - and this is a particularly important one - we think this



should be a market-driven arena, not a regulated arena. There are two models that one could think about for the development of Internet commerce. The first model is what I would call the traditional telecommunications or broadcast model, under which virtually every country in the world created its telecommunications infrastructures either as government-owned or government-regulated industries.

The second model is a market-driven model where buyers and sellers are allowed to come together freely and do their business free of any government regulation or government interference. We believe the Internet should develop under that second model, as a market-driven arena, not a regulated one.

This is particularly important because telecommunications, broadcast television and the Internet are all going to converge in the next few years. You'll be accessing the Internet on your television set. You'll be getting broadcast television on the personal computer. You'll be making telephone calls from both. As all these services converge, they should do so in a market-driven environment, not a regulated environment. This means we will need to go through a very thorough deregulation of the telecommunications and broadcast industries.

The reasons why we initially regulated those industries no longer hold with the Internet. We regulated broadcast because we had limited spectrum to allocate. With this new Internet environment, we have almost unlimited bandwidth. There is no need for regulation. Competition will sort it out.

With respect to telecommunications, when the investments were originally made to build our telecommunications infrastructure, the size of the investment necessary relative to the size of telecommunication companies at the time was so large that we created regulated monopolies to help the infrastructure grow.

In the case of the Internet, we're going to have the greatest competition that free enterprise economies have ever seen among telecommunication companies, television cable companies, broadcast companies, consumer electronic companies, software companies, publishers, wireless companies and so on to build up the infrastructure of the Internet.

We don't need to regulate it.

In fact we should stand back and let that competition occur because it will be the most efficient way of getting what people want out of the system and the fastest way of getting the Internet into homes.

MINIMAL GOVERNMENT INTERVENTION

The third principle is that when governments do need to act, they should act in a minimal, predictable and transparent way, creating a simple legal environment and legislating only where necessary and in very precise ways.

The fourth principle is that whatever we do needs to take cognizance of the particular nature of this medium. For example, the Internet is decentralized by nature and, therefore, any governmental attempts to control it centrally will fail. They'll be impossible to implement. And life is too short to spend too much time doing what is impossible.

The nature of the medium is decentralized and thus, our policy mechanism must be decentralized. Similarly, the Internet is a medium where technology moves very rapidly, meaning any policy which ties itself to a particular technology will be outmoded before it is enacted. Therefore, we need to be sure that our policies are technology-neutral.

GLOBAL FRAMEWORK

The final principle is that this is the first marketplace that is being born global. The traditional means whereby industries grow within countries and then countries negotiate to make them compatible doesn't work with the Internet. From the very beginning, we need to have an international outlook. We need to have international agreements that set a common global framework for electronic commerce to develop.

Now these five principles - private sector leadership, a market-driven medium, minimalist government intervention, a situation where we respect the nature of the medium when we make policies - its decentralized nature - and the global nature of the medium - need to guide everything we do.

Now I'll run through quickly what we think are the important issues and our general disposition to them. I'll also give you details on one or two of them.

FREE FROM CUSTOMS & TAX

First, we believe that the Internet should be free of any customs duties. We've spent fifty years bringing down customs duties in the physical world. There's no reason to introduce them to this new world and, in addition, collecting online duties would be a bureaucratic nightmare. Because of this we are advocating at the World Trade Organization to make electronic transmissions free of any customs duties.

With regards to electronic commerce, we believe that any taxation should be neutral, and that there should be no discriminatory taxation against the Internet. No bit taxes, no Internet access taxes, no Internet telephony taxes. The application of existing revenue-based access should be done in a way that is simple, uniform and transparent.

LET THE MARKET SET STANDARDS

The second issue is electronic payment systems. We think electronic payment systems should be allowed to develop from the marketplace and that governments should not attempt to pre-regulate what goes on. Nobody knows what the marketplace is going to want or who's going to develop it and if we try to prematurely regulate, we'll only stifle that innovation.

Naturally, banking authorities need to monitor what's going on to ensure massive frauds are carried out, but that's very different than regulation. We don't think electronic banking should be regulated. Similarly on the third issue of technical standards, we think the marketplace, not governments, should set technical standards.

There were a number of governments in the world that were calling for an intergovernmental meeting to decide upon standards for the Internet, using the false argument that that would somehow accelerate the development of common standards and interoperability. That's the wrong course of action. First, governments would likely get it wrong in terms of what the right standards should be. Second, even if we got the standards right, by the time we reached an inter-governmental agreement, it would be too late because technology would make them obsolete.

So the best thing to do is let the market set standards, even if that means

sometimes having competing standards. The market will sort it out and work more efficiently in the long term.

NO NON-TARIFF TRADE BARRIERS

The fourth issue has to do with non-tariff trade barriers. These are cases where Internet service-providers are allowed to go into a country but only if they sign up with the Prime Minister's uncle's telecom company or something of that sort. We need to bring down all those barriers and truly create the Internet as a seamless global marketplace. The Internet itself technologically is a seamless marketplace and it should work that way without governments erecting all kinds of non-tariff trade barriers.

PRIVACY

The fifth issue concerns privacy. Privacy protection is crucial on the Internet if people are going to feel comfortable doing business there. And we also believe it should be a fundamental right of people to be able to protect their own privacy in this new electronic age. We do not wish for privacy to be violated as the electronic age emerges.

But having said that we care a lot about privacy protection does not mean that we think governments should come in and pass a thousand pages of regulations on privacy. We simply don't think it would work. We could pass the regulations and laws, but we could not enforce them. There are tens of thousands of Web sites forming everywhere around the world, and there's no way a government could police them, even with regulations. And in the process of trying to form and enforce those massive regulations, you would bog down the Internet in bureaucracy and slow down its development.

INDUSTRY CODES OF CONDUCT

So what's the alternative? The alternative we support is one we believe embodies the paradigm that I described earlier, where industry and consumer groups together develop codes of conduct based upon widely accepted OECD principles.

That is, a seller should notify a buyer of what's going to be done with any information that's collected. The buyer should then have the choice to opt out and say: "no, I don't want to do business with you if that's what you're going to do" or, "yes, it's okay with me if you use the information but only in this way and not in that way."

Essentially the buyer and seller are forming a contract about what can be done with the buyer's information and the buyer has control. The buyer is able to then update information or check it for accuracy. The codes of conduct would essentially specify just that and would then state, for example, that the seller must notify the buyer with readily identifiable seals on a Web page.

Web sites that agree to join this organization that forms the codes of conduct would then be allowed to display some kind of seal or symbol on their Web site to show their customers that they were abiding by the privacy principles. The code of conduct organization could then set up an enforcement mechanism to handle consumer complaints and survey the Internet to ensure that those sites displaying the seal are abiding by the principles.

Now this allows the government and industry and consumer groups to tell consumers: "The Internet is a free medium; you can do what you like on the Internet. We don't want to limit where you can go. But be careful. If you visit a site that does not have one of these symbols on it, your privacy may not be protected." This maintains the freedom of the Internet but it also empowers consumers to protect themselves if they want to. It's their choice, but it gives them the tools and empowerment to do it.

This creates an incentive for Web sites to join a privacy code organization and get a seal. If they don't, they will be limiting their marketplace because there will be many consumers who will not go to a site that does not have a seal.

So you've created the market mechanism to try to encourage privacy protection. You've created a decentralized private sector based enforcement mechanism. You've empowered consumers to protect themselves and protect their data, and you've done it in a way that doesn't set up cumbersome government regulations that will bog down the Internet.

NO GOVERNMENT CENSORSHIP

Now we think that this kind of paradigm also holds for content. We believe that government should not censor the Internet. Even if you do believe that government should censor the Internet, you're on the wrong side of the argument because government could not censor the Internet even if it wanted to. The Internet is a medium that is designed to defy such central government control.

We think a more effective method to protect children on the Internet is to empower parents to screen out content they don't want in their homes through the use of filtering devices and rating systems.

If you're the type of parent who's afraid of the Internet, who doesn't understand it, whose children understand it better than you, and you sign up with your Internet service-provider, you should have some boxes you can check that will filter various types of Internet content.

This could be done using software packages created by organizations whose value systems you feel comfortable with. For example, there may be a Christian Coalition package or a Children's Television Network package. Different children's advocacy groups may have packages. And those software packages will then be triggered and filter out content based on the given group's guidelines. Now they're not a hundred percent foolproof, but they can do a pretty good job and they're getting better.

If you're the kind of parent who mistakenly believes you understand the Internet better than your children, you can let everything through, and then in the browser or the search engine, you should have the ability to filter out content that you don't want. Which types of content are filtered and which are not should be your choice as a parent. The tools should exist to empower you to do that. Again, we think this will work more effectively than government censorship to meet the social goal.

INTELLECTUAL PROPERTY

The next issue has to do with intellectual property protection. A lot of what is going to be sold on the Internet is intellectual property and, therefore, we believe that copyrights, patents, and trademarks need to be protected on the Internet. International copyright protection treaties were recently negotiated in Geneva and we're urging their ratification by all nations because we believe that they will effectively protect copyright holders without unduly burdening the Internet.

Similarly, we think there needs to be agreements on patent protections of Internet-related patents. With regards to the reform of the domain name system, there needs to be respect for trademarks in domain names. We also think that the technical management of the Internet, which for historical reasons have partly resided in the US Government, should be privatized and managed by a private non-profit international corporation with an international board of directors.

We are taking steps now to try to move towards that privatization. The US Government is prepared to give up all the authority it now has over the management of the Internet, including management of the root service system, to this new private international non-profit body. We are seeking to do this in the next six-month period or as soon as possible after then.

LEGISLATIVE RECOGNITION OF ELECTRONIC BUSINESS

The eighth issue has to do with the *Uniform Commercial Code*. We believe it's important to form international agreements which recognize the conduct of business electronically, recognize electronic contracts and also recognize means for authentication and digital signatures. We believe this too should be market-driven, not government-driven, and that authentication and digital signature techniques should be able to be formed by private industry and recognized by governments for legal purposes.

We don't believe the government should get into the business of licensing authentication or digital signatures, or in any way setting rules that are too intrusive. We think these standards should be set by the marketplace. The buyer and the seller should choose the level of authentication they feel they need for a given transaction. Those levels of authentication may be offered by software companies, banks, accounting firms or notary firms, and the buyer and seller should be able to choose what they want, and then it should be recognized legally in contract.

And we're supporting processes around the world now to create a usable *Uniform Commercial Code* so that this can be a contract-based system.

ENCRYPTION

The final issue - the one that has most perplexed us and been the most difficult - concerns security and, in particular, the issue of encryption. High level encryption is necessary for transactions to be secure. In the United States, we have now liberalized our earlier stance on encryption, allowing any electronic commerce transaction and financial transaction to use any type of encryption, including 128-bit, one of the most sophisticated types of encryption. We also allow 128-bit encryption for authentication in digital signatures.

However, there is an ongoing controversy on the question of using high-level encryption in other types of purer communications, such as e-mail. We're still trying to work out the proper compromise between the needs of law enforcement and the needs of commerce.

RESOLVING ISSUES

Let me conclude my remarks by saying we are pursuing all these issues that I've run through on the international scene, having discussions and trying to reach agreements. As we approach these discussions, we in the United States don't believe by any means that we have all the answers. These issues are very complicated. The Internet is changing very rapidly. We need to resolve these issues but we need to resolve them in a flexible way. And we know we're going to have .2, .3, and .4 versions of our strategy as the marketplace and technology teach us about how things are evolving.

NEW PARADIGMS

We have a very exciting opportunity here. When I first received this assignment, I read some histories of the Industrial Revolution. It was very interesting because a number of countries at the time understood that there had to be new commercial, legal and economic paradigms in the Industrial Age compared to what there had been before. Some developed and embraced those new paradigms. Other countries tried to hold onto their old ways of doing things. And with a hundred percent correlation, those that embraced the new paradigms succeeded in the Industrial Age. Those that didn't fell backward. New countries who had not previously been so successful emerged as industrial leaders, and some countries who had been world leaders fell behind.

We believe we are in a similar period right now. Use of the Internet as a commercial medium is just a couple of years old. In the United States, we are not looking to dictate how this medium should develop, because we don't think we know enough to do that and we don't think it would be proper to do that even if we did know enough. Instead, we are looking to come together with those countries who are interested in grasping this future and, as equal partners, trying to architect the basic structures for this new era.

NOT FOR TRADE NEGOTIATION

And for those countries who don't want to, we're not interested in conducting this as a trade negotiation. If there is a country that wants to make its own standards, keeps its markets closed, keep up non-tariff barriers, require that everything be translated into its language, we're not going to try and convince them to do otherwise.

It will be unfortunate for its people, but we're not going to try to make this a trade negotiation. There are going to be a billion people on the Internet by the year 2005. If the people of a given country are not there, it will be their problem, not the world's problem.

I travelled to Australia because I know that there is a keen interest in this country to embrace this future. We know that the Internet is taking off in this country. I am here in Australia because we are interested in learning about how you view these issues, and we would like to work with you in helping create this new future.

If we can do this right, if we can set the right framework to allow this new digital age to really take off, it is going to be something that we can be proud of, something that our children will benefit from and our grandchildren will benefit from. And it is something in which I personally view as an exciting opportunity to participate.

Ira Magaziner is Special Advisor for policy development on On-line and e-commerce issues to President Clinton. This article is based on his paper presented to the e-commerce "Enabling Australia" Summit in Canberra on 16-17 April 1998.

"We Deliver" - E-commerce in Action with Australia Post

Linda Nicholls, the Chairman of Australia Post, describes the practical - and profitable - examples of e-commerce in action with Australia Post.

I don't think the real gap in e-commerce is between Australia and the rest of the world. I think it's between the potential of e-commerce and where the thinking of most Chief Executives is.

Now one of the really good things about being Chairman of Australia Post ("**Post**") is that I have the opportunity to work with a Chief Executive that gets it - that can really make a difference.

What I'd like to discuss is some of the things that we're doing at Post, with an emphasis on the ideas that you could use tomorrow and have them profitable for you this week.

In being Chairman of a very large company (Australia Post is the fifth most profitable company in Australia) I think making money matters. I have heard a lot about revenue; I have heard a bit about cost and I think it's time we talked about profits.

E-COMMERCE IS ABOUT BUSINESS STRATEGY

I don't think e-commerce is about IT. I think e-commerce is about business strategy. I think e-commerce is about identifying opportunities and going after them, the way a good Chief Executive, the way a good management team, the way a successful corporation does in any aspect of their business. So for me, the toughest decisions about e-commerce have nothing to do with which browser or which server. The toughest questions, I think, are how exactly are your customers going to find you? What's your business advantage?

Now those are questions that Chief Executives obviously have to answer if they're going to put together a decent business plan. They're questions that Boards of Directors ought to know their Corporation has the answer to if they're doing a job in corporate governance, and clearly those questions are ones where significance only escalates as the network world marches on.

Now I'm pleased to say that it was in the early 90's that Post saw that there were some competitive advantages available for us from e-commerce and the advantage that really hit us in the face were:

- extended functionality and convenience to our customers;
- the opportunity to make some of our business customers more profitable; and,
- the opportunity to make us more profitable.

There were two areas where we thought we could make some advances - one was trade and services and the other was business-to-business. I think that the role that Post plays today is helping businesses with e-commerce strategies that let you transition from where you are today to the exciting promise often discussed.

BRIDGING GAPS

I think that what Post is doing to help people make money is about bridging the gap, and when I talk about bridging, I'm talking about our delivering a couple of very specific benefits. One is bridging so that services are easy and useful for all customers, and the second is bridging in the sense of migrating existing activities from their real physical world to their virtual e-commerce world.

So, yeah, okay, so what, Linda. What do you really do? What's this idea that's going to make me money tomorrow if I'll only sign up, huh?

BILL PAYMENT

One example that I think is very strong at Post is what happened to us in the bill paying business. Now, bill paying (other than having you lick stamps and put them on envelopes and send cheques that we deliver through the mail) has not been a traditional business for us. But a few years ago, a number of you would be aware, we got into electronic bill paying through our outlets over the counter. We do about 130 million transactions a year with about 240 bills you can pay there.

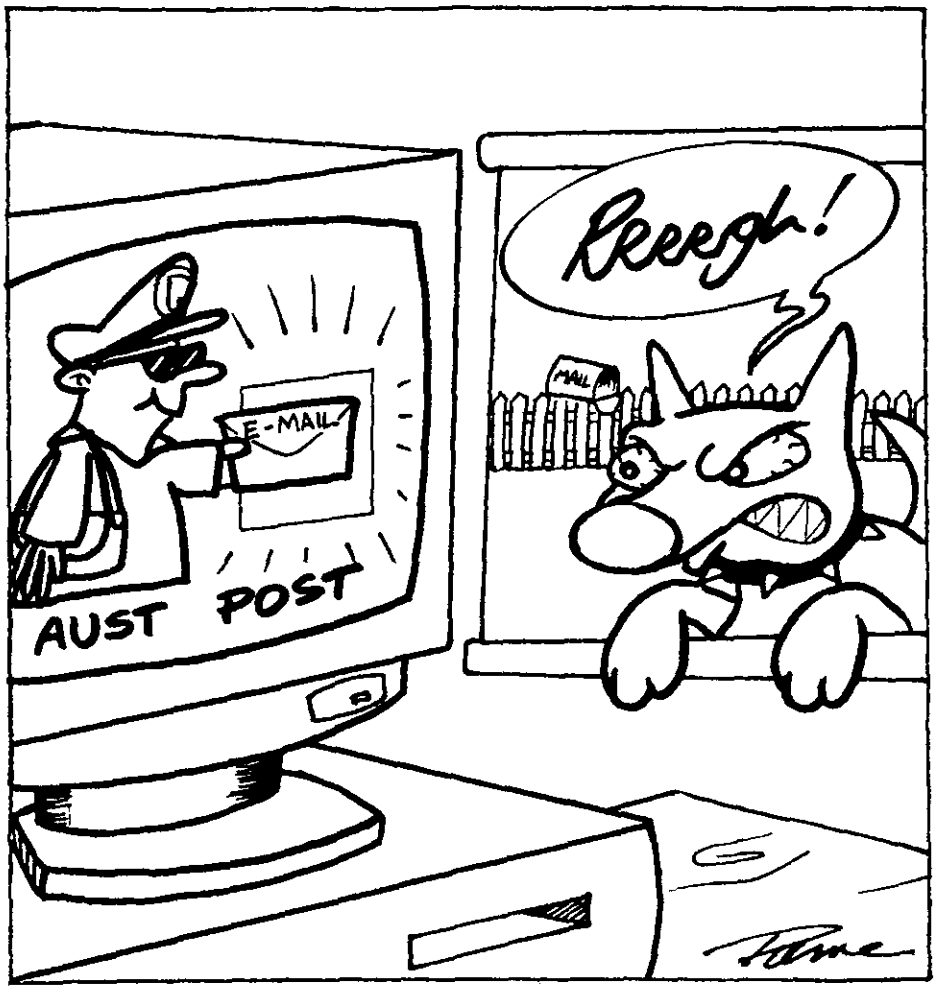
Now last year we moved to Telethon*, and in August it's on the Internet. A service that is in transition from something comfortable and conventional that customers understand, through to e-commerce.

POST'S E-COMMERCE CUSTOMERS

Now who are the customers for this and why do they care about it? Well, we've really got two sets of customers. One is the householders and small businesses who go in to Post Offices every day to pay bills, call us on the phone, and in August, use the Internet. They love the convenience, they love the functionality because they don't get it anywhere else. But the second group is business because electronic bill paying improves cash management, it gets the bills collected faster, it drives revenue to the bottom line, it delivers profits. I don't know about your customers but my customers like to be profitable. They like to know that I help them make more money.

ELECTRONIC DATA INTERCHANGE

The second service we're in is what we call EDI. EDI post is a service for electronic acceptance, preparation and printing of high volume mail. Now clearly this is a service for major mailers and many of you here today in small business would not be participating in this. But what constitutes major mail is, of course, a number that's getting smaller all of the time. Now today EDI post is available to make deliveries clearly by print and also by fax. Very soon we'll have delivery on the Internet. So as a major mailer, you don't have to worry what address your customer prefers - we deliver. It's a very interesting service.



ELECTRONIC BANKING

I hope some of you have used Gyro Post. There are over 2600 of our postal outlets where you can do electronic banking. There are ten financial institutions participating. What's interesting to me about Gyro Post is, firstly, the tremendous increase we've had in take-up and transaction through-put. We did 23 million transactions last year and this is quite a new service. But what's particularly interesting about Gyro Post is how it brings financial services to the bush. It brings financial services that were previously only available in Sydney and Melbourne and the capital cities into regional Australia and into rural and outback Australia.

RURAL AUSTRALIA

One of the things that interests me in electronic commerce is not just how you provide the service to geeks and nerds, executive road warriors - that's not my market. My market is all of Australia. We know that we have a number of customers, particularly those in rural Australia, and I apologise to Telstra, who don't have adequate phone services so that they can surf the Net from home. Many of them don't have enough electricity to plug in to keep their PC going. Why? Because they are generating electricity themselves. These are customers who are enjoying electronic commerce with Post.

TAX PAYMENT

I'm glad Michael Carmody's here. I know some of you wondering what's a tax man do, other than trying to collect revenue. Most people don't know that Post actually collects a very large portion of Australia's revenue. We collect about half of the total tax take in Australia - that was $53 billion last year - and if you're not yet using Tax Pack Express, which is our electronic lodgement service, I think you'd better get down to the Post Office.

PRIVACY

A strong theme through a number of our speakers was issues about security and trust and particularly the issue of privacy. At Post we take privacy very seriously. We know that privacy is something we have understood for a very long time. Whether you're posting love letters or your tax return, you're entrusting us with information you want kept very personal and very private and just between you and the addressee, and we've been doing that for generations. It was therefore natural that we took the issue of privacy in e-commerce very seriously, and that's what led us into developing the world's first certification service, Key Post. It uses digital signatures, public key cryptography, enables confidential and verified electronic messages.

I had a very pleasant Key Post experience this morning and that is that one of my larger customers, Alan Stockdale, unprompted said really nice things about Key Post. Now I don't know about your business, but in my business, when customers tell you the service is terrific, you know the service is terrific, so I'd like to thank Alan for that unprompted advertisement and for those of you who would like to know more about it, well, please talk to us.

E-COMMERCE GROWTHS

What's the outlook for e-commerce growth? I've only spoken about the things we're doing now. The motto of Post is "We Deliver". As you heard from FedEx, we deliver matters in the world of e-commerce. Why? Because you can teach a mouse to shop but nobody has taught the mouse to deliver. Logistics, warehousing - very big businesses. Businesses we've been in for a long time, businesses we're not just good at - we're the best at it.

We're not stopping our investment in new technology. We know that a significant part of our future is in e-commerce, but we're particularly interested in those aspects of e-commerce that are profitable for us right now and are profitable for you, our customers, right now.

So, in summary, what we're looking at doing is moving our own business and our customers through a transition from what we've been doing traditionally to what we know is the realisable potential of the e-commerce world.

Linda Nicholls is the Chairman of Australia Post. This article is based on her paper presented to the E-commerce "Enabling Australia" Summit in Canberra on 16-17 April 1998.

Fed Ex, The Net and the Virtual Global Warehouse

William J. Conley Jr. explains how Federal Express is using e-commerce to build the virtual global warehouse.

One thing is that I am pleased about is the fact that Federal Express ("**Fed Ex**") has been known as the airline of the Internet. We have learned many years ago to adopt and to work using new medium. We are a company known as being an early adopter in the marketplace.

Some of the points I will discuss - first of all, a little about Fed Ex, our experiences in using the Internet. The fact that we do use it. We started to use it first as a cost reduction mechanism, and secondly, it became a true opportunity for a new revenue stream, a new distribution channel to reach out and touch our customers.

I'm also going to talk about what I call the cycle of commerce (I'll later refer to it as the wheel of fortune) because that is exactly what e-commerce can do for you, here in Australia.

I'll talk about new channels of distribution and, last but not least, as always, I will show you some results that my attorneys will let me share with you, without compromising confidentiality.

FACTS ABOUT FED EX

A few facts about Fed Ex. One thing about Fed Ex, we keep growing, keep expanding. We have now over 140,000 employees, 620 aircraft flying worldwide to move our customers cargo and over 39,000 vehicles to do pick up and delivery. We do delivery today in over 212 countries, or about 96% of the world's GDP is now served directly by Fed Ex, with over 55 million daily transactions conducted electronically and over 650,000 customers are on-line with Fed Ex every day conducting business with us via the Internet of our Fed Ex private provider network.

Some other facts - of course, we do do over 3 million shipments per day around the world every day. Our clock starts every 24 hours, it's another 3 million plus shipments and we continue to grow.

Our revenues for 1997 were $11.5 billion and we will be closing our fiscal year here in May 31st this year, as we approach a $13 billion company in annual turnover, and in January 1998 we became a subsidiary of FTX Corporation.

We are known by most of you for our expertise, if you want to call it that, in supply chain leadership, supply chain management. We have our worldwide distribution centres for doing customer value-added services, we have our integrated global ground and air network that completely is integrated and works, to move customers' packages on their behest.

We serve all the countries that are physically possible to serve, with a few that we're still working on, and we are known as a quality leader. You cannot serve customers and provide a value-added service without having a quality momentum.

We were awarded the Malcolm Boldridge award by the United States in 1992 and we have since received worldwide certification. We're the only service company to receive worldwide certification to the ISO organisation.

PHILOSOPHY ON TECHNOLOGY

We are both a package company and a packet company (being bits, or bits of data information). We have consistently been recognised as a company out there on the leading edge, attempting to use technology to improve service to our customers. We don't just do it for the fun, we don't just do it to experiment. We invest a lot of money in R&D, with the total reason for pay-back, either to reduce costs or improve our revenue stream, and in the case of the Internet, we've been able to do both.

Our Chairman of Board said some time ago, very clearly, that the Internet was going to make it difficult for any person in the middle-man position in the future to maintain or stay in business.

We see that the Internet has the power, similar to what WallMart did in the retail sector, of virtually putting other people out of business, through information and supply chain management capabilities. The Internet provides the connectivity and Fed Ex, with its global network, provides the delivery capability to do that, and we are absolutely convinced that the Internet is going to revolutionise and change how we do business and how we conduct ourselves in business in the future, if not today.

One thing unique about the Internet, using Moore's law - the power of this medium continues to grow, for every time you add a point it grows exponentially. The very first hook-up on the Internet was like the very first telephone, or the very first fax machine. It had nominal value. Once you had the second phone, or the second fax machine, the value of your vehicle, the value of your communications medium grew.

The Internet is so powerful today, it's going to continue to grow, that you need to participate, to become hooked up, to become visible throughout the rest of the world.

WHY FED EX MOVED ONTO THE NET

Now a lot of people say "why does Fed Ex need to be the airline of the Internet?" First, it was an absolutely logical step for us to take. We had been doing business, we have a large proprietary communications network, largest on-line client server network in the world. And again, to move 55 million data transmissions every day, you need a powerful network, and we started out years ago, recognising to get closer to the customer, and to reduce our cost, we had to explore other avenues.

So ten years ago, we started giving customers computers for free, and they use that computer to generate transportation documents which make it easier so when our courier shows up. He just walks in, picks up the packages and leaves. So it's a productivity improvement.

There are now 150,000 computer placements in the world today, placed by Fed Ex that allow us to save time.

We have built the universal network of global transportation. You'll see our aircraft on every ramp around. We actually fly in to 325 airports around the world on a daily basis.

We have a ground network that hooks up with it and definitely the Net builds and gives us another information vehicle to communicate and get closer to our customers.

FED EX INTERACTIVE WEBSITE

So we have taken a leadership role in e-commerce. We believe that we had to, becoming a worldwide Web pioneer. Our Web page is interactive, you can do things with it. It's not a dead Website - it's a real live medium that allows you to do things and adds value to your life and adds value to your transactions with us as a company.

We've got over 5,000 IT professionals around the world that keep that running and we continue to work and deploy more and more assets to make it easier for our customers to do business with us.

Our Web page was launched in 1994. We have been doing business prior to that time through other mediums, fax/phone and whatever. We recognised in 1994 that we had to get into the Web page and we became one of the first people in our industry to launch the Web page. But we started simple. The first Web page was real easy; it coupled very simple functions that you could just order, pick up or delivery information.

EXPANSION TO OTHER LANGUAGES

Then we expanded it to a much more complex Web page and then we started going international. So today our Web page is in German, Spanish, soon to be Japanese, French. It's in multiple countries and it even has an Australian Web page and it speaks Australian, so it's a wonderful Web page.

So it allows you to reach out to your customers. If you want to know about Fed Ex worldwide, you can go to the worldwide Web page for Fed Ex, and from there you can tick whatever country you want to talk to, and you can click to your country, so that it will immediately link you to the French page, German page, Spanish page or whatever country you may be in, and if there's a specific language for that page, it also allows you to tune in and read in your local language as necessary.

So again, what are we doing? We're taking data and bringing it to our customers, and allowing them to use us and for us to share information with each other.

FED EX INTRANET

One of the interesting things that's happened as we developed the Web page, we've also developed besides the Internet, a very large intra-Net, internal company network, which allows us to share data. We have over 5,000 pages on our Web page. All of our corporate policies, our sales presentations. We have a learning lab so that you, as a customer, can go in and learn case studies about other customers that use. So we have built actually a learning centre within our US Web page and you can also access from other countries.

To view this has allowed us to lower our costs. We no longer distribute Policy and Procedure - those are now on the Web page. We have saved the distribution costs - huge, huge opportunities to save money.

WEB HELP PAGES

And then for those who are not quite as Web inclined, we've even built very simple pop-up pages, help pages, on our Web page, that you can come up and click, point, click - it pops-up and tells you what is the next step. So if you get lost, there's kind of a road map to get you back to where you need to go.

So we're again not only helping our customers but we're helping them help themselves to use technology.

RESULTS

And here's some of our results to date, to talk about using the Web. First of all, it's been a very steady growth. Once we launched it in '94, for the first several months, it just kept growing and more and more hits kept coming on board.

From about January '97 on, it slowed down to a little bit below 10% growth per month. Last month 8.6 million hits - 8.6 million people went shopping on our Web page. They wanted to find out what's on there.

Now, not all of those were phone calls. Not all those people were real buyers but potentially some of those people were going in there to find information about us who previously had to call us. So that was 8.6 million people who now could get instant information about our service, without having to place a phone call, and as a CEO or a COO you're saying, well, gee, that's 8.6 million phone calls you don't have to answer. You've just saved a whole bunch of cost.

TRACKING & TRACING

The second point is traces. Now in our business, I'm sorry, in the real world of transportation things tend not to always work perfectly. So you get a lot of what we call whismo's - where is my order - whismo calls - where is my order, what happened to it.

We had 2.1 million calls last month. The average phone call for a trace is 300 seconds. So with that 2.1 million traces that were done on-line, we eliminated the need for 630 million man seconds last month. So for those who want to take their calculators out, calculate how many people we saved by allowing the customers to get their own information and with this movement to self-help, as people want to help themselves, they want to find out themselves, we've saved that manpower.

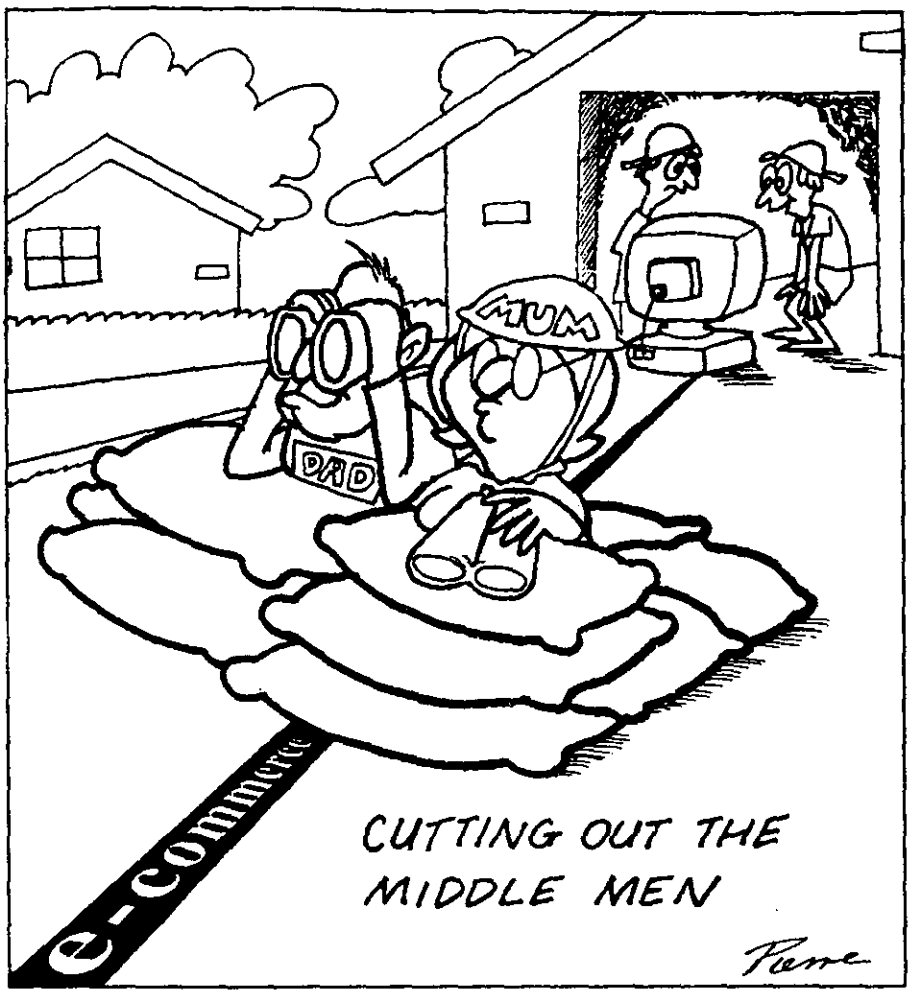
Now we've never laid off anybody in Federal Express. What this has allowed us to do is to grow.

Because we have to keep hiring. Every time you get more phone calls, you've got to hire more people but if you could get some of the customers to take off some of the routine, mundane activities, as you can with "Track and Trace", that's something else the employees can now do. Higher value-add selling or other type of activities to help your company, and that's exactly what we're trying to do.

Another thing we've done, of course, is allowed people to download software off our Web page. And on average, about 10,000 per month download software that allowed them to ship and use Fed Ex services.

CHANGING CUSTOMER RELATIONS

And it's definitely changing the way we do business with our customers. One of the things we're exploring is a "hot-link", that if you want to talk to somebody after you've gone through your own search of



the web page, you can hit the Hot-Link button and it immediately dials the phone for you and links you to a Fed Ex customer service person. So that's the direction in which we're taking it.

The Internet is altering and changing the way people are doing business, specifically in the marketing arena, it is changing the direction to mass advertising to direct marketing and getting down to a one on one virtual marketing capability, something that no-one else has been doing.

And you're seeing all mediums, in print, TV, media, radio - the real pay-off of the Internet is it stops interrupting commerce. The power of the Internet today is that:

- you can place an order;
- that order can then go to a fulfilment centre where the pick/pack/ships transmission is completed;
- tied to a documentation that shows its transportation, which then completes and goes to the proof of delivery form;
- it's delivered to the customer, with the electronic transmission coming back in to your purchasing department, closing out the purchase order;
- electronically triggering a transaction to send a bill payment to your bank;

all without having to touch anything, without a break at all in the movement in the information about your shipment.

HOTLINKS TO SUPPLIERS AND CUSTOMERS

Best practices on the Web are continuing to evolve, but the real key today on the Web is not necessarily what's on your page, but what your page is connected to. As you develop your Web pages, I strongly encourage you to make sure you're hot-linked to your other suppliers and your customers because that's the value of the Internet. It allows you to connect all the players through this very powerful medium.

PROMISE & EXPERIENCE

Just a few more thoughts on this before I get into how can you play in this game. First of all, it's definitely changing the brand, the line between the promise and the customer's experience.

Customers today want instant gratification, so the moment you order a book, you want the book there tomorrow, so what the Web is allowing you to do is close that gap between the buying moment and the receiving moment of the transaction.

The Internet, you've heard today, is a global medium. It's going to continue to expand. It levels the playing field. It makes small and new organisations look big and established. On the Web page, you don't know if this is a big company or a small company - you don't care. You want the quality of the transaction, not necessarily the size of the company.

NEW CHANNELS OF DISTRIBUTION

The Web is going to change the way we do distribution and it truly gives you a new channel. Don't look at it as a competing channel of distribution. Look at it as a new or alternate way to reach out and find new customers.

Best practices, as I said, are being established but the key thing about the Internet, it's not just technology that's making it successful. It's business practices, it's a medium that allows you to communicate with your customers more effectively than you've ever had a chance to do before.

GENERATING NEW REVENUE STREAMS

At Fed Ex, we also recognised it became an opportunity because of our internal drive to reduce costs we also found out we could actually generate additional revenue.

We have a service today called "Virtual Order" where we literally work with our customers to develop their Web page, to develop an electronic catalogue for them, and to process orders for them including fulfilment, with electronic medium over the Internet, so this is just one of the services we offer to our small and medium customers.

Large customers don't need that. What large customers need is visibility to everything that's moving in the supply chain and we developed a product called "Full View" to where from the moment the purchase order is placed by the purchasing department, from the vendor, it tracks it all the way through, processes the order all the way through including box content.

VIRTUAL WAREHOUSING

Now let me tell you an example why this started. It started with a company in Memphis, Tennessee called Auto Zone. Auto Zone had 300 auto parts stores and 3,000 vendors. They never knew from one day to the next what orders were going to what stores, what was in each order when it showed up. Now with Full View capabilities hooked up with the Internet they place an order, they can track an order from their headquarters in Memphis to all their vendors, to all their stores. They know exactly what's inside each box that's moving in that purchase order, and if necessary, can re-direct the order by communicating to Fed Ex to redirect that shipment for them. This allows them to virtually manage their business - and this is about the closest you're going to get to a virtual warehouse where you're going directly from the supplier, directly to the end destination, with no warehousing in between.

So it was a breakthrough that we're making, and we're very proud about that.

William J. Conley Jr. is Vice President, Logistics and e-commerce for the Asia-Pacific Region, Federal Express. This article is based on his paper presented to the E-commerce "Enabling Australia" Summit in Canberra on 16-17 April 1998.

The Government's Proposals for Copyright Reform and the Digital Agenda

David Rees of the Attorney-General's Department explains the latest proposals for reform of the *Copyright Act*.

INTRODUCTION

On 30 April 1998 the Attorney-General, the Hon Daryl Williams AM QC MP, and the Hon Senator Richard Alston, the Minister for Communications, the Information Economy and the Arts, announced the Government's decision to reform the *Copyright Act* to improve the protection of copyright material to meet the challenge posed by new technologies. These reforms, referred to as the 'Digital Agenda Copyright reforms', largely implement the proposals contained in the Discussion Paper, *Copyright Reform and the Digital Agenda*, which was released in July 1997. The Digital Agenda copyright reforms are an important part of fulfilling the Government's commitment to encouraging the growth of the new information economy.

Advances in communications technology, in particular, have overtaken many of the existing provisions in the *Copyright Act* which are technology specific. For example, the right to authorise or prohibit the broadcasting of copyright protected material is limited to "wireless telegraphy" to the public. This definition takes no account of developments such as the Internet or cable pay TV. Therefore, owners of copyright are not able to comprehensively control the use of their work on these systems.

The need for copyright reform has also been recognised internationally. In late 1996, two new World Intellectual Property Organisation (WIPO) treaties were agreed to, and the Digital Agenda reforms are in part a response to these treaties. The new treaties updated international copyright standards in relation to the on-line environment.

The Government has decided that the new rights in the *Copyright Act* will be "technology-neutral", so that new developments such as "web TV" or "Internet broadcasting" will not require repeated technology-specific changes to the Act.

KEY ELEMENTS

There are four key elements in the Digital Agenda copyright reforms, and they are as follows:

- a new right of communication to the public;
- a package of exceptions;
- two new enforcement remedies; and
- limitation on liability of carriers and ISPs.

COMMUNICATION RIGHT

The centrepiece of the Digital Agenda copyright reforms is a new technology-neutral right of communication to the public, which will replace and extend the existing broadcasting right, and which will also replace the limited cable diffusion right. This new right will remove the uncertainty surrounding the operation of the existing transmission-type rights in the new communications environment, as recently demonstrated by the various judgments in the *APRA v Telstra* litigation.

This new right of communication to the public will address current deficiencies in legislation by substantially improving copyright protection for books, computer software, art, film, sound recordings and broadcasts on the Internet and on cable pay TV.

EXTENSION OF EXCEPTIONS

At the same time, the reforms ensure that users of copyright material, including libraries and educational institutions, continue to have reasonable access to copyright material in the on-line environment. As far as possible, existing exceptions for libraries, archives and educational institutions have been extended to the on-line environment. The conditions regarding these exceptions will be similar to those applicable to hardcopy copyright materials. The exceptions include fair dealing for the purposes of research and study.

The Government has decided that there should be exceptions for certain temporary copies made in the course of the technical processes of transmission and browsing on the Internet.

The Government is concerned to replicate, as far as appropriate, the

balance between the rights of owners and the rights of users that exist in the print environment.

LIABILITY OF CARRIERS AND ISPS

The Government's decision on the Digital Agenda copyright reforms also addresses the concerns expressed by carriers and ISPs about liability for infringements of copyright on their facilities. The Government has decided that ISPs and telecommunications carriers will not be liable for copyright infringements on their customers' web sites by reason only of the fact that the infringement occurs on the facilities of the carrier or ISP. If, however, the carrier or ISP has had a greater role in regard to that infringement than just providing the physical facilities for the website, then the question of possible liability for authorisation of the infringement will be determined by the principles of authorisation, which will be inclusively set out in the new legislation.

ENFORCEMENT MEASURES

The Digital Agenda copyright reforms also include two new enforcement measures. First, the Government has agreed to introduce criminal sanctions and civil remedies against the abuse of technological copyright protection measures such as program locks and encryption. The technological measures remedies include banning commercial dealings in circumvention devices such as unauthorised decoders to receive pay TV signals. Secondly, the Government has decided to introduce new sanctions against those who tamper with rights management information (RMI), which is electronically attached to copies of copyright material. RMI usually includes details about the copyright owner and the terms and conditions of use. These two new enforcement measures are critical in defending new and existing rights against piracy, which is often made easier by new technology.

CLRC RECOMMENDATIONS

The Government has also agreed to adopt many of the recommendations contained in the Copyright Law Review Committee (CLRC) report, *Computer Software Protection*. The Government is still considering the CLRC recommendations on decompilation of computer programs.

Both the Digital Agenda Discussion Paper and the CLRC report received widespread industry approval and were the subject of extensive consultation with the community. Over 70 written submissions were received on the Discussion Paper proposals, and many community consultations were also held. Those consulted included bodies representing owners of copyright, such as the Australian Copyright Council and copyright collecting societies; users of copyright, such as libraries, universities and schools; telecommunications carriers such as Telstra and Optus; and Internet Service Providers, such as OzEmail. The wide ranging Digital Agenda reforms to the *Copyright Act* approved by the Government take full account of this consultation.

These important copyright reforms will be included in an exposure draft *Copyright Amendment Bill* that the Government hopes to release for public comment in the coming months.

David Rees is a Lawyer in the Intellectual Property Branch of the Attorney-General's Department.

"Convergence": Reforms for New Media Technologies or, just another Plug-in?

Tim Dwyer from the ABA examines the utility of the term "convergence" and the complex factors to be considered when formulating a regulatory response.

"With digitalisation all of the media becomes translatable into each other - computer bits migrate merrily - and they escape from their traditional means of transmission... if that's not revolution enough, with digitalisation the content becomes totally plastic - any message, sound, or image may be edited from anything into anything else... digital is a noise-free medium, and it can error-correct' comments Negroponte... 'I can see no reason for anyone to work in the analog domain anymore - sound, film, video. All transmission will be digital."[1]

One of the difficulties with explanations of this kind is that while the broad trend has proved to be true enough, when you monitor the hyperbole you notice that the changes described are far from revolutionary: they've actually emerged in an orderly, piecemeal fashion that typifies technical developments based on scientific research and development in modernity.

NETWORK INTELLIGENCE

What has occurred is that certain advances have facilitated developments such as 'network intelligence'. In this particular example it was incremental technical developments in software programming which allowed increases in 'intelligence' functionality. This is not to deny the force of convergent technologies, a contemporary reality which has emerged with a powerful momentum, and which continues to generate unabating investment in the communications and information sector of the economy.

A recent Green Paper released by the European Commission frames the convergence issue in terms of the new business and market phenomena which are being enabled by technical developments, and how these are affecting relations between service providers and audiences/users. The paper offers some useful new evidence on 'network convergence' (eg. XDSL, ISDN, ATM and IP), market developments in services, and in relation to mergers and alliances between different segments of the services provision value chain.[2]

ANOMALIES IN INTRODUCING TECHNOLOGIES

Yet even in practical industrial applications, convergent technologies of delivery are characterised by anomalies and inconsistencies. For example, the idea that the Integrated System Digital Networks ("**ISDN**") would emerge as the main wireline delivery system within a multi-network society, has now been called into question. As one commentator argued:

> *"By the end of the 1980s the ISDN was a fractured concept. Competing networks have come into existence: cable television and satellite networks, dedicated LANs, competitive microwave and fibre-optic networks all undermine the scope for an integrated network. Far from becoming more integrated, networks have become more differentiated: packet networks, directory inquiry networks, mobile and switched circuit networks have evolved separately. The reality of sunk investment in separate networks has eroded confidence in the idea of the ISDN as a universal public network."*[3]

This observation, made almost ten years ago, remains valid: ISDN is a partial network infrastructure that teleco's continue to roll-out in selected market segments, and which is threatened by other network protocols.[4]

At a more basic technical level there are gaps and inconsistencies which point to alternatives to digital delivery mechanisms. Older analogue techniques continue to have their virtues for specific applications such as cable television delivery systems. Australia's Foxtel and Optus subscription pay television broadcasters transmit their signals over analogue systems. It will be interesting to see whether the introduction of Digital Terrestrial Television Broadcasting ("**DTTB**"), mandated to commence from 1 January 2001, forces the introduction of a common set-top box decoder unit across subscription and free-to-air television services.[5] This will become a critical test of the digital techno-orthodoxy in terms of the openness and interoperability of the different systems for the benefit of audiences.

CONVERGENCE: THE OUTCOME OF A RANGE OF FACTORS

Not shying away from these difficult technical issues, the then Australian Broadcasting Tribunal ("**ABT**") recommended in the early 1980s that the *Broadcasting Act* 1942 include a clear statement of system objectives and, the need for a single communications act to cope with converging technologies. As the years have passed the trend (and indeed pressures) towards convergences have steadily increased. However, it's important to realise that these trends towards convergence are a multi-dimensioned movement which is not confined simply to technical advances as many insist. There's been a great deal of cliched thinking about this thing we call convergence, which has now become part of the commonsense way of viewing technical developments in communications media: as if technology was somehow independent of a range of economic, political and cultural factors.

DISCRETE PROCESS

When discussing the kinds of developments we conveniently lump together under the convergence rubric, its worth remembering that it can (and does) refer to a number of discrete activities and processes. It can mean the tendency to similarity: in technology itself - for example, in reception devices like the PC or the TV; in the market, where there is a redefining of industry structures, services and products; in the restructuring of institutional arrangements; and, very importantly, in policy rhetorics themselves.

CARRIAGE & CONTENT

A major instance of the coming together of formerly distinct activities has occurred between carriage and content: new transactional services are breaking down the meaningfulness of this infrastructure versus program provision distinction. This is one of the central assertions of the *Telecommunications Act* 1997 ("**TA**"), recognising that earlier legal distinctions between telecommunications carriers and services providers have been greatly diminished. For the first time in telecommunications laws providers of content services are specifically catered for: a content service is a broadcast service, an on-line service or any other service specified by the Minister (see 15 TA).

CONSUMER ACTIVITIES

And, in a cultural sense, consumer activities are also converging: nowadays you can virtual bank or shop using the PC in the study or the WebTV in the living room. Technologies used in the past to carry personal communications are now carrying 'mass' communications. Or, to put this in a slightly different way, the earlier bifurcated understanding of point-to-point and point-to-multipoint communications media has assumed a more complex set of meanings. From a marketing perspective, this is sometimes framed in terms of access to the consumer who is likely to want to seamlessly switch between niche and mass categories in search of a postmodern identity. Equally, interactive computer mediated services and virtual private networks have for sometime whiteanted such distinctions.

CHANGES IN FRAMEWORKS

Intimately connected with these service delivery and application transformations (brought about by shifting political, economic, cultural and technical realities) are changes in the institutional and legal frameworks seeking to control these developments. Jock Given, in the context of an analysis of the introduction of DTTB to Australia, has noted the need to draw a distinction between the 'technical and rhetorical elements' in the digital bitstream 'common currency'. Further, quite rightly, he encourages some caution when it comes to the political rhetoric about 'technological neutrality':

> *"Governments which lectured on the necessity for unfettered markets and 'technological neutrality' (thinking about media and communications in terms of the services, or content, they offer rather than the means by which they deliver it) nevertheless mandated a digital transmission system for satellite pay TV in Australia, promised the shut-down of the analogue 'AMPS' mobile telephony system to ensure the development of digital GSM networks, and required Telstra to make 'digital data capability' available to 96% of Australians by 1998."*[6]

In Australia, the practical difficulties presented by convergence trends in electronic communications media has been very much a product of the slow accretion of the disparate laws governing each sector. At the time of their drafting these separate regulatory regimes for

broadcasting, telecommunications and radiocommunications were quite satisfactory to meet the communications objectives of the day. However, with the advance of information technologies and changing political, economic and cultural factors, these context-bound regimes have inevitably strained under the pressure of time.

PROBLEMS FOR REGULATORS

The obvious question which arises for regulators is: are there any viable alternative models of reform which seek to construct 'future-proof' legislative frameworks, other than the usual reactive pattern of layering amendment upon amendment? Information technologies in the broad, and electronic communications media in particular are, inevitably, sitting ducks when it comes to making assessments about the adequacy of legal frameworks which seek to balance the public interest against a variety of other industrial interests. The challenge will always be to lessen the impact of current assumptions (be they technical, economic or political) and being prepared to make a leap of faith regarding the wider long term social benefits enabled by more enduring principles.

Some commentators have argued that a key aim must be to make it easier to get into the market and to move towards lighter obligations applied in a consistent manner across the converged environment. They are therefore encouraged by instances in the computing, Internet and on-line publishing industries, where a degree of self-regulation, for example, in relation to harmful or illegal content on the Internet, has supplemented the application of general laws, such as competition or consumer protection rules applying across a whole range of economic activity. But, notwithstanding what are arguably positive developments, self-regulation is not without risks in light of the possibility of international inconsistency, in an era of increasing globalisation with international trade agreements.

THE VALUE OF THE TERM

Nevertheless, convergence remains a useful handle to describe a logic which is driving legislative change across what have in the past been regarded as fairly discrete electronic communications media sectors. However, there are other important political, economic, cultural and technical factors and rationales which are also contributing to these transformations. The continuing international reality of the Internet and other communications media services will also impact on regulatory approaches to the enforcement of, for example, licensing. These call into question the exact role of national licensing activities carried out either within a nation state or where services are delivered by region-wide platforms such as satellite. Similarly, the prospect of globally-networked, broadband satellites whose traffic includes high-speed, high volume Internet delivery further complicates future rules governing 'positive' regulations for diversity in ownership and control, Australian content and programming for children.

1 Brand, S. The Media Lab: Inventing the Future at MIT. London and New York, Penguin, 1987, p. 18-19. This book begins with the memorable dedication: 'Dedicated to the drafters and defenders of the First Amendment to the U.S. Constitution: *Congress shall make no law... abridging the freedom of speech or of the press.* Elegant code by witty programmers'.

2 *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation*. Commission of the European Communities. Brussels, December, 1997. See also, *Webcasting and Convergence: Policy Implications*. OECD, DSTI/ICCP/TISP(97)6, December, 1997.

3 Mulgan, G. *Communications and Control: Networks and the New Economics of Communications*. London, Polity, 1991 p. 105.

4 See, for example, an interview between Liz Fell and Ron Spithill, MD, Alcatel Australia Ltd. Alcatel works with Telstra to install ISDN network facilities and services. *Australian Communications*. May 1998, p. 48.

5 The Government announced this by way of a Media Release 'Digital - A New Era in Television Broadcasting' dated 24 March 1998. The Government intends to introduce amendments to the *Broadcasting Service Act*, 1992 as soon as practicable.

6 Given, J. 'Being Digital: Australia's Television Choice', Media and Arts Law Review, Vol. 3 March 1998. p.40-41.

Tim Dwyer is with the policy and content regulation branch of the Australian Broadcasting Authority.

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

Contributions and Comments

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

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

Andrew Lambert
c/- Blake Dawson Waldron
Level 37 Grosvenor Place
225 George Street
SYDNEY NSW 2000
Tel: +612 9258 6390
Fax: +612 9258 6999
Email:
andrew.lambert@bdw.com.au

OR

Jason Macarthur
c/- Tress Cocks & Maddox
Level 20, 135 King Street
SYDNEY NSW 2000
Tel: +612 9228 9276
Fax: +612 9221 4988
Email:
jecm@tcm.com.au

Communications and Media Law Association

The Communications and Media Law Association (CAMLA) brings together a wide range of people interested in law and policy relating to communications and the media. CAMLA includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CAMLA members include:

- defamation
- contempt
- broadcasting
- privacy
- copyright
- censorship
- advertising
- film law
- information technology
- telecommunications
- freedom of information
- the Internet & on-line services

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

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

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

CAMLA Website

Visit the CAMLA website at www.gtlaw.com.au/camla for information about CAMLA, CAMLA seminars and events, competitions and the Communications Law Bulletin.

To: **The Secretary, CAMLA, Box 545, Glebe, NSW 2037**
Tel/Fax: +61 2 9660 1645

Name: .....

Address: .....

Telephone: ..... Fax: ..... DX: .....

Principal areas of interest: .....

.....

I hereby apply for the category of membership ticked below, which includes a Communications Law Bulletin subscription, and enclose a cheque in favour of CAMLA for the annual fee indicated:

- Ordinary membership $95.00 (includes subscription to CLB)
- Corporate membership $425.00 (list names of individuals, maximum of 5)
- Student membership $35.00 (please provide photocopy of student card - full time undergraduate students only)
- Subscription without membership $95.00 (library subscribers may obtain extra copies for $10.00 each)

Signature .....