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The Role of the Media in a Time of Crisis

Vincent Ho, the winner of CAMLA's 2001 Essay Competition, provides a timely examination of the conflict between the media's responsibility to ensure the public's right to know and their moral obligations to those they could endanger.

"Of all the foundations of a free democratic society, that most basic – the freedom to know, to be informed – has guaranteed that such knowledge and such information can be fashioned by the fanatic through the conduit of the media eye. To close that eye would erode a fundamental right, would close an open society. Yet not to do so would assure future massacres, further terrorist-events with little hope of audience saturation".[1]

J. Bowyer Bell

THE DILEMMA

The above quote captures the essence of the terrorism dilemma facing the media. It is well recognised that a degree of symbiosis exists between the media and the perpetrators of terror. The news competition and sensationalism that characterise Western media lend themselves to exploitation by terrorists. These features enable terrorists to use the free media as a platform for their propaganda and recruitment. Modern terrorists have learned to cunningly exploit the media's own *modus operandi* to draw attention to their causes. In return, the actions of terrorists expose media stations and newspapers to millions of viewers and boosts ratings sky high.

To illustrate this, the attacks on the World Trade Centre on September 11, 2001 were committed on a scale unparalleled in the history of modern terrorism. The terrorist acts were perpetrated in a way that would maximise television coverage, with the graphic images broadcast live to millions of appalled viewers all around the world. Major television channels had no option but to broadcast what was happening live, as the events taking place were far too significant to delay. No other terrorist incident in modern history has so captivated and at the same time horrified so many people.

The access to the media as a result of the terrorist attacks was utter and complete. Instantly, Osama Bin Laden became a recognised household name, his exposure almost as great in the United States as that of the President. Throughout parts of the world he has been venerated as a hero and his Al-Qaeda movement has enjoyed new found legitimacy in the hearts and minds of many who harbour a deep resentment of the United States. Intelligence officials warned members of the United States Congress in early October that 'there is a high probability' of a future attack.[2] Sure enough, another terrorist attack to gain the media's attention was not long in coming and this time it was aimed by unknown parties at the media itself.

The anthrax attacks deadly as they were, represented a most efficacious means of utilising the media vehicle to amplify fear into a national phenomenon. There are good grounds to presume that any terrorist action initiated in the future will be duly reported by the mainstream media, and via this conduit, the significance and status of the perpetrators greatly magnified.

Muslims the world over have found themselves the victims of attacks in obvious racial hate crimes. In the United

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States a wave of fear has spread throughout the Islamic community, as cries for vengeance turn to persecution. Among the most gut-wrenching attacks include the murder of a Pakistani Muslim store owner in Memphis, the murder of a Sikh man in Arizona for appearing Muslim and the stoning of a pregnant Muslim woman in Rhode Island.[3] Many thousands more Muslims in the United States have felt the hand of intimidation. Here in Australia, an Islamic school in Perth has had its windows smashed, Muslim women and children have been vilified and several mosques defaced.[4]

The media cannot be held responsible for the repression and victimisation of Muslims. However, just as Asian Australians were vilified after Pauline Hanson made her views known through the media mouthpiece, it should be recognised that there exist barbarous members of our society actively seeking scapegoats, upon whom they unleash their frustrations and rage. For these persons, the media is the principle source of information upon which they feed.

Media then, have the difficult task of weighing up their moral obligations to those they could endanger against their inherent responsibility to ensure the public's right to know.

Freedom of expression is a fundamental tenet of modern democratic principles. There is a strong moral, ethical and philosophical imperative to allow the emergence and growth of ideas without inhibition or restraint. Freedom of expression importantly is not just the domain of the individual. In modern mass society, Vincent Blasi argues that the mass media have the power and influence over the opinion process to properly monitor government; the individual no longer does.[5] Therefore, the media are a necessary and appropriate countervailing force to government, essential for the perpetuation of any free democracy.

The imperative for freedom of expression however is put into question when the issue of a terrorist crisis comes into play, particularly where hostages are involved. The issue then becomes one of proportionality not absolutes. It is justified to say that media should not interfere in a process that may lead to jeopardising the safety of hostages, and indeed the media has as important a responsibility to the safety of the hostage as it does to the public's right to know.

Media interference in the Lufthansa hijacking in 1977 and the Hanafi Muslim takeover in Washington D.C. earlier on in the same year was strongly criticised for being potentially dangerous and in the Lufthansa case, media coverage contributed directly to the death of a hostage.[6]

There is also an element of accountability to the nation when reporting terrorist incidents. The reporting of terrorist incidents may generate contagion effects,[7] for example with anthrax hoaxes in America. There is the opportunity for vilification to be wreaked upon innocent victims. And of course, as noted, there is the greater issue of the media's symbiotic relationship with terrorists, increasing the likelihood of further terrorism against the state.

THE LEGISLATIVE AND JUDICIAL RESPONSE

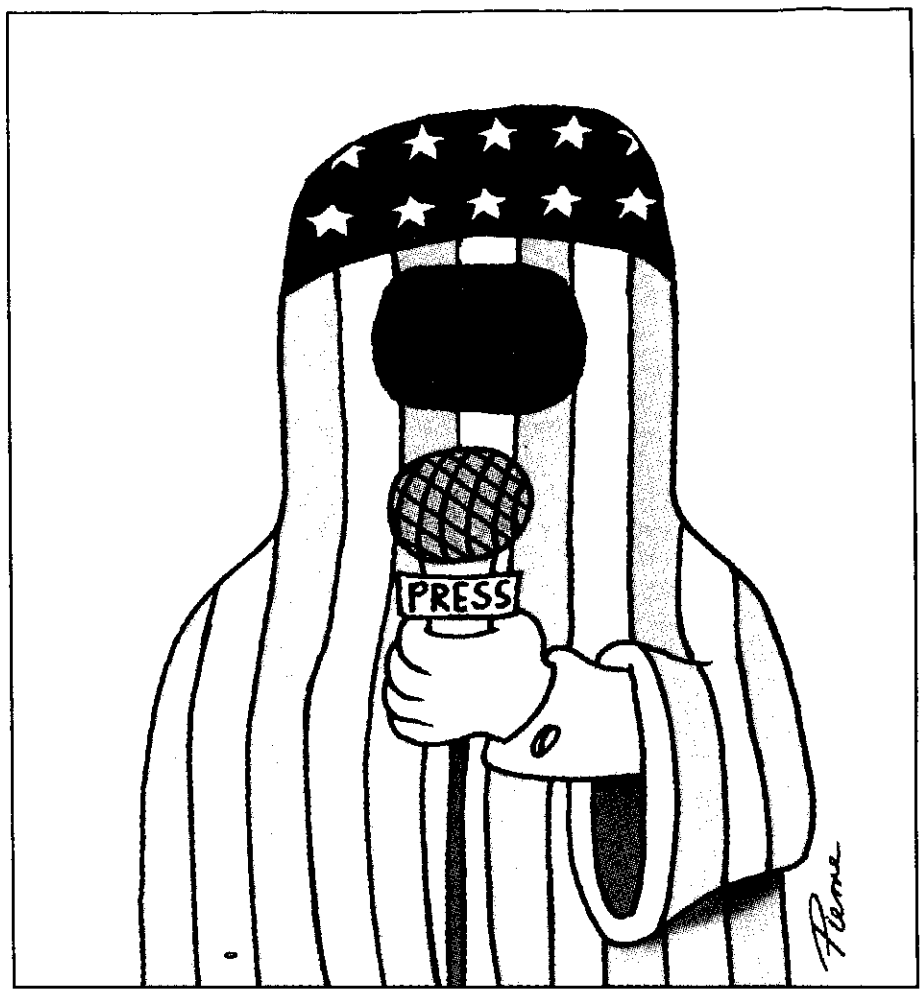
For these reasons, codes have been drawn up to try and find a compromise between the media's desire and duty to exercise

free speech and the safety of the people. In Australia, a system of voluntary restraint by media organisations has been adopted rather than outright censorship. Justice Hope's *Protective Security Review* commissioned in 1979 stressed the need for media cooperation in terrorist crises.[8] However, the review also recommended the use of police powers against media organisations that do not cooperate with government and security guidelines. Although this may be seen as an infringement of civil liberties, the reasons for this are at least understandable if the action is taken in the best interests of citizens. Where hostages are involved there is an *a priori* interest in their well-being and safety, one that can justifiably override the national interest for immediate news coverage. Similar restraints would be called upon the media in times of national security or if the rights and liberties of citizens were put into true jeopardy.

More disturbing are issues where national security interests are not clear-cut and the government has raised insufficient grounds to explain the case for the endangerment of citizens. When a situation arises where the need for information is more urgent and compelling than the case for endangerment of citizens and the nation, the media can appeal to the judicial system. However, as courts do not like to probe government motive, the result is often an enforced denial of information to the public.[9]

There are legal constraints on what the media can report on terrorism. In the United States, section 793 (d) and (e) and section 798 of the *Espionage Act*[10] allow wide ranging powers for prosecution for the possession and publication of unauthorised national materials when interpreted in full technical sense; applying equally to journalists and members of the public. The successful prosecution of Samuel Morison, a civilian intelligence analyst employed by the United States navy, for passing photos to a private weekly defence magazine, exemplifies the vulnerability media and individuals face as a result of legislation's nebulous definition of national security.[11]

The United States District Court rejected a defence argument in *United States vs. Morison* that the *Espionage Act* applied only to the secret transmission of information to foreign powers.[12] The court held that 'the danger to the United States is as great when this information is released to the press as it is when it is released to the agent of a foreign government'. The court deemed that Morison's motive, whether to injure the security of the United States or whether to inform the public, was irrelevant to a finding of guilty under section 793 (d) and (e). This decision was later affirmed in the Fourth Circuit Court of Appeals.[13]



Section 78 of the *Crimes Act* 1914 is the Australian equivalent.[14] Like sections 793 (d) and (e) of the American *Espionage Act*, the provision can be extended to have a wide range. In the United Kingdom, active wide ranging powers of the *Official Secrets Act* which provided the direct model for Australian legislation, has already led to penalties for political dissent and criticism of government activity.[15]

THE ISSUE OF CENSORSHIP

Media organisations respectfully comply with national security interests but there should be reasonable justification presented for grounds of censorship. This is not to say that reporters should presumptively embark upon a course of audacious coverage but rather, should tread a judicious course vis-à-vis their principle mandate of reporting the news.

The request by the White House to major news organisations to censor bin Laden's video messages is highly questionable. United States National Security Advisor Condeleeza Rice has said that bin Laden may be using video messages to relay coded instructions for operatives in the US to stage retaliatory attacks for the US bombardment of Afghanistan and has requested that American television networks self-censor the messages of bin Laden.[16]

Asked for evidence about possible cryptic messages, the White House said it had none. Despite the paucity of evidence of any security threat to citizens, media networks nonetheless acceded to the request of the White House, in deference to the patriotic fervour sweeping the United States.

The government-funded international radio station 'Voice of America' protested attempts by the U.S. Government to prevent broadcasts of an exclusive

interview with the Taliban Leader Mullah Omar.[17] Colin Powell apparently made requests to the Emir of Qatar to crack down on the pan Arab, all-news satellite station al Jazeera. Ahmed Sheikh, the channel's news editor, was surprised at American efforts to censor the station. 'Because this [complaint] comes from the United States, which considers itself the strongest advocate of freedom of expression this comes as very strange and unacceptable'.[18]

It is highly probable there will be no media coverage of the land invasion when it gets underway. A correspondent for the US armed forces' own newspaper *Stars and Stripes*, told Phillip Knightley that even he would not be allowed to accompany any invasion force.[19] Large media organisations will have no option but to accept this. Despite the sheer importance of the First Amendment, it is unlikely that the media would prevail in a court of law.

Judges simply do not like to determine what constitutes national security. As Lord Parker of Waddington stated in *Zamora*, " Those who are responsible for the national security must be the sole judges of what the national security requires".[20] *In Pictures vs. Defence Department*[21] was launched post-Gulf War to challenge for the right of access to pictures of dead American soldiers in a U.S. Air Force Base, under the First Amendment. The trial judge ruled that the First Amendment did not 'mandate a right of access to government information or sources of information within government's control'. Sadly, the larger question of the constitutional validity of the government censorship was not considered.

A more pressing question for the media concerns the pall of censorship self-imposed over the United States in the aftermath of the terrorist attacks. The fact that the majority of Americans support media airing the views of those who feel U.S. policies were to blame for the terrorist attacks,[22] has not affected media censorship in the United States after the terrorist attacks. Censorship has been vast and swift.

Bill Maher's program *Politically Incorrect* was taken off the air by the ABC network for comments Maher made in reference to the hijackers. Maher was forced to broadcast a humble apology.[23]

Both Tom Gutting and Dan Guthrie, columnists for the *Texas City Sun* and *The Daily Courier* respectively, criticised President Bush and both were promptly sacked. *The Texas City Sun*'s publisher made a front-page apology to "all our country's leaders and especially President George W. Bush" and the editor of *The Daily Courier* announced that only "responsible and appropriate" criticism of Mr Bush would be permitted in future media coverage.

Criticism of the other side has also been punished harshly. Ann Coulter was fired by the *National Review Online* for posting a racist article encouraging attacks on the Palestinian state[24]. Coulter's words which were unquestionably inflammatory, offensive and most certainly untrue, nonetheless are in the form of opinions and deserve protection for their right to exist.

The aftermath of September 11 has united people in a way that was hitherto unimagineable and in the prevailing political climate dissent is all but non-existent. Rousseau articulates the power of patriotism in his writings.[25] To Rousseau, patriotism is a passion, a strength of the soul that empowers action. Along with *amor patriae* or love of country, patriotism is a zeal for justice and an enthusiasm for civil benevolence. An attack on one is an attack on all.

The media in the prevailing nationalistic spirit most understandably want to play their part as patriotic citizens in these troubled times. But journalists are imbued with the unenviable responsibility to discern and report the truth. It is through their vigilance that the war on terror is prevented from devolving into a war on truth.

John Stuart Mill once wrote

> *'Not the violent conflict between parts of the truth, but the quiet suppression of half it, is the formidable evil. There is always hope when people are forced to listen to both sides'.*[26]

Unpleasant and frightening as the truth may be, there is an inherent duty by the media who are the custodians of free voice in our modern society to voice this truth. Any self-imposed prior restraint by the media organisations necessarily deny people the opportunity to receive impartial information which may change their mode of thinking. The exceptions of course as noted previously are where national security interests and the rights of citizens become paramount.

In the same way that the flag desecration case *Texas vs. Johnson*[27] was held by the US Supreme Court to symbolise a key bed-rock principle - 'Government may not prohibit the expression of an idea simply because society finds the idea to be offensive', there is an inherent right for media to present without government restraint, opinions and more importantly facts which may run counter to the views, perceptions and beliefs held by the majority of American people. Detailed exposure and recognition of the plight of the Afghan people in this war may be counter to the aims of the United States Government but may ultimately result in action that can realistically lead to a better life for the Afghan people.

LESSONS TO BE LEARNT

There are lessons that Australia can learn from what is happening in the United States. In the recent Tampa boat crisis, much criticism was justifiably levelled by the media towards the government, for denying relevant footage. While the government's action may be protected by a technicality in defence law[28], it is difficult to see how the incident would have endangered national security to the point of censorship. Irrespective of the merits of the case, the media has the right to portray the story with all its essential facts.

Terrorism is a crime on humanity and no less a tragedy. It is not an easy subject to grasp and more difficult still to present objective truth. Consideration and an awareness of the moral, ethical and legalistic issues involved in a time of crisis will enable media to determine the best way to forge ahead in fulfilling its duty to the people.

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Freedom – Lost or Loaned

Mr Kerry Stokes, AO, in his 2001 Andrew Olle Media Lecture provides this personal account of his reaction to the events of September 11 2001 and their impact on the role of the media.

"The world as we know it has changed forever." You've heard those words countless times since the events of September the 11th. Yet somehow they sound obvious, hollow, and inadequate.

I was shocked and horrified as I watched live pictures of people jumping to their deaths. Knowing that as I watched those buildings crumble to the ground I was in fact witnessing the deaths, of thousands of people. Innocent people who, like us, were just going about their everyday lives.

I said aloud: "*The world will never be the same*".

Those horrific images we saw over and over will forever be etched in our memories. We're now forced to question everything. The way we live our lives, the way we conduct business the way we, as media, fulfil our role.

I'd suggest, now is a time for contemplation: The Macquarie Dictionary defines contemplation as: "*thoughtful-observation & consideration*", "*continued attention and reflection*". Never before has contemplation been more important, more relevant. Now is the time as a nation, and indeed for the world, we must plan for peace. This is not a new challenge for our civilisation. As Aristotle said:

> "*It is more difficult to organise peace, than to win a war, but the fruits of victory will be lost, if the peace is not well organised.*"

It is imperative that we develop a cohesive strategy and plan in response to this event and to put this plan in place for the future. I call it an event because it didn't happen in isolation. This is not the first, nor sadly the last, act of terrorism. Although in my view these are the most cold blooded acts of murder more horrific than any fiction Hollywood could dream of.

The full impact of this horror is yet to be felt. There is little doubt there are more horrors to come. Around the world, and indeed in Australia, it's like the waves that follow the tidal wave.

This address is probably the most difficult I've had to give. I found it impossible not to become emotional, angry, frustrated. Yet that is what we must put aside if we are to contemplate the future. My first thoughts when considering a topic were of the media's role in our evolving multi-cultural Australia. The events of September 11 brought multi-culturalism and tolerance into even sharper focus.

And like the continuing pall of smoke that still comes from the ruins of lower Manhattan so too the world is still absorbing the consequences. I believe the world is at an incredible turning point.

I'd like to pose some questions. I hope that collectively we will have some of the answers.

This is the time for us to put aside our commercial and philosophical differences. If we get it right, the people in our industry can play an integral role in identifying and determining the type of country we want to call home. We, people in the media, can assist in shaping a better future for Australia. Because, it is you who are respected. It is you, the people in this room, with whom millions of Australians identify. It's therefore up to us collectively to be not mere observers in this issue but active participants in the solution.

Let's reflect firstly on our response to the events.

At one point I was watching just one international feed from one media organisation on every single network in this country. Even at the source in New York, the home of media, they were ill prepared to provide coverage. From New York we would have expected to have an instant critical response. Initially they were too dismayed to mount a cohesive and adequate coverage in their own town.

Given it was eleven at night here in Australia, we could be forgiven for taking time to marshal our own resources. As a result, in the world of globalisation and infinite choices there was in reality, only one: CNN. The fact that networks in Australia were able to go into a 24 hour coverage, that the television, radio, newspapers and even on-line, produced outstanding coverage is testament to the dedication and commitment of the people involved in all of our newsrooms.

When we look back over the past decade it seems blindingly obvious that these terrorist assassins would strike again. I suppose the difference this time is none of us ever contemplated the extent to which they'd succeed in their macabre objectives of worldwide terror. But was it all that surprising? They'd blown up American embassies. They'd blown up an American destroyer. They'd attempted on at least one occasion that we're aware of to demolish the World Trade Centre. Apart from obvious Washington targets, the World Trade Centre stood as a symbol of America and indeed the world's democratic and capitalist societies.

They may be fanatics but they weren't stupid. They may be fanatics but they did have the cunning and intellectual-prowess to plan and execute this operation. They used our basic democratic freedoms to wreak havoc and put fear into the hearts of millions. The same freedoms we sometimes take for granted. This causes us to question our own personal values and brings divisiveness into our communities. It's chilling to realise that these people actually used everything in our free and democratic society against us.

They turned our domestic airlines into bombs. They used our banking systems to fund it. They used our education and training systems to carry it out. They even used our postal service and, for a 50 cent stamp, they brought the frontline to each and every one of us.

We must meet the challenge by joining other nations to combat and prevent terrorism. We need to work towards securing a safer world for all of us. There are so many issues that need to be dealt with, to be discussed, debated and understood:

- the impact of democracy being used against us;
- the impact on our freedoms;
- support and protection for the Australians we sent to fight and
- protection for their families at home; and
- support and protection for minorities isolated in our communities.

In these circumstances, how do we raise the level of rational debate in a climate of outrage?

We have the natural desire for justice. We want to bring those responsible to justice and we want it to be swift because we want to go back to life as we knew it. But sadly, we're no further enlightened on the very issues we need to understand, or the right path that leads to a cohesive resolution. Nor have we actively debated or canvassed critical issues of importance to us as a nation. Vital issues that will keep us cohesive and together as one.

We're witnessing a dangerous response within some sections of our community. I'm talking of attacks on places of worship, abuse and vilification. This response can only be described as sad, misguided, and ignorant. It is a response at home to the acts of terrorism worldwide; an illustration of what can follow acts of terror especially of this magnitude.

This can only be addressed at a grass roots level.

Should we be angry? Yes. Should we be involved? Yes. Should we seek questions and answers? Definitely.

Firstly, we have to address the effects and implications which occur as a result of these acts of violence and terror. It's incumbent on us, the media, as an industry to provide the level of debate to facilitate this understanding. As I look around me in this room tonight I see some of our most eminent writers, reporters, commentators and presenters. Many well known and trusted nationally.

Journalism has often been the catalyst for change in the world, much of it positive.

Our views of the world and changes in policy, have often been the result of courageous and forthright journalism, be it from the fields of Vietnam where nightly coverage on our television sets changed opinion and prompted wider and more vigorous debate, or the Washington Post's unravelling of the break-in of the Watergate Building, and as far back as the First World War and reports by famous and trusted correspondents such as Sir Keith Murdoch.

Historically, politicians and policy makers have always been swayed by public opinion. It is our reporting of the conflicts and issues that have opened up public debate and set the agenda. This is the foundation of a strong democracy. But against the background of this insidious environment and conflict, it won't be that easy. There are some parallels with two conflicts of the recent past: The Falklands War and Desert Storm. These were the first examples of "media managed conflicts". Limitations were placed on our ability to accurately reflect events as they occurred. Again, that's what we're facing today.

The repercussions from September 11 continue to resonate around the world. As the conflict escalates, it'll be subject to further restrictions on reporting. None of us want to put at risk our own national security. Nor the safety of our troops. The issue for us is the balance and that balance is an awesome responsibility.

But where's the debate? We seem to have been remarkably quiet on how this landscape of restriction, based partly on fact and emotion, will be managed in the national interest. So we accept that our own freedom of speech and independence has become an unwitting even unlikely victim. But how far are we prepared to go to continue to enjoy the freedom we now have?

All of us have been asked to surrender certain freedoms. But in surrendering those rights, we've placed a condition. And like Justice Kirby, I believe that whatever freedoms we do give up at this point.... we want them back. They are only on loan. They should not be given in perpetuity. Will these changes place our own democratic process at risk? I suggest it will only be at risk if we don't get the balance right.

We've just celebrated our first hundred years of Federation. We've come from a close group of almost warring states, to a tight-knit federation. We have our parochial differences, which is healthy, but even in Western Australia we consider ourselves part of the federation. When I look round at our country, I feel satisfied that democracy has delivered. We may be the lucky country but we've also made our own luck. We do have an ingrained sense of fairness and resolve that should enable us to pass through this dark period of time. And terrorism is a passing darkness.

We might have had, and continue to have, our arguments and fights over ideologies. But the difference in this country between right and left and centre is in fact much narrower than in most other countries. We have a history in recent times when elections of governments are won and lost

on the votes of a hundred thousand people. This in a country of 18 million people. And this polarisation hasn't divided the nation. We always come together on the really important issues.

Which brings me back to the contribution we can offer.

A century ago, the media was limited to newspapers and magazines; no radio, no television, no tools of newsgathering beyond a pencil and notepad. But one could argue, that the issues of public importance received far greater public involvement and were subjected to rigorous debate.

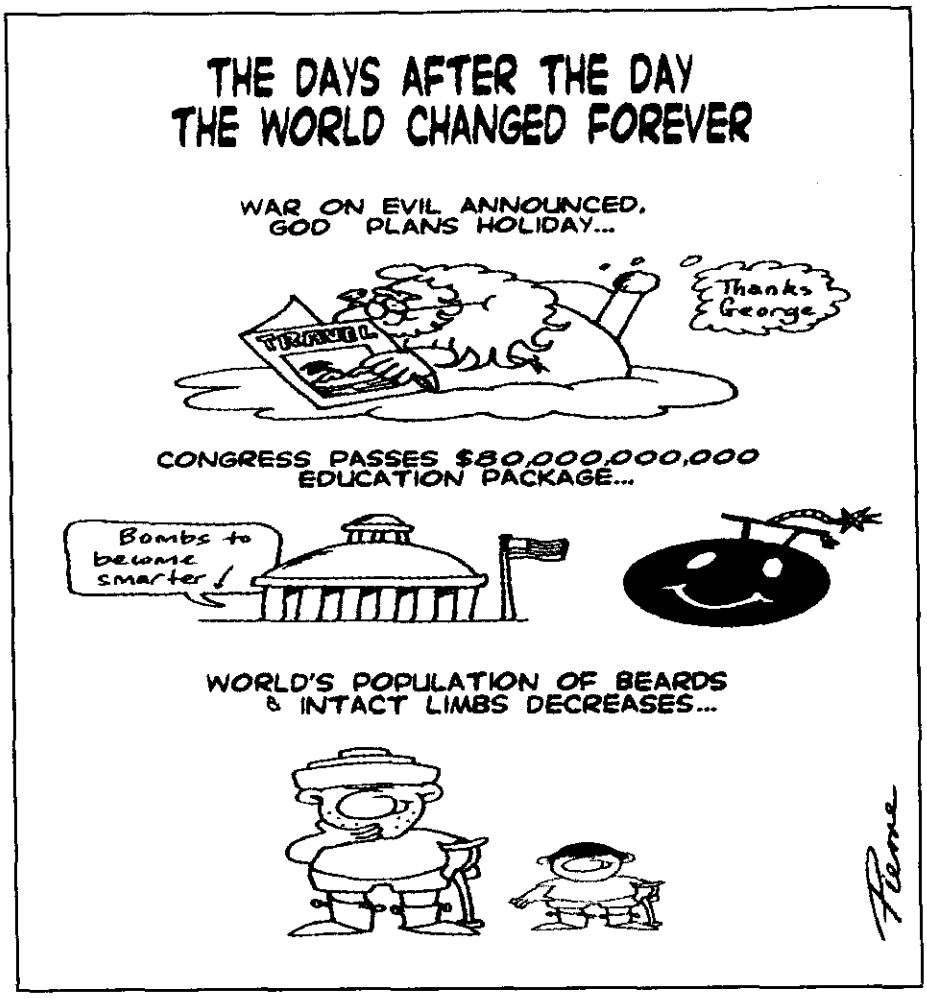
The legacy of those formative years of our federation, can be found in the extraordinary writings of people such as CJ Dennis, Banjo Patterson and Henry Lawson. Not just creative writers, but intuitive writers and visual communicators. Their major concerns were the differences between the bush and city. With today's vigilant scrutiny by lawyers, most of their comments and observations would probably have been highly defamatory.

Some of our greatest advances as a society occurred as a result of vigorous debating of the issues, ironically, at a time when the media as we know it today barely existed. Today we have more media, but are we, as Australians, better enlightened, more informed?

Isn't our role in the media to ensure that all Australians understand the issues and are given the facts, to be able to participate objectively? People who have an opinion have the right to express that opinion. Where are the forums that give them the opportunity to do so?

The ABC, through radio and television, has played a critical and vital role over the years in that democratic process. Programs like "Australia Talks" are an initiative that demonstrates why the ABC should not be judged on its ratings alone. With programs like that the ABC provides the alternative mix to commercial television and adds to a richer fabric of media in Australia. It brings far greater value to our communities than ratings can interpret.

If you believe that we must continue to strive to become a truly multi-cultural society then you would expect the media to show leadership in these most dangerous of times. People look to the media to promote debate and consider the broader issues. The proliferation of national and international media has removed the focus from the grassroots of our own communities. Our neighbourhood, our cities, our states, our country, are now part of the world's problems. I don't know about you but this is certainly not what I had in mind when we talked of globalisation.



For the first time in our history we had the means to produce, express and distribute information to most of the people on this planet. A test for our new technology. But how did it measure up?

As communication shrinks this planet are we also shrinking diversity of opinion? Do we actually end up with just one source?

Diversity is a cornerstone of our country. It represents our "Australian-ness" and is something that unites us all. Now is not the time for our country to move against diversity of opinion and return to the isolation of minorities. Minority groups cannot be allowed to be isolated, disenfranchised. They must be heard.

We have to rely on and trust the strength of our democracy. It is these foundations that we have to trust so that we can listen to minority opinions, respect them and consider them, and take them into account, before moving on to do what is right for this country.

Sometimes in the past we haven't had a great history for tolerance. We've only just begun to deal with the problems of our own indigenous people. But we've found that by putting the issues on the table and discussing them it develops a broader understanding of how to resolve them. And resolve them for the benefit of all of Australia.

Now, we're faced with dealing with prejudice, at times, inherited in our system, at other times, imported. But having made the decision that we're going to be a multi-racial, multi-religious society we have no choice but to make it work.

Mahatma Ghandi best sums up the way I feel towards this. When talking of culture, he said:

> *"I do not want my house to be walled in on all sides and my windows to be stuffed. I want the cultures of all lands*

to be blown about my house as freely as possible. But I refuse to be blown off my feet by any."

And can it work? I think so.

Let me share a personal experience. Last Saturday I was excited to be invited to a wedding of two young people in Perth. It was held at the Uniting Church. The foundation stone was laid by Lord Forest in 1908. This was the beginning of a new life together but also the beginning of a new Australian generation.

I first met the groom's Vietnamese mother 22 years ago when she fled to the safety of Australia. Her biggest concern was her husband and oldest son who was five. They'd been separated. By sheer luck they were reunited in Perth four months later. This woman and her husband were both highly educated but when they arrived, with broken English, accepted any work they could, becoming a valuable part of our community.

Several years later this woman went to buy a house. She paid cash. She had saved every single pay packet since arriving in this country. Her family survived on her husband's dishwasher wages alone. In Vietnam he was a bank manager. Today, their two boys are both university graduates making an important contribution to this country. The bride's family in this story also came to Australia to seek better opportunities for their family. The bride and one of her brothers are now caring for the people of Perth in their role as doctors.

The importance of this story is that twenty years ago we regarded the Vietnamese refugees as liabilities. Even families who had come here from other countries demonstrated a prejudice. Two decades on they represent an important part of the future of this country. And I believe this process has enriched our country.

It's worth noting that these Vietnamese refugees were of a different time, a different age. All borders surrounding their country were closed. Their only choice apart from boats was Cambodia. And the second family in this story came here 13 years ago as legitimate immigrants in their own right.

I think we all agree we need a greater understanding of the real issues that can divide us and turn them into issues that unify us. For every problem brings its own opportunity.

I encourage us all to create those opportunities. Let's make a start in trying to find some of the solutions. Let's have some clarity. Perhaps it's time we fall back on the very basic, simple and fundamental philosophies that help forge our federation. Only today we have better facilities than street corners or a soapbox. Let's go back to the grass roots, back to the local public meetings, open public forums for members of our communities, no matter what their views or backgrounds, to canvas those views and opinions. Forums that would encourage inclusion rather than exclusion, providing an opportunity for citizens to interact with their neighbours and air their grievances, discuss their differences in a secure and open environment. A chance too for interaction with our electoral representatives. Once they are informed and understand all the issues most concerning their local communities they are far better placed to take them further to state government, to federal government, to the places of power where change can be driven. What seems to have been forgotten are the people in local communities. They also cannot be isolated.

Some local councils across Australia do have annual general meetings where the mayor and councillors address ratepayers and review the council's performance in a constructive and formal way.

This morning, as chairman of a public company, I was held accountable to my shareholders who elected their directors. I addressed them. Reviewed the year. Talked about the company and its opportunities and what we can expect for the rest of the year. I answered their questions, while they were able to observe the questions posed by media and analysts.

It's a process that works. The directors, executives and I spent time preparing and contemplating this process. I can tell you personally I am always nervous and excited before and at an AGM. Why shouldn't we expect our elected officials to be held accountable in the same way and by the people who elected them? The importance is what is between elections.

This doesn't have to be complex. The model of an AGM is an interesting one. Perhaps elected members could be expected to have one or two public meetings each year to both report and to more importantly listen to the issues of their constituents. That's one possible model.

Another could well be the one used to address reconciliation. We had community involvement, high profile media commentators, opinion makers and leaders who lent their support and participated in the process.

We haven't completed that process, in fact, we've only just begun. It's an ongoing process. By its nature, it will never be completed. However, it does ensure all issues past, present and future, are addressed, analysed and understood. That better enables us to find solutions. Perhaps the word "reconciliation" can have wider implications in bringing all of our communities together. These two ideas are not mutually exclusive and in fact I think they work better together than individually.

My challenge to you as people in the media, and to all our leaders, is to set the example and become part of the solution. If you're still asking how this affects you, here are some suggestions: Help to set-up those local meetings. Contribute. Your role could be as host, mediator, facilitator, or guiding the experts who join the debates or simply to kick-start this process, and give some credibility, so that we as Australians and we in the media, are more than just observers in our own country.

I don't have the solutions, just suggestions as to how we can start the journey to find them.

It's worth contemplating whether in fact the media has played a part in isolating our local communities. Let's make a commitment to a process: a commitment to nurture the future of Australia as a true multicultural society Together, personally, we might just be able to make a difference.

I'm here tonight to pay tribute to the memory of Andrew Olle and his contribution to the media and public debate. He is remembered for his involvement in this area. Those of you who knew him better than I would know how he would have responded to these questions and challenges I've posed tonight.

Mr Kerry Stokes, AO, is the Executive Chairman of Seven Network Limited

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Australian Celebrity Endorsements: the Need for an Australian Right Of Publicity

Scott Ralston, in his highly commended entry in this year's CAMLA Essay Competition, compares the US and Australian approach to this topical issue.

Celebrity endorsements are big business.[1] We are surrounded by product promotions from the stars of sport, television and cinema.[2] The ubiquity of these endorsements testifies to their impact in a complex, communications based society. Endorsement occurs when

> "*a product is associated with a desirable personality, in whose reflected light it will appear more pleasing.*"[3]

But what happens when the association is made without the celebrity's authority? The future value of the celebrity's endorsement is usually diminished by exposure. In America, the celebrity may rely on the "right of publicity" in order to seek compensation for this loss. At present, this right does not exist in Australia. A prospective plaintiff must try to found their action in copyright, trademark, statutory misrepresentation or passing off. I suggest that this state of affairs should be rectified. Part I of this paper examines the American Right of Publicity. Part II compares the right with the relatively meagre Australian law in this area. Part III examines some of the issues of policy and principle that need to be considered before adopting the right.

PART I - THE RIGHT OF PUBLICITY UNDER UNITED STATES LAW

At last count twenty-seven US states have a right of publicity at common law or statute.[4] The right of publicity is the right "of every person to control the commercial use of his or her identity."[5] Identity in this sense is an umbrella concept that includes image, likeness, voice, name, nickname and slogans.[6] The touchstone of liability is the *identification* of the celebrity, identification without consent suggesting an appropriation of the celebrity's interest in the goodwill associated with their identity.[7] The *Midler* decision[8] exemplifies the breadth of the right. In that case, the Ford Company bought the rights to a Bette Midler hit song and asked Ms Midler if she would re-record the song for their use. When she declined, the company hired another singer who was asked to mimic Midler's voice as closely as possible. When Midler sued, she received damages for loss occasioned to her right of publicity. In another example, a football star with the nickname "Crazylegs" sued for the unauthorised use of the nickname and playing number in a commercial for women's shaving gel.[9]

But the right is not as expansive as these cases may at first imply. It is limited to protecting an individual's identity from commercially exploitative uses. It does not extend to

> "*the use of a person's identity in news reporting, commentary, entertainment, or in works of fiction or non-fiction or in advertising that is incidental to such uses.*"[10]

Since the right of publicity's relatively recent genesis,[11] it has proved "one of the most dynamic and fluid areas of law in the United States."[12] Contemporary debates revolve around the application of the right to the internet,[13] fictional characters,[14] and proposals for a federal statute to regulate the right.[15]

PART II - THE PROTECTION OF IDENTITY UNDER EXISTING AUSTRALIA LAW

In the *Tansing* case,[16] a full bench of the Federal Court held that the right of publicity does not presently exist at common law but did leave the possibility of future development open. There is no statutory tort protecting such a right despite positive recommendations.[17] Presently the prospective plaintiff must found their claim in other available causes of action, which are examined in this Part.

Copyright is of limited utility in protecting celebrities against unauthorized use of their identity. It exists for the protection of original literary, dramatic, musical, artistic works and other such subject matter, not facets of identity such as image or nickname.[18] Similarly, many facets of identity do not come within the definition of a trademark[19] or fail to meet the further requirements for registration.[20] And for infringement to be made out, the trademarked facet of identity must be used *as a trademark*.[21] Consequently, it would be difficult for Ms Midler to protect the unauthorised use of a sound-alike, or Mr Hirsch to prevent the use of his nickname using these regimes. Under the *Trade Practices Act 1974* (Cth), the seemingly suitable provisions of Section 53(c) and (d) have been interpreted narrowly to mean formal endorsement must be suggested before liability will follow.[22]

Protecting celebrity identity is left largely, therefore, to the realms of passing off and statutory misleading or deceptive conduct.[23] The statutory cause of action confers wider protection[24] and is more flexible in its remedies,[25] but it is similar enough to be discussed together with passing off.

For an action to be made out in passing off (or misleading or deceptive conduct), a *misrepresentation* of approval, consent or connection between the endorser and endorsed product must be identified.[26] Where no such connection is implied, the applicant fails even if it is clear that she is being referred to.[27] This means that if the advertiser refers to some aspect of the celebrity's identity (voice or nickname for example) but members of the public would be unlikely to conclude such a connection between endorser and endorsee exists, then liability is avoided. Thus, where there is a clear disclaimer of association, liability usually will be excluded.[28] This appears unfair. The celebrity has still suffered a loss in that

the value of his or her endorsement has been diminished by the exposure.

The Federal Court has arguably recognised this injustice and have relaxed the test for "misrepresentation" in the *Crocodile Dundee* cases.[29] In these two decisions, the Court appeared to suggest that mere *identification* was enough to suggest an association and therefore a misrepresentation.[30] This was despite the fact that the relevant advertisements were unlikely to lead anyone to assume Paul Hogan (the plaintiff) was actually participating, and in one case were obvious parodies. These decisions reveal that the search for a misrepresentation is sometimes artificial.[31] It is not difficult to sympathise with judges searching for a misrepresentation in the subtle and subliminal nature of modern associative advertising. But the question is whether this often troublesome search disguises what the courts are really looking for. We may recall that *identification* is the touchstone of liability for the American right of publicity. The Federal Court may be, in substance, already applying a right of publicity-style approach.

The clearest indication of the affinity of Australian judicial reasoning with the right of publicity occurs when the courts seek to fashion a remedy. In *Henderson v. Radio Corporation*[32] (a case in which passing off was established), the court said that the plaintiff had been "wrongfully deprived" [33] of his right to recommend any given product. In a more recent case concerning the swimmer Kieran Perkins,[34] the court said:

> *"the damages claim was based upon the premise that the publication diminished the opportunity to commercially exploit his name, image and reputation"*[35]

Such judicial language discloses the nature of the interest protected. It is not so much protecting the consumer from a misrepresentation, as the celebrity's proprietary interest in exploiting the goodwill, or potential goodwill, in their identity or reputation. What the courts are guarding against is not so much a *misrepresentation* but an *appropriation*. As Justice Pincus has put it, the "wrongful appropriation of a reputation."[36] Courts would be more candid about the nature of the cause of action if they were to acknowledge the artificiality of searching for a misrepresentation, and be more explicit about the element of appropriation, a point succinctly made by Fisher J of the New Zealand High Court:

> *"And what of the credibility of courts if they are seen to strain towards a particular finding of fact in order to adapt an ill-fitting cause of action? Is it really necessary to force the square peg of character merchandising into the round hole of passing off?"*[37]

The answer to that question should be no.[38] A right of publicity that does not require a misrepresentation for the cause of action to be made out is the logical solution to the incidental and artificial protection afforded by the current state of the law.

PART III - WHY AUSTRALIA SHOULD ADOPT THE RIGHT OF PUBLICITY

The High Court of Australia has emphatically denied the existence of a general tort of unfair competition.[39] In *Nike International*[40] a unanimous court cited with approval an earlier statement from Dixon J who said that in "British jurisdictions" courts of equity have not:

> *"thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalisation."*[41]

On conventional reasoning, it follows that an intangible value outside the boundaries of recognised heads of protected interests, such as personal identity, will not receive protection from appropriation. But while Dixon J's statement is axiomatic in a general sense, it precedes a tremendous growth in the existing categories of intellectual property, in Australia as well as other common law jurisdictions.[42] The Canadian common law has not escaped the influence of the American right of publicity and includes a tort preventing the appropriation of identity.[43] The *Athans* case[44] is an instructive example of the Canadian tort. A likeness of George Athans, a famous water skier, was used without his permission to promote summer camps. He failed in an action for passing off because no deception of the consumer could be shown.[45] However, the Court implicitly followed American authority and held he succeeded in a tort action for appropriation of personality because:

> *"it is clear that Mr Athans has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right, if it is invaded."*[46]

In Australia, as Deane J points out, the rejection of a general action for unfair competition:

> *"does not involve a denial of the desirability of adopting a flexible approach to traditional forms of action when such an approach is necessary to adapt them to meet new situations and circumstances."*[47]

What is needed then is justification for the right of publicity as a "special head of protected interest". Morally speaking, a Lockean defence of the right would suggest that the celebrity deserves to be rewarded for the fruits of his skill and labour in creating his persona.[48] At least in the case of a professional sportsperson, advertising power comes only as a result of extremely hard work. In a similar vein, it would be unjust for the exploiter to be enriched by using someone else's identity for his or her gain.[49]

One way of separating the tort from a wider tort of unfair competition might be by the human element of the interest of a real person in his or her own identity. Properly limited by principle,[50] such an evolution in tort law need not result in the "high-sounding generalizations"[51] to which a more general tort of unfair competition might give rise.

Consumers might also benefit from the integrity of endorsements that is a by-product of the right of publicity. The American right of publicity exists in addition to trade practice legislation[52] and is a useful, if indirect, addition to consumer protection legislation.

In the US, the right is not without its critics.[53] They argue that celebrity identity is as much a product of society as of the celebrities themselves and should be reserved:

> *"as part of our cultural commons, freely available for use in the creation of new cultural meanings and social identities, as well as new economic values"*[54]

But we may query whether such a right would place too great a restriction on culture, or as one critic put it, allow celebrities to censor popular culture.[55] The right affects only commercial speech. Those who would gain from commercial speech unrestricted by the right are typically large corporations.[56] This highlights a point identified previously; that it is the celebrity that should gain from their own skill and labour, not the person who seeks to trade on their reputation.

CONCLUSION

In terms of the protection conferred on personal identity, the state of Australian law compares unfavourably with its American equivalent. Australian courts have been forced to use the legal fiction of misrepresentation to protect personal identity from appropriation by others. This need not be the case. The right of publicity shares an affinity with the current judicial approach in this area of the law, even if this affinity is not always explicit. The right is consistent with the fundamental rationales underlying intellectual property law. It is a feasible and desirable evolution in the development of law in this area and it is likely the courts will be given an opportunity to take this path before long.

1 By "celebrity" I mean any real person famous enough for their identity to have commercial value.

2 See, for example, "Oh Brother! It's Jemma's Jocks v O'Hare's Chesty Bonds", *Australian Financial Review*, 25 August 2001.

3 *Shoshana Pty Ltd v 10th Cantanae Pty Ltd* (1987) 11 IPR 249 at 250-1. [Hereafter "*Shoshana*"].

4 Fleischer S.M., "The Right of Publicity: Preventing an Identity Crisis" (2000) 27, *Northern Kentucky Law Review*, 985 at 986.

5 McCarthy J.T., "The Human Persona as Commercial Property: the Right of Publicity", 1996 7(1), *Australian Intellectual Property Journal* 20 at 21.

6 See respectively: *Wendt v Host International* 125 F.3d 806 (9th Cir. 1997) [Hereafter "*Wendt*"]; *Ali v Playgirl, Inc.*, 447 F.Supp. 723 (S.D.N.Y. 1978); *Midler v Ford* 849 F.2d 460 (9th Cir. 1988) [Hereafter "*Midler*"]; *Apple Corps. Ltd v Adirondack Group* 476 N.Y.S.2d 716 (Sup. Ct. 1983); *Hirsch v S.C. Johnson & Sons, Inc.* 280N.W.2d 129 (Wis. 1979) [Hereafter "*Hirsch*"]; *Carson v Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983)

7 *Haelan Laboratories v Topps Chewing Gum* 202 F.2d 866 (2d Cir. 1953). [Hereafter "*Haelan*"].

J McMullan, "Personality Rights in Australia" (1997), 8, *Australia Intellectual Property Journal*, 86 at 94.

8 *Midler*, note 6; see, for a similar case *Waits v Frito-Lay, Inc*, 978 F2d 1093 (9th Cir, 1992).

9 *Hirsch*, note 6.

10 *US Restatement (Third) of the Law of Unfair Competition* 47 (1995); See, for an example, *New Kids on the Block v News America Publishing Inc.*, 745 F Supp 1540.

11 Generally credited to *Haelan*, note 7.

12 Fisher K.M., "Comment: Which Path to Follow: A Comparative Perspective on the Right of Publicity", (2000) 16 *Connecticut Journal of International Law*, 95 at 95.

13 Ezer D.J., "Celebrity Names as Web Site Addresses: Extending the Domain of Publicity Rights to the Internet", (2000), 67, *University of Chicago Law Review*, 1291; Fernandez C, "The Right of Publicity on the Internet", (1998), 8 *Marquette Sports Law Journal*, 289.

14 See Wendt, note 6, and Dawson D.H., "The Final Frontier: Right of Publicity in Fictional Characters", (2001), *University of Illinois Law Review*, 635.

15 Goodman E.J., "A National Identity Crisis: The Need for a Federal Right of Publicity Statute" (1999) 9 *Journal of Art and Entertainment Law*, 227; Robinson R.S., "Preemption, the Right of Publicity, and a New Federal Statute", (1998), 16, *Cardozo Arts & Entertainment Law Journal*, 183.

16 *Sony Music Australia & Michael Jackson v Tansing* (1993), 27 IPR 649 (Full Federal Court).

17 Australian Law Reform Commission Report No. 11 of 1979, *Unfair Publication: Defamation and Privacy*.

18 *Copyright Act 1968* (Cth) Pts III and IV.

19 *Trade Marks Act 1995* (Cth) ss 6, 17.

20 *Trade Marks Act 1995* (Cth) ss 41, 44.

21 See *Koninklijke Philips Electronics NV v Remington Products Australia Pty Limited* [1999] FCA 816; and on appeal to the Full Federal Court [2000] FCA 876.

22 *Shoshana*, note 3, per Gummow J at 316; *Weitman v Katies* (1979) 29 FLR 336 at 344 per Franki J. Though for a successful use of s53(c) see *Wickham v Associated Pool Builders Pty Ltd* 12 IPR 567; [1988] ATPR 910. [Hereafter "*Wickham*"].

23 *Trade Practices Act 1974* (Cth) s 52.

24 *Parkdale Custom Built Furniture Proprietary Limited v. Puxu Proprietary Limited* (1982) 149 CLR 191 per Mason J at 205.

25 *Trade Practices Act 1974* (Cth) ss 80,82.

26 *Shoshana*, note 3, per Wilcox and Gummow JJ; see for a discussion of the general requirements of passing off, *Conagra Inc.v McCain Foods (Aust) Pty Ltd* (1992) 23 IPR 193; (1992) 33 FCR 302.

27 *Honey v Australian Airlines* (1990) 18 IPR 185 (Full Federal Court); *Wickham*, note 22.

28 *Newton-John v. Scholl-Plough (Australia) Ltd* (1986) 11 FCR 233 cf. *Hutchence (trading as INXS) v South Sea Bubble Co Pty Ltd* [1986] ATPR 40-667.

29 See *Pacific Dunlop v Hogan* (1989) AIPC 90-578, 12 IPR 225; *Hogan v Koala Designs* (1988) 20 FCR 314 [Hereafter "*Koala Designs*"].

30 Howell R.G., "Personality Rights: A Canadian Perspective: Some Comparisons with Australia", (1990), 1, *Intellectual Property* Journal, 212 at 219.

31 Ricketson S, "Character Merchandising in Australia: Its Benefits and Burdens", (1990), 1, *Intellectual Property Journal*, 191 at 192; Corones S.G., "Basking in Reflected Glories: Recent Character Merchandising Cases", (1990), 18, ABLR 5.

32 (1960) SR (NSW) 576 [Hereafter "*Henderson*"].

33 *Henderson*, note 32, per Evatt CJ and Myers J at 595.

34 *Talmax v Telstra Corp* (1996) 36 IPR 46 [Hereafter "*Talmax*"]. For a good discussion of this case see McMullan, note 7.

35 *Talmax*, note 34, at 53.

36 *Koala Designs*, note 29, at 325.

37 *Tot Toys v Mitchell t/a Stanton Manufacturing* HC (NZ) (1992) 25 IPR 337 at 379.

38 See, for a contrary view, Katekar B.F., "Coping with Character Merchandising: Passing Off Unsurpassed", (1996), 7, *Australian Intellectual Property Journal*, 178.

39 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No2)* (1984) 156 CLR 414 [Hereafter "*Moorgate*"]; *Campomar Sociedad Limitada v Nike International Ltd* (2000) 169 ALR 677 [Hereafter "*Nike International*"].

40 *Nike International*, note 39, at 680.

41 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*. (1937) 58 CLR 479 at 509.

42 Consider the rejection of the same field of activity test in passing off in *Henderson*, note 34.

43 It is actually part of the common law of a number of Provinces, the most readily identifiable being Ontario. See generally C Nest "From *Abba* to *Gould*: A Closer Look at the Development of Personality rights in Canada" (1999) 5 *Appeal* 12.

44 *Athans v Canadian Adventure Camps Ltd* (1977) 17 OR (2d) 425, 80 DLR (3d) 583 [Hereafter "*Athans*"].

45 *Athans*, note 44, at 433.

46 *Athans*, note 44, at 434.

47 *Moorgate*, note 39, at 445.

48 Pendleton M.D.,"Character Merchandising and the Proper Scope of Intellectual Property", (1990), *Intellectual Property Journal*, 242 at 249; Fisher, note 12, at 97.

49 *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562 (1977); see also S Ricketson "'Reaping Without Sowing': Unfair Competition and Intellectual Property Rights in Anglo-Australian Law" (1984) 7 *University of NSW Law Journal* 1 at 3.

50 Consider the limits on the American right referred to above, or the Candian application of a balancing of interests test: *Gould Estate v. Stoddart Publishing* [1998], 321 DLR (4th) 161 (Ontario Court of Appeal).

51 *Moorgate*, note 39, at 446.

52 For example the *Lanham Act* s 43(a) prohibits false or misleading statements in relation to sponsorship of goods and services.

53 Madow M, "Private Ownership of Public Image: Popular Culture and Publicity Rights", (1993), 81 *California Law Review*, 125; Sen S, "Fluency of the Flesh: Perils of an Expanding Right of Publicity", (1995), 59, *Alberta Law Review*, 739.

54 Madow, note 53, at 238-9.

55 Madow, note 53, at 144-6.

56 McCarthy, note 6, at 27.

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Cultural Parochialism and Free Trade

Tim Magarey, another highly commended entry in this year's CAMLA Essay Competition, argues that the output of the 'cultural industries' should not be exempt from the ambit of free trade agreements.

Australia maintains a policy of protection for local film, television and other media producers through the mechanism of such legislative regimes as the *Broadcasting Services Act* 1992 (Cth) (**BSA**). Australian content restrictions on programming and foreign ownership rules operate to shield domestic producers from the ravages of the international marketplace. Many commentators argue that it is only because of the existence of this protection that local industries are able to survive. Legislative measures of the kind embodied in the BSA, however, are inconsistent with the provisions of international free trade instruments such as the *General Agreement on Tariffs and Trade* (**GATT**). It is only by virtue of exceptions such as that contained in Article IV of the GATT[1] that these regimes, which are by no means unique to Australia, persist free from international legal and political repercussions.

This paper considers the exclusion of culture from free trade instruments such as the GATT and from the auspices of the World Trade Organisation (**WTO**). It is argued that, given the benefits of free trade and the objectives of such agreements, there is no sufficient reason why goods and services which are produced by the "cultural industries" should be exempt from the ambit of free trade agreements.

FREE TRADE AND THE GATT

The GATT has its origins in the negotiations at Bretton Woods following the end of the Second World War. It was one of a series of instruments and organisations which were established by the Allied Powers after that conflict with the principal objective of avoiding another war.[2] The premises on which the provisions of the GATT are based are:

- International trade raises the level of material wealth and thus the standard of living of individuals in participating nations. The theory of comparative advantage suggests that all trading nations benefit irrespective of their relative starting wealth.
- Free trade obligations prevent nations from deploying self-interested, beggar-thy-neighbour economic policies which in the inter-war period contributed significantly to the instability and conflict in the international system.
- Multilateral consensus is important because it prevents individual nations destabilising the system from without.[3]

Prima facie these premises are broad enough to have been generally accepted as sufficient justification for the jurisdiction of free trade agreements embodied in the GATT and the WTO. The detail of the provisions of the instruments themselves, however, has been the subject of hot debate since the GATT first came into force. The exclusion of particular industries from the province of the GATT has been expressed in the terms of their being "exceptions" to principles of general prevalence. The exception in Article IV,[4] for example, was incorporated into the GATT in 1947 and has remained since then despite the efforts of the United States to have it removed or altered.[5] Today, as was the case then, such exceptions have to be justified as a countervailing good which outweighs the benefits of trade.

INFORMATION FLOWS

In addition to general premises about the benefits of free trade, however, it is arguable that particular benefits attach to the free flow of information. While some of these are avowedly economic in flavour, others subsist in ideas about human rights which hold that access to information is essential to political and

economic freedom and personal development.[6] If we regard the benefits of free access to information as real, then we must not allow barriers to information flows to be erected unless some compelling reason exists why we should.

Some of the arguments for exceptions to the general principles laid out above will be considered. It is argued that they are not convincing enough to warrant the significant exception to which they lay claim. In fact, such exceptions operate specifically in opposition to these principles and should be resisted.

ARGUMENTS FROM ECONOMIC MODELS

Many of the arguments against free trade in cultural products draw on economic models which suggest that these products are consumed in a manner which makes the application of the premises of GATT inappropriate. Foremost among these are arguments based on the public good aspects of cultural products.

Most cultural products possess the characteristics of public goods – that is they exhibit the conditions of non-excludability and non-rivalness.[7] By non-excludability it is meant that it is impossible to prevent the consumption of a good. By non-rivalness it is meant that once the good is produced, consumption of it does not "use up" the good so that it cannot be consumed by another person. A pure public good is both non-excludable and non-rival. While both characteristics rarely subsist perfectly in any given cultural product, these products are distinguishable on these bases from private goods such as food.[8] Movies and books, for example, exhibit the characteristic of non-rivalness. Having been consumed by one person they are available at a low marginal cost of supply for consumption by others. Free-to-air television and radio broadcasts are both non-rivalrous and non-excludable – anyone in the broadcast area can receive and consume for no cost the signal at no loss to any other person.[9]

The conditions for efficient allocation of public and private goods differ considerably. This is because the low marginal cost of supply of public goods means that once the sunk cost of producing the good is recouped it is inefficient to exclude any consumer who places positive value on the good and is willing to pay a price higher than the (probably nominal) marginal cost of supply.[10] Thus, if one consumer values the good at $15, and another at $5, it is inefficient to refuse to supply the second consumer on the grounds they are not willing to pay the same price as the first because there is no lower cost-based limit on the price which should be charged. The most efficient outcome, then, is to have every consumer pay a different price depending upon the peculiar value they place on the good. There are considerable transaction costs, however, associated with applying this in practice.[11] Because the cost of negotiating with each individual consumer is prohibitive, producers of public goods tend to fix prices at a given level and charge all comers that single price. This solution will always be less than optimal because there will be some consumers who place positive value on the good but do not purchase it because that value is less than the asking price.[12] At the same time, free-riders, who value the good above the asking price, will exploit the circumstances to make a windfall welfare profit. The chances of setting the price at a median level such that the revenue returned on the good is equal to the net welfare achieved in the community are slim, and the spectacular profits and equally spectacular losses made on individual films and television programs, for example, testify to the difficulties the market has in setting the price appropriately. For this reason, opponents of free trade argue, the market is not an appropriate place for the production and consumption of public goods. The market is incapable of producing an efficient price and thus a net allocative inefficiency is bound to result.[13]

This is really an argument about unregulated markets rather than about free trade between nations. Its logical conclusion with respect to international trade, however, is that the size of the global marketplace exacerbates the scale of the inefficiencies which arise out the production of public goods capable of being consumed by an international audience. Moreover, trade between nations confers advantages on producers in nations with large native audiences which allow the recouping of sunk costs at home and the "dumping" of product at low prices for windfall profit abroad.

Regulation by nations, they argue, would eliminate the difficulties of pricing in the market, operate to divide up the international market to prevent inefficiencies spreading beyond the market immediately affected, and prevent dumping by applying tariffs and setting quotas on imports.

It is by no means clear that this is the case. It is difficult to see how governments are capable of pricing public goods more efficiently than markets. Governments possess no ready mechanism for determining the price which should be charged for access to such goods.[14] Permitting individual national governments control over the trade flows and pricing of imported product would simply introduce variety into the field of choices of inefficient outcomes in the trade in cultural products.

Furthermore, "dumping," as the practice of price discrimination is often pejoratively referred to, is not necessarily inconsistent with efficient outcomes.[15] This is especially true in the case of public goods. As was outlined above, inefficiencies arise in markets for public goods because the need to charge uniform prices prevents price fluctuating to match the peculiar value each individual consumer places on the good. Charging different prices for, for example, television rights or cinema rentals and admissions in different territories permits the matching of different median prices to different social and economic circumstances. In this way, a crude form of price discrimination, founded in the practice of licensing intellectual property rights on the basis of territorial distribution exclusivity, permits the recouping of a return which in sum is more likely roughly to approximate the net welfare value placed on the consumption of the good by individuals in any given territory.[16]

CULTURAL SOVEREIGNTY

Economic considerations, however, only account for some of the resistance to the inclusion of cultural products within the ambit of free trade instruments. Perhaps of greater concern to the proponents of cultural protectionism than doubts as to whether the market is capable of allocating resources for the production of cultural products are questions about whether the market, even an efficient market, should be permitted exclusive dominion over the field of culture at all.

Central to this position seems to be a great resistance to commercialisation. Many advocates of protection reject the idea that culture is capable of being priced and bought and sold in the market. It has inherent value. Culture, they argue, is something more fundamental to society than the instrument of economic theory and the mechanism of the marketplace. To subject it to the vulgarities of a commercial environment is to rob it of that which makes it valuable.[17]

A corollary of this argument, often levelled at the Americans, is that culture is part of the social foundation on which the institution of the market is built, and that the degree of importance ascribed to the market in different societies is a function of the very culture which it is proposed should be subject to market forces. In the United States, a nation of entrepreneurs and businesspeople, the market is part of the spirit of the society. It is deeply intertwined with other values Americans hold dear. In some parts of Europe, by contrast, this is not the case. The role of the marketplace can be separated from other aspects of community life in a way which might not occur in the U.S. The point is that it is culture which determines the function of the market, not the other way around. Free Traders confuse this relationship when they advocate the abolition of trade restrictions on cultural products.

Another theme is that of "cultural sovereignty." Culture and the freedom of self-determination are linked in this idea. It is argued that culture is the stuff of which communities and individuals are made. It is the meta-narrative which we employ to understand the world and which permits us to generate choices about the way we choose to live our lives.[18] It is thus vital to individuals' freedom that their heritage is not eroded by the imposition of alien cultures. Nations have an obligation to their citizenry to protect the national culture from the threat posed by the allure of exotic cultural imports.

There are fundamental difficulties with each of these arguments. First, and most obviously, they all assume that culture is something which is capable of being defined to a satisfactory degree to permit it to be the subject of specific protection. It is not at all clear that the things which we collectively refer to as "culture" are susceptible of definition for such purposes. In the absence of accurate identification of those things which require protection, the measures which may be taken will necessarily be somewhat arbitrary in their focus and scope.

Secondly, even if culture is capable of being adequately delineated for the purposes of targeted protection, it may not be the case that cultural unity is congruent with nations or jurisdictions. Australia's cultural mix is testimony to this fact. Where national or jurisdictional boundaries take in a number of cultures, the same problems which arise at the international level may manifest in microcosm within those boundaries. Trade barriers are no answer to this problem.

Thirdly, trade barriers to protect culture as manifest in movies, television or books may be the top of a slippery slope. Extension of the logic of cultural protectionism into other industries could undermine the gains of fifty years of trade negotiations. While absolutism is naturally to be avoided, arguments for the maintenance of trade barriers lose a great deal of their cogency when viewed in light of claims by French and Swiss farmers for subsidy protection to support their role as bastions of European culture.

Fourthly, there is the difficult question of money. Who is to pay for the subsidies granted to and the high prices charged by coddled domestic producers? The answer, of course, is that it is the taxpayer and the consumer who pay for inefficiencies which the motivating force of competition could alleviate. We must question whether the price to be paid represents value for money when the outcome is arbitrary and uncertain.

Yet, more important, perhaps, than all of these objections, is one which is not restricted to economic or financial concerns. The GATT was originally conceived as a stabilising influence in a world where economic tensions have the potential to develop into war.[19] The potential for the collision of cultures has never been thrown into starker relief than in the period since September 11th. It is arguable that the combination of cultural differences and third world poverty contributed to this dangerous situation.

While it is not suggested that free trade is the answer to all the world's ills, nor that broadcasting *Neighbours* or *Seventh Heaven* into every home on the planet would prevent hostility rooted in cultural misunderstanding from erupting into conflict, defiant economic and cultural isolationism is surely the wrong posture to be taking at this time. Such an approach is contrary to the spirit of the GATT, and is counterproductive in a world which now, more than ever, needs all the unity it can get.

CONCLUSION

All this is not to be taken as suggesting that the objectives of cultural protectionism are not noble and admirable in and of themselves. What is suggested is that in view of uncertainty as to the benefits flowing from protectionist measures, and the present pressing need for the global stability which instruments such as the GATT were specifically designed to foster, the costs of putting such measures into practice far outweigh the benefits derived from them. In the current environment, an exception to the principles on which the GATT is based cannot be countenanced.

1 For "Cinematographic Films"

2 Jackson J., *The World Trading System*, 2nd ed., 1997, Cambridge, MIT Press, p.13.

3 *Ibid* pp.11-20.

4 See note 1, *infra*.

5 "US Urges Free Worldwide Trade in Movies, Radio Programs During Uruguay Round Talks", 7 *International Trade Report* (BNA) No. 36 at 1369 and more recently, *"Communication from the United States: Audiovisual and Related Services"*, WTO S/CSS/W/21, 18 December 2000 available at www.wto.org.

6 These ideas have been taken so seriously that they have been enshrined in a series of international treaties. The principal instruments are the Universal Declaration of Human Rights, art. 19, GA Res 217A UN Doc. A/810 (1948) and the International Covenant on Civil and Political Rights, art 19, GA Res 2200, UN GAOR, 21st Sess., Supp. No. 16 at 55, UN Doc A/6316 (1966)

7 Brown C.V. & Jackson P.M., *Public Sector Economics*, Cambridge, MIT Press, 1991, p.28.

8 The classic example of a private good is a hamburger. It is excludable, because only one person can consume it at a time, and rivalry subsists over it because once it is consumed it cannot be consumed again.

9 Owen B.M. et. al., *Television Economics*, Lexington, Lexington Books, 1974 p.57.

10 Picard R., *Media Economics*, London, Sage, 1989, p.52.

11 Transaction costs may be defined as anything which reduces the incentive to trade with another rather than produce oneself; hence, "transaction costs comprise all those costs that cannot be conceived to exist in a Robinson Crusoe (one-man) economy." Cheung, "On The New Institutional Economics," in Lars Werin and Hans Wijkander (eds), *Contract Economics*, Oxford, Blackwell, 1992 at 366.

12 Owen, p.20.

13 C.E. Baker, An Economic Critique of Free Trade in Media Products, (2000) 78 *North Carolina Law Review* 1357 at 1384

14 Ming Shao W., "Is There No Business Like Show Business? Free Trade and Cultural Protectionism," 20 *Yale Journal of International Law* 105 at 137-138.

15 In fact, dumping is a particular form of anticompetitive price discrimination where product is sold at a loss (at a price below the marginal cost of supply) on overseas markets with the purpose of driving out competition. Not all price discrimination amounts to dumping, and the test for determining whether dumping has occurred is complex and is beyond the scope of this discussion.

16 It is to be noted, of course, that the practice of price discrimination is the subject of some controversy amongst proponents of free trade in cultural products. It is arguable that it is not consistent with economic models of workable competition. This controversy is part of a wider debate about the competition issues which arise with respect to territorial exclusivity in intellectual property licensing, which is, again, outside the scope of this paper. Mention should be made, however, of the fact that an international effort to encourage the abolition of territorial exclusivity practices and the permitting of "parallel importation" is being undertaken in the name of freer trade. The recent amendment of the *Copyright Act* to permit the parallel importation of audio compact discs is an example of this.

17 Witness the comment by former French Prime Minister Edouard Balladur during the Uruguay Round of GATT negotiations in 1993: "[The French] cannot accept everything related to the fundamental values of our tradition, our culture, our civilisation being treated like ordinary traded goods." Qtd in K. Auletta, "Television's New Gold Rush," *New Yorker*, Dec. 13, 1993, p.88.

18 Kymlicka W., *Multicultural Citizenship*, Oxford, Clarendon Press, 1995, pp. 84-5.

19 Jackson, p.17; see note 2 *infra*.

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Internet Dumping and Regulation of the Audiotex Industry

John Corker examines the risks associated with using 190 and 0011 services and some possible solutions.

Internet Dumping occurs when a user's modem is disconnected from their usual dial-up number and reconnected to an international (0011) or premium rate phone number, such as 190 numbers (without their knowledge). Most commonly it occurs on adult sites. In many cases people are not aware that they have been dumped until they receive an unusually high phone bill.[2] Some consumers have reported having received "international phone bills for thousands of dollars"[3].

Internet Dumping has occurred in Australia at least since mid 2000[4]. As at June 2000 about 2 users a week registered complaints with the Telecommunications Industry Ombudsman (**TIO**). However the average number of complaints for the 9 months to end of September 2001 is about 80 complaints a month. The total of Internet Dumping complaints received by the TIO to end September 2001 is close to 1000.[5] Complaints to Telstra are understood to be higher than this.

THE AUDIOTEXT INDUSTRY

The Audiotex or Telemedia industry provides access to a range of recorded information and interactive services (speech, facsimile or data) via premium or international telephone lines. In Australia premium rate services were initially provided by Telstra in the mid '90s using the 0055 prefix. This prefix was phased out in August 1998 and replaced by the 190 prefix. Cable and Wireless Optus also provided Telephone Information Services at premium rates from 1995-2000 but no longer offers the service.

In the US use of 0011 numbers for access to adult services first appeared in the late 1980's and operated without any form of regulation[6]. It has grown as an industry and now provides access to a range of recorded information and interactive services (speech, facsimile or data). The

international Audiotex or Telemedia industry is said to be valued at between US$2-6bn a year globally and calls alone account for around 2-4% of outbound international traffic for those Network Operators who participate.[7]

HOW DOES DUMPING OCCUR?

In most cases the re-connection of a computer to a 190 or 0011 line occurs when a redialler program is downloaded from a site, disconnects the user's modem from their ISP, and reconnects them to the internet via the 190 or 0011 number. This connection then allows access to a 'private internet area' where the particular content is found. Some adult sites offer this method of access as an alternative method of payment to an online credit card payment.

Once the user has completed their visit to this area, a number of things may happen. There may be an automatic disconnection when the user leaves the area. To resume access to the internet the user has to reconnect through their own ISP. However in many cases the user may leave the adult site and continue to surf the net still incurring premium rate or 0011 phone charges. Many users have claimed that they are unaware at any stage at all of being connected to a 190 or 0011 line.

Many users say they are not aware that they have downloaded a redialler. Some websites refer to the redialler as a 'registration tool', 'drop dialler' or simply software that provides 'free membership to various adult sites'. Recent research by the International Audiotex Regulators Network (IARN)[8] shows that there are just a few manufactures offering these programmes and most of them have no 'uninstall' facility.

THE TIO'S ROLE

The TIO administers the telecommunications complaints scheme for carriers and carriage service providers in Australia. ISPs are required to participate in the scheme by reason of being considered carriage service providers. The TIO has acknowledged[9] that a major difficulty in investigating internet dumping cases has been to establish whether or not a user was in fact notified of call charges. Through extensive investigation it has found that in all cases where it has been able to visit the disputed websites there was some form of notice on the relevant website advising the user that higher call charges could be expected. One key issue that has been raised by their investigations is the adequacy and visibility of these notices.

TELSTRA'S ROLE

Premium rate calls are presently only available via Telstra. With the Telstra 'Infocall' service, the rate can be between 35 cents and $5.50 a minute. Telstra state that entry to the industry involves a capital cost of up to $150,000 for the purchase of specialised telecommunications equipment. There are presently only 39 Telstra premium call service providers. Telstra charges service providers about one third of every dollar generated in gross revenue from the caller[10]. The ACCC issued a preliminary view in July 2001 that portability for premium rate numbers should be mandated as soon as possible thus allowing other carriers to provide these services.

Generally, Telstra is unsympathetic to dumping cases and has been loathe to settle any disputed bills for telephone charges.

Telstra states on its website:

> *"Telstra does not know of any proven cases of fraud in relation to Internet 'dumping'. In all cases we know of, a person has actively accepted the terms and conditions of downloading the site using an Internet dialler and the lessee of the phone line is legally liable for the charges.*
>
> *If an IDD charge is proven to be due to fraudulent activity, the fraudulent charges are reimbursed and the matter is directed to the police. If a customer suspects a fraudulent charge in relation to 190 numbers, they should contact TISSC."*

TISCC'S ROLE

Australia's Telephone Information Services Standards Council Ltd (TISCC) is an independent regulatory body funded by the telephone information services industry. The Council is made up of four community and four industry members (two from the service provider sector and two from the carrier sector), and an independent Chairman.

The TISCC Code of practice deals only with domestic premium rate services ie calls beginning with the prefix 190. Compliance with the TISCC code provisions is enforceable by being made a term of the agreement between the service provider and the carrier.

As of 1 July 2001, a new Schedule 12 to the TISCC code was introduced titled "Internet Dialler Services". It sets out prescriptive provisions that require service providers to display, in a separate fixed dialogue box, prior to connection to the service, a 16 point font message that provides the 190 number and the premium call rate and requires the user to click to accept before proceeding. A further dialog box requires the user to click on YES to indicate he or she is the bill payer or has the bill payer's permission to accept these charges.

The provisions also state that dialling and modem tones are not to be suppressed, a digital clock is to be displayed showing the time elapsed for the call and every ten(10) minutes a dialog box is to appear showing the time elapsed and displaying an OK button that when clicked on makes the dialog box disappear. At any point the user clicks on an EXIT box, the existing ISP default connection is to be maintained. Most of the rediallers examined by the TIO will not meet this last requirement.

The Code also states that Internet Diallers must not activate a premium rate service remotely without the intervention and informed consent of the user.

UK POSITION

In the UK, ICSTIS, the Independent Committee for the Supervision of Standards and Telephone Information Services, regulates the content and promotion of domestic premium rate telephone services but, similar to Australia, not international services. It is a non-profit body funded by industry but its committee members must be independent of the premium rate industry.

Three of the more relevant provisions of the ICSTIS code are as follows:

- All recorded services of a sexual nature must, as soon as is reasonably possible after the caller has spent £10.00, and after each £10.00 of call spent thereafter, do the following:

  (a) inform the caller of the price per minute of the call,

  (b) require callers to provide a positive response to confirm that they wish to continue the call. If no such confirmation is given, the service must be terminated.

- All services over £1.00/min and certain services at £1.00/min will require ICSTIS' prior permission before operating.

- All new live services require ICSTIS' prior permission before operating, regardless of cost.

PREMIUM RATE AND INTERNATIONAL SERVICES

There is a sharp distinction to be drawn between premium rates and international services. The charge to the caller for premium rate services is set by the service provider or promoter who may also be the information provider.

International services are however charged at standard IDD call rates. They involve an originating and a terminating carrier, a service provider and an information provider. The originating carrier based in Australia establishes the overall fee charged to a caller (**Collection Rate**) based on three factors: its own transport costs, the fee charged by the terminating carrier (**Settlement Rate**) and profit.

The terminating carrier pays a portion of the settlement rate to a service provider as a commission for generating minutes of telephone traffic. The service provider pays a portion of revenue received from the terminating carrier to the information provider. Rates paid will usually vary according to the volume of traffic generated.

In both models the information provider is dependent on the service provider for revenue but the fee paid by the caller is set, in the 190 model, on a sliding scale by the service provider and, in the 0011 model, at a fixed rate by the originating carrier.

THE INTERNATIONAL TELEMEDIA ASSOCIATION (ITA)

The International Telemedia Association (ITA) is a self regulatory body based in London that comprises service operator, information provider and carrier members. It is concerned only with recorded information and interactive services available through 0011 lines. ITA claims a membership who between them account for an estimated 85% of all international telemedia traffic although the list of members on its website is rather limited. It includes originating and terminating carriers, fraud detection specialists and trade associations representing network and customer interests.

The ITA Code covers fair business practice, advertising and content and also the important area of fraud detection and prevention. Its code is much less prescriptive than those of the premium rate service regulators but includes these two key provisions.

> 5.2.11 - No caller shall remain connected to a programme or service for more than thirty (30) minutes. After thirty minutes any such call will be disconnected by the Telemedia Service Operator.
>
> 5.2.2 - All programmes shall normally be preceded by an announcement that:

- callers should be 18 years or over (adult services)

- international call charges apply

Complaints can be made online. ITA states[11] that where a violation of the Code is established, enforcement of ITA sanctions is provided in conjunction with the terminating carrier. ITA has the agreement of member carriers and non-member networks to enforce sanctions. Complainants are kept informed during the investigation process and notified of the case conclusion. A database is maintained on Code violations and cases of fraud. This information is available to regulatory authorities where a working relationship exists.

IARN

The International Audiotex Regulators' Network, IARN, was set up in 1995. IARN has established guidelines for the minimum standards that may be expected to apply to not only domestic premium rate services but also cross-border (0011) and global premium international rate services (979) when provided between IARN member countries.

IARN has recently changed its name from EARN, the European Audiotex Regulators Network indicating its European origins but also its desire to be an international organisation. It has 17 members from European countries all involved in the regulation of, or setting standards for, content and promotion for premium rate telephone services (audiotex) in their own countries. The UK based ICSTIS is a member but its only member outside of Europe is TISCC from Australia. There doesn't appear to be any cross membership between ITA and IARN.

Its guidelines include the following:

- before commencing a premium rate service, the correct rate per minute or per call should normally be stated. Where technically possible, this rate statement should not be charged for. It must be unambiguous and clearly audible.

- price reminders should be given every five(5) minutes.

- service providers should take every possible precaution to ensure that minors do not gain access to inappropriate services such as adult services, dating and virtual chat.

The complaints handling provisions provide an interesting model for co-operation between member countries and are based on Art 3 of the European Union's E-commerce Directive which states that the service is subject to the law applicable in the country of origin of the service.

The regulator in the country of the complainant:

- is to be the first and main point of contact for any consumer with a complaint.

- must identify the country of origin of the service complained about and the relevant national regulator and then hand over the complaint to that regulator for investigation.

- must keep the complainant informed on progress and the final outcome of the complaint
- is responsible for chasing up the other regulator to ensure that the investigation proceeds.

INTERNATIONAL PREMIUM RATE SERVICES (IPRS)

The International Telecommunications Union (ITU) headquartered in Geneva, Switzerland is an international organisation within which governments and the private sector coordinate global telecom networks and services.

It has recently approved a Recommendation for a numbering plan for international premium rate services. These new 12 digit numbers, starting with a 979 prefix, have been available by application to the ITU since April 2001[12] although may take some time to appear commercially in Australia.

The operation and management of the IPRS service is provided on a managed basis by a Recognized Operating Agency (**ROA**) in the country of the information service provider in conjunction with an ROA in the country of the caller. An ROA is any individual, company, corporation or governmental agency that operates an international telecommunication service to carry public correspondence[13]. In Australia this is likely to be the carrier providing carriage services to places outside Australia.

The original 1998 ITU Recommendation for these services imposes responsibility on the terminating Recognized Operating Agency to notify the information service provider of the regulation in the country of call origination as follows:[14].

> *The terminating ROA has the responsibility of processing all applications received on behalf of the Information Service Provider and will notify the IPRS Information Service Provider:*
>
> - *of the service/call charge and revenue options provided;*
> - *of the local code(s) of practice in the country of call origination for information service providers, and that failure to comply may require the IPRS originating ROA to withhold or withdraw access.*
>
> *The terminating ROA has overall control responsibilities to ensure the satisfactory completion of service orders for initiation, change, suspension and disconnection."*

As the new 979 numbers become available, it seems likely that the Audiotex industry will move traffic to the new international premium rate services as it will provide greater flexibility with charging. The domestic premium rate industry may also seek to use these services if they are cheaper or less regulated.

AUSTRALIAN GOVERNMENT POSITION

On 12 July 2001, Senator Alston issued a media release indicating that the ACA will be directed to develop service provider rules under s.99 of the *Telecommunications Act 1997* so that internet premium rate adult services will be treated similarly to telephone sex services. That is, access to these services will only be available where the customer has agreed in writing to their telephone having access to telephone sex services and access is restricted through a Personal Identification Number.

New regulations will also give the ACA '*a range of flexible powers*' to make service provider rules over a broad range of issues relating not only to 190 services but also 0011 services.

The Minister's media release indicates that new rules could include:

- requirements on carriers to notify customers where bills exceed limits.
- the establishment of a registration system for carriage service providers and content service providers involved in the supply of premium rate services.
- restricted access and call barring arrangements.

PUBLIC INFORMATION

In recent months the number of complaints about internet dumping to the TIO has remained steady. The TIO has taken the lead in providing public information and advice about how to minimise the risk of dumping and what to do when you receive a surprisingly high phone bill. Useful information has also been published by the Minister's office and Telstra. However many Internet Service Provider sites seem only to have quite general information, if they have any information at all, about the risks of internet dumping.

The TIO indicates that users can help to prevent dumping by:

- barring access to international and 190 numbers
- reading carefully any windows that offer downloads
- putting long expiry dates on internet history files so dumped calls can be traced
- turning off computers and disconnecting a modem when not in use.

TROJANS

Internet dumping seems to be a problem unique to dial-up internet services. However for persons with a permanent connection the possibility of re-connection to a 190 or 001 service could occur through the use of trojan horses or trojans.

A trojan is a destructive program that masquerades as a benign application. Unlike a virus, trojans do not replicate themselves but they can be just as destructive[15]. Once installed a trojan may allow a person to take over a computer and "remote control" it.

The Consumers' Telecommunicatons Network report a trojan being brought to their attention and watching it silently re-connect a modem from a local call to a 190 number. However, neither the TIO or Telstra have found evidence of the use of trojans in reconnection disputes.

For Trojans to be operated for gain in this context, they would have to be operated by or on behalf of a particular service provider. This would involve the commission of criminal offences in Australia. For this reason, if this is occurring, it is more likely to be done by or on behalf of overseas service providers.

The Leech case reported in the SMH[16] in March 2001 was said to have possibly been caused by a trojan but is still being investigated by the TIO.

The trojan type attacks are part of the wider issue of internet security. This is

still a major issue for personal users and the answer lies with the need for education about the risks of internet use and the benefits of using personal firewalls and anti-virus software.

CONCLUSIONS

The continued high incidence of the problem indicates that a lot more needs to be done to inform the public of the risks of internet dumping and how to minimise them.

Carriers benefit significantly from the provision of 190 and 0011 services to service providers. With media publicity of the problem in April 2001, Telstra provided some public comment and advice about the risks and implications of internet users being reconnected to a 190 or 0011 number but many seem to have not heard the message. There are new internet users every day and a much broader based information program seems to be necessary.

ISPs provide direct connection to the internet and arguably therefore have a legal duty of care to advise their subscribers of the risks associated with use of the internet. Big Pond notified its customers in an April 2001 bulletin of the risks and state in that bulletin that they also did this earlier in June 2000. Other ISPs seem to have published little detailed information about the problem anywhere at all. This may be due to the fact that the complaints about dumping go to Telstra and the TIO, not the ISPs and so most ISPs are perhaps not aware of the extent of the problem. However, being in a direct relationship with the customer for internet access it seems reasonable to suggest that they should advise their customers of the risks perhaps in their regular e-zines.

The other end of the problem is with the service providers and website operators.

Different regulatory issues are raised by each of the 190, 0011 and the anticipated new international premium 979 services.

The TISCC code Internet Dialler provisions which commenced 1 July 2001 seem to address the consumer issues well for 190 services. These are:

- prominent notice to the user of the timed premium charges;
- a clear decision is required by the user to accept the charges;
- re-connection to the original ISP after use of the service is mandated; and
- notice to the caller of the length of time of connection to the premium service is provided every 10 minutes.

Nevertheless the TIO complaint figures for July to September 2001 show 190 dumping complaints about 190 numbers and 70 for International numbers. Because of the quarterly lag in phone bills, it may be too early to draw any conclusions from this data about the effectiveness of the new TISCC code provisions.

The TISCC code also prohibits activation of the service remotely thus indirectly making some reference to the use of trojans.

One issue it doesn't cover is the requirement for a redialler to have an uninstall capacity. Another issue that the TISCC code could not deal with is early notice to be given to phone account holders when their bill goes over a certain monetary limit. The latter is important to notify an account holder of an unauthorised use of their account, for example, use of the service by a child without the parent's knowledge, particularly when hundreds of dollars worth of charges can be incurred in a single connection.

The Government's response is useful in that it directs the ACA to address this issue and to look at both 190 and 0011 services. The ACA should also look at the new 979 services.

Regulation of international services is more complex than the 190 services.

Effective regulation will require the co-operation or coercion of the originating carrier, the service provider, the information service provider and the terminating carrier. 0011 services are subject to the limited provisions of the ITA code, the most important one being mandatory disconnection after 30 minutes, but many other issues are not addressed.

The industry self-regulation option is to have IARN adopt more prescriptive provisions in its guidelines and to go on a drive for new members. Its country co-operation, role and responsibility provisions provide a useful model for a global code.

Global codes are appropriate when addressing regulatory issues arising from transborder communications. However, many countries will not join an international regulatory regime unless there is a commercial incentive to do so. IARN and ITA still have some way to go before a global self-regulatory model could be considered adequate.

The ITA code contributes the idea of a co-regulatory model where the industry representative body is global but national governments can insist on particular matters. It does this by providing, alongside the common code provisions, country schedules that set out the specific provisions to apply in that country.

Australia has headed down a path of direct regulation with the Minister directing the ACA to develop appropriate service provider rules under s.99 of the Telecommunications Act 1997.

One option may be for the ACA to use the service provider rules to prohibit carriers carrying audiotex services unless:

- contractual provisions exist in the agreement between the originating and terminating carriers requiring the service provider to require the information provider to comply with provisions similar to Schedule 12 of the TISCC Code.
- the originating and terminating carriers follow complaints mechanisms similar to those set down in the IARN guidelines.

This would at least be enforceable by the originating carrier against the terminating carrier but not as against an overseas service or information provider. This approach would seem to marry the IARN approach, where primary responsibility for the relationship with the complainant lies with the originating carrier, and the ITU approach where primary responsibility for regulation lies with the terminating carrier.

However, the danger of too prescriptive domestic regulation is industry moving offshore and Australian users having less recourse against unscrupulous overseas operators.

22 TIO Media release, 6 March 2001.

3 Op. Cit 2

4 *Australian IT*, 27 June 2000, 'Criminals cash in on call scam' by Hayes S.

5 Figures provided by the Deputy Telecommunications Industry Ombudsman.

6 Jackson M, *Director Carrier Relations*, International Telemedia Association: "The Future of International Telemedia Services in a Deregulating European Market", 1999.

http://www.telemedia-ita.org/NEWS/

7 ibid.

8 http://www.iarn.org

9 Op Cit 1.

10 The Infocall Service Information Pack, Telstra, Sept 2001, p.3.

11 http://www.telemedia-ita.org, Issue 25

12 www.itu.int/itu-t/bureau/circ/019E.doc

13 Definition from the ITU.

14 ITU-T Recommendation E.155

15 Definition from www.webopedia.com

16 Davies A, 'How a Family Ran up a $700 Phone Bill One Day When Nobody Was at Home', *Sydney Morning Herald*, 5 March 2001, p.3.

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Cross-Media Rules to be Revisited Again or Not

Raani Costello reviews the legislative and policy background of media ownership restrictions

Doing away with Australia's cross-media ownership laws is on the media policy agenda again following the Coalition's re-election to Federal Government in November 2001. The Coalition's election platform included the twin objectives of:

- giving media companies exemptions from the cross-media ownership restrictions if undertakings are given to maintain separate editorial processes and maintain existing levels of local news and current affairs; and
- abolishing the media-specific foreign ownership restrictions that apply to newspapers and television.

This article provides the legislative and policy background necessary to understand the present revival of this issue and why it may be difficult for the Government to achieve its policy objectives. Following his re-election, Prime Minister John Howard has made the comment that he is:

> *"not going to bloody his nose on it if the minor parties in the Senate remain opposed"*[1]

CROSS-MEDIA RESTRICTIONS

Over the last five years, the Coalition Government has unsuccessfully attempted to revisit and repeal the provisions of the *Broadcasting Services Act 1992* (Cth)(**BSA**) which prevent any single entity from controlling any two of the following in any geographic licence area:

- a commercial free-to-air television licence;
- a commercial radio licence; and
- a wide circulation newspaper.[2]

These restrictions were introduced by the Federal Labor Government in 1987 and the oft-quoted remark of then Treasurer Paul Keating that media proprietors

> *"may be princes of print or queens of the screen, but not both"*

reflects the underlying policy intention of preventing a media company from controlling broadcast and print media in the same geographic area.

These restrictions have been criticised since their creation as stifling the growth of Australian media companies and have been a constant barrier to much anticipated changes in the control of the Fairfax newspaper group, publisher of the *Sydney Morning Herald*, *The Age* and the *Australian Financial Review*.

1996 REVIEW OF CROSS-MEDIA AND FOREIGN OWNERSHIP

In late 1996, the Coalition Government, through the Department of Communications and the Arts, commenced a review of the cross-media rules which it later abandoned without making any formal recommendations.

The Government also sought to review the media-specific foreign ownership restrictions. Australian foreign ownership policy is primarily controlled under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and associated policies (**FATA**). In summary[3]:

- all direct (ie, non-portfolio) proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the foreign investment policy. Proposals involving portfolio share holdings of 5% or more must also be submitted for examination;
- foreign investment in mass circulation national, metropolitan, suburban and provincial newspapers is restricted. All proposals by foreign interests to acquire an interest of 5% or more in an existing newspaper or to establish a new newspaper in Australia are subject to a case-by-case examination. The maximum permitted aggregate foreign interest (non-portfolio) investment/involvement in national and metropolitan newspapers is 30% with any single foreign shareholder limited to a maximum interest of 25% (and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5%). Aggregate foreign interest direct involvement in provincial and suburban newspapers is limited to less than 50% for non-portfolio shareholdings.
- aggregate foreign ownership of Telstra is restricted to 35% of the privatised equity (presently 49.9%) and individual foreign investors are only allowed to acquire a holding of no more than 5% of that privatised equity. Prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing businesses in the telecommunications sector. Proposals above the notification thresholds will be dealt with on a case-by-case basis and will normally be approved unless judged contrary to the national interest.

The BSA also contains specific foreign ownership restrictions with respect to free-to-air and pay television licences, namely that:

- foreign interests in commercial free-to-air television licences are limited to a 20% company interest in

aggregate. A foreign person may not be in a position to exercise control of a free-to-air commercial television broadcasting licence. No more than 20% of directors of a licensee may be foreign persons[4]; and

- with respect to subscription (pay) television broadcasting licences, foreign interests are limited to a 20% company interest for an individual and a 35% company interest in aggregate.[5]

No change to the law was made arising from the 1996 review due to the opposition to the changing of the cross-media and foreign ownership rules both from within the Coalition Government (particularly regional National Party members) and the opposition parties.

Submissions to the 1996 review by interested parties highlighted the following:

- some parties were generally favourable to the repeal of the cross-media rules but wished foreign ownership restrictions to be maintained. For example, Publishing and Broadcasting Limited, owner of the Nine television network, submitted that Australian media companies are forced to stay small and non-competitive due to artificial cross-media restraints and are unable to compete with foreign conglomerates.[6]

- some parties were favourable to the repeal of the cross-media rules and the relaxation of foreign ownership regulations. For example, News Limited (publisher of *The Australian*, *The Herald Sun*, *The Daily Telegraph* and *The Courier Mail* amongst others) submitted that foreign ownership rules remain a substantial barrier to entrants and investors in the media industry and combined with the cross-media limits are out of step with the trend in economic regulation which is to expose industry to competitive pressures.[7]

- the Australian Competition and Consumer Commission (*ACCC*), Australia's competition regulator, was of the view that the BSA and FATA could be impediments to international competition, as they could be used to block acquisitions of Australian media outlets by foreign media proprietors. he ACCC believed that as competition is reduced, so are the prospects for greater plurality and diversity in the media.[8]

- it was the widespread view of media companies that the cross-media rules are antiquated and piecemeal because they did not acknowledge digital convergence and the rise of new media such as the Internet and pay television which they argued increased the plurality of views and made concentration of ownership and influence more unlikely. Critics of this position, such a public interest groups and the journalists' union, argued that the same media companies tend to dominate new forms of media such as pay television and Internet content portals and in any event, print media and free-to-air television remain the most influential media. As such, they maintain that cross-media restrictions prevent concentration in the ownership and control of the most politically influential media.

PRODUCTIVITY COMMISSION INQUIRY INTO BROADCASTING

In 1999, the Federal Treasurer Peter Costello referred the BSA and related broadcasting legislation to the Productivity Commission and asked the Commission to advise on practical courses of action to improve competition, efficiency and the interests of consumers in broadcasting services. As with the inquiry of 1996, consultation with key interest groups and affected parties was sought.

The Commission's *Broadcasting Inquiry Report*, released in April 2000[9], recommended that:

- Foreign investment in broadcasting should be covered by Australia's general foreign investment policy. All restrictions on foreign investment, ownership and control in the BSA should be repealed.[10] If the immediately preceding recommendation is not adopted, the BSA should be amended immediately to remove restrictions on investment by foreign managed, but Australian sourced, funds in Australian commercial television businesses.[11]

- The *Trade Practices Act 1974* (Cth) (*TPA*) should be amended immediately to include a media-specific public interest test which would apply to all proposed media mergers. This test would be administered by the ACCC, and require that the ACCC seek Australian Broadcasting Authority (*ABA*) input on social, cultural and political dimensions of the public interest.[12] The cross-media rules should be removed *only* after the following conditions are met:

  - removal of regulatory barriers to entry by new entrants into broadcasting, together with the availability of spectrum for new broadcasters;

  - repeal of BSA restrictions on foreign investment, ownership and control; and

  - amendment to the TPA to provide for a media-specific public interest test to apply to mergers and acquisitions in the media industry.[13]

To date, the Commission's recommendations have not been formally commented on by the Government and no legislation was proposed arising out of the recommendations. While the Commission's recommendations on foreign ownership are not too far removed from the Government's election policy (see below), the Commission's recommendation that the cross-media rules should only be removed on the condition that new entrants be allowed into the broadcasting market is in conflict with the Government's policy regarding commercial free-to-air television and the introduction of digital terrestrial television. The Government has granted incumbent free-to-air licensees a period of protection, ending in 2007 at the earliest, in which no new free-to-air commercial television licences may be granted by the ABA.

The Commission also recommended that certain intra-media ownership restrictions be removed, namely, the prohibition on the control of more than one commercial free-to-air television licence in the same licence area;[14] and the prohibition on the control of more than two commercial radio licences in the same licence area.[15] The Commission is of the view that the normal competition provisions of the TPA are sufficient to achieve public policy objectives of competition and diversity.[16]

CURRENT POLICIES OF THE GOVERNMENT AND MAJOR OPPOSITION PARTIES

The newly re-elected Government's current policy on broadcasting, *Broadcasting for the 21st Century*, sets out their policy on media ownership[17]. In summary, the Coalition's position is as follows:

- the cross media rules are anachronistic and media organisations should be able to obtain exemptions from the rules if they give undertakings to maintain separate and distinct editorial processes; and retain existing levels of local news and current affairs production on television and radio;

- the existing media-specific foreign ownership rules that apply to television and newspapers are preventing the introduction of new players and a more competitive media sector. They should be abolished, with media acquisitions considered under FATA; and

- if the above objectives cannot be achieved, the restrictions on the broadcasting sector in relation to foreign managed funds will be reviewed as a matter of priority. This is an express acknowledgement of the Productivity Commission's recommendations on foreign media ownership policy.

Labor's media ownership policy is part of their overall arts policy entitled ALP Platform 2000 and had not been formally revised during the election campaign.[18]

In summary:

- Labor is committed to diversity in both the ownership and operation of free to air and pay television, radio, newspapers and emerging online media. Labor recognises that the convergence of new technologies does provide new opportunities and challenges for Australia's media but believes that the strategic objective of diversity can continue to be secured by a range of measures. To this end Labor will retain cross media ownership laws.

- no express mention is made of Labor's position on foreign ownership of media companies. However, Stephen Smith (the Shadow Minister for Communications) was reported during the election campaign as stating that:

> *"the continuing existence of the cross and foreign media ownership rules as the tactical devices currently needed to secure a very fundamental strategic objective in media and broadcasting laws, and that's called diversity".*[19]

The Democrats' media ownership policy[20] does not expressly state the party's position on the cross-media rules. However,

- the Democrats' policy states that:

> *"Australia has one of the highest concentrations of media ownership. This has serious political and economic consequences which must be addressed. The best guarantee of independence in the media is the widest possible spread of ownership. The Democrats believe that Australians should own the majority of Australian media outlets, but acknowledge there may be special circumstances where overseas proprietors add to the diversity and plurality of content."*

- a spokeswoman for Democrat Senator Vicki Bourne was reported during the election campaign as saying,:

> *"We think the regime as it stands has added to Australia's diversity of ownership and plurality of opinion and that's served audiences as well as can be expected. Unless we actually see what the Government is proposing then we can't say one way or another whether we'd support it."*[21]

Along with Labor and the Democrats, the Australian Greens are likely to be an important force in the Federal Senate and the composition of the Senate may impede the Coalition's chances of achieving its policy objectives. The Greens' policy objective with respect to media ownership is:

> *"the regulation of media and publishing to ensure diversity of local, regional and national products."*[22]

It will be interesting to observe how the Government goes about pursuing its policy objectives – whether it will conduct another public inquiry as it did in 1996 and 1999 or alternatively, introduce legislation into Parliament without undertaking such a process. It appears that the Coalition strategy of characterising the changes to the cross-media restrictions as one of creating exemptions rather than wholesale repeal of the cross-media rules supports the view that it might be a lower profile attempt this time round. However, even this may prove too difficult given the composition of the Senate, as noted by Prime Minister Howard in his recent comments.

It should be noted that the non-BSA foreign ownership restrictions are easier to change than the cross-media and foreign ownership restrictions in the BSA relating to television. For example, the Government could relax the 30% foreign limit on newspapers without the need for Senate approval.

11 Gilchrist M and Doman M, "PM Takes Back Promise to Media", *The Australian* (15 November 2001) at http://theaustralian.news.com.au/common/story_page/0,5744,3252530%255E2702,00.html

2 BSA, s 60.

3 See the Foreign Investment Review Board's website for a summary at http://www.firb.gov.au/policy_pubs/policysummary1a.htm#Media

4 BSA, s 57 and s 58.

5 BSA, s 109.

6 Publishing and Broadcasting Limited, Submission to the Cross-Media Review, 1996, p 4.

7 News Limited, "Reforming Media Policy", Submission to the Cross-Media Review, 1996, p 13.

8 ACCC, Submission to the Cross-Media Review, 1996, para 7.4.

9 Available at http://www.pc.gov.au/inquiry/broadcst/finalreport/index.html

10 Recommendation 10.1.

11 Recommendation 10.2.

12 Recommendation 10.3.

13 Recommendation 10.4.

14 BSA, s 53(2).

15 BSA, s 54.

16 Recommendation 10.6.

17 Pt 4, p 18. It can be accessed at http://www.liberal.org.au/policy/Broadcasting%20policy.pdf

18 http://www.alp.org.au/policy/platform2000/chapter_14.html#6

19 Crabb A and Lawson A, "Media Ownership Limits May be Relaxed", *The Age* (30 September 2001) at http://www.theage.com.au/news/national/2001/08/30/FFXNSAJQYQC.html

20 http://www.democrats.org.au/policies/

21 Banham C. "Alston Flags Overhaul on TV, Newspaper Ownership", *Sydney Morning Herald* (30 September 2001) at http://www.smh.com.au/news/0108/30/national/national11.html

22 http://www.greens.org.au/

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Legislation Note
Some Final Words On Privacy

Catherine Dickson provides some final words on implementation of privacy law compliance for the private sector.

With December 21 2001 having been & gone, most organisations should be in full swing implementing the National Privacy Principles (NPPs). With your preparation almost complete, you may be considering some of the more difficult aspects of the new privacy legislation. Dealing with information that is sent overseas is an issue that most organisations have left to last. This activity is regulated by NPP 9. It is a difficult area to prepare for, particularly given the lack of guidance as to what constitutes effective data protection standards in other countries. However, transborder transfers of information should not be ignored. They are high risk because the Australian entity is effectively responsible for the handling of all personal information collected in Australia that it sends overseas. Some important issues to consider in this context are:

Who are you transferring to? If you are transferring within the Australian-based collecting entity then NPP 9 does not apply. There is also an argument that if the disclosure is to a related body corporate, then it is not an interference with privacy by virtue of section 13B of the new privacy laws, so NPP 9 does not apply. However the better view is that NPP 9 applies to transfers rather than disclosures so that NPP 9 applies to any disclosure that involves a transfer overseas.

How are you transferring? Personal information that is collected at an Australian website and transferred to an overseas company (whether related or not) for processing will be subject to NPP 9.

What are you transferring? Remember the employee records exemption only applies to employee information when it is in the hands of the employer. Once it is transferred overseas to a parent company the NPPs apply.

Why are you transferring? You may also be wondering about the utility of some of the conditions listed in NPP 9. You are not alone! Contracts concluded in the interest of the individual are going to be difficult to establish. Also satisfaction of all but the conditions allowing transfer with consent or to a recipient that is subject to an equivalent law, binding scheme or contract, will most likely have to be established on a case by case basis.

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

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Contibutions 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.

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