

Senate Select Committee on Information Technologies

**SELF-REGULATION IN THE INFORMATION AND
COMMUNICATIONS INDUSTRIES**

**Minority Report
by
ALP Senators**

NB: Current ALP Senators who are members of the Senate Select Committee on Information Technologies were not appointed until after the 1998 election, prior to which all public hearings had been held and almost all Submissions received. Accordingly ALP Senators have only been able to review material in Submissions and Hansard, but not explore issues or examine witnesses on any matters raised in their submissions.

In addition, Senator Lundy was absent overseas on Parliamentary duties at the time of writing this Report. Accordingly, Senator Lundy was unable to participate in the deliberations leading to this Minority Report.

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1. Introduction

- 1.1 The communications and information industries, like other industries, are undergoing significant and far-reaching changes as a result of rapidly advancing technologies. The importance of these industries, both economically and as an element of democratic society, deserves recognition. Arising from these functions of the media are responsibilities to prevent misuse of the ensuing powers. For this reason these industries have traditionally been subject to some degree of regulation.
- 1.2 The traditional approaches to regulating the communications and information industries have been industry-based, however increasing convergence of these industries necessitates reconsideration of the policy frameworks within which these industries operate. It is inevitable that increasing irrelevance of these industry-based assumptions will complicate government intervention and regulation.
- 1.3 Existing frameworks regulating the communications and information industries are fragmented and industry-specific notwithstanding similarities in the issues they seek to address. Telephony and the Internet, the print media, and radio and television broadcasters, are subject to distinct regulatory regimes.
- 1.4 There are varying degrees of self-regulation and co-regulation to which these industries are subject, and regulatory frameworks are commonly developed by the relevant industry. The predominant concerns with the existing regulatory structure that have become evident to Labor Senators are:
 - Whether the privacy of individuals is adequately protected;
 - Whether there are adequate controls over the publishing, broadcasting, and the like, of content considered ‘undesirable’;
 - The impact of ‘commercial arrangements’ on the content of news and current affairs;
 - The insidious breaches of the self-regulatory Code by commercial radio stations evidenced by the ABA’s findings in the 2UE Report on the Commercial Radio Inquiry into commercial arrangements between 2UE’s presenters and corporations.

- 1.5 It is important, in the formulation of policy, that regulatory controls are balanced with basic freedom of speech. It has been pointed out to the Committee that the danger of implementing strict controls in this industry (particularly in the context of privacy controls) is that they can have the detrimental impact of reducing this freedom:

..it is true throughout the whole business of self-regulation of the media that, if you move in any direction which reduces the freedom of speech, the price is too high. ... The price we pay for the freedom of speech is the misdemeanours that occur along the way.¹

- 1.6 Undoubtedly there are misdemeanours in these industries in relation to intrusions into individuals' privacy. It has been argued to the Committee that the number and extent of these are insignificant when weighed against the potential impact of government intervention on the flow of information to the public, particularly in the absence of a constitutional guarantee of freedom of speech.² Ms M Scollay, Privacy Commissioner, Human Rights and Equal Opportunity Commission, suggested a need for debate on the appropriateness of the present balance:

...clearly there is a balance between public interest in privacy and the public need to know. ... In terms of where an activity by the media is particularly intrusive into the personal lives of people, it is very clear that there is a community standard out there which says that the media has gone too far but where that line should be drawn is an area for debate.³

2. Limitations of existing regulatory schemes

- 2.1 A number of limitations and deficiencies of the existing regulatory schemes have been brought to the Committee's attention. The issues that have been raised need to be addressed by alterations, where appropriate, to the relevant scheme.

¹ Mr J Morgan, Member, Australian Press Council, *Official Committee Hansard*, Sydney, Thursday 05/02/98, p.16.

² Mr J Morgan, Member, Australian Press Council, *Official Committee Hansard*, Sydney, Thursday 05/02/98, p.16; Australian Press Council, Submission 17, p. 3.

³ *Official Committee Hansard*, 5 February 1998, pp. 42-43.

2.2 Labor is concerned at instances of blatant breaches of individual's privacy and the publication and broadcasting of content which is clearly undesirable, particularly where regulatory schemes have sought to intervene and failed. The efficacy of the scheme's complaints-handling mechanisms reflects the overall success of the regulatory scheme.

2.3 **Print media:**

2.3.1 The print media is largely self-regulated, and the Australian Press Council (APC) and the Australian Journalists' Association (AJA) oversee this arrangement.

2.3.2 Several instances of reprehensible conduct that have come before the APC have resulted in a range of criticisms of the process by which they consider and resolve complaints.

2.3.3 The photographs published in the *Daily Telegraph*, of then Senator Bob Woods and Dr Jane Woods, are illustrative of the criticisms. The *Daily Telegraph* photographs of the Woods in the back garden of their home was held by the APC to be 'a blatant example of the unjustified breach of privacy'.⁴ The newspaper subsequently republished the photograph despite the APC's prior determination that publication of the photograph was contrary to the APC's Statement of Principles. This illustrates:

- The APC's failure to take on a pro-active role in investigating potential breaches of their Statement of Principles. In the Woods case, there was no complaint to the APC regarding the second publication of the photograph, and therefore there was neither consideration of nor adjudication on the matter. Additionally, the photograph was originally published not only in the *Daily Telegraph*, but also in the *Herald Sun*, the *Courier Mail*, and the *Advertiser*, and the APC made no adjudication on those apparent breaches because they were not the express subject of the complaint. The APC has stated 'The Council prefers to rely on

⁴ Australian Press Council, Adjudication No. 916, April 1997, available at <http://www.austlii.edu.au/au/other/apc/916.html>.

members of the public bringing matters up’⁵, that is, initiation of investigations by complaints is preferred to investigation of apparent breaches on its own initiative.

- The adjudications and enforcement powers of the APC have been criticised as ineffectual, rendering the APC ‘a bit of a toothless tiger’⁶ according to Mr Paul Bongiorno. The Press Council’s response to this assertion was, ‘Our experience is that by and large newspapers and magazines do abide by the Press Council’s adjudications’.⁷ In this context, the adequacy of “by and large” compliance is the issue.

2.3.4 Other criticisms of the APC arising from evidence to the Committee include:

- There is an apparent lack of community awareness of the availability of the APC’s complaint procedures, resulting in under-utilisation (and, consequently, the overall level of community dissatisfaction with the print media is unascertainable).
- The time frame for complaints is too lengthy.⁸
- It has been suggested that the protection of individuals’ privacy by the APC is inadequate (in light of enforceability issues) and that ‘the current regulatory framework fails to strike the right balance’⁹ between the right of individuals to privacy and the public interest in a free press.

2.3.5 Analogous criticisms have been levelled at the Australian Journalists’ Association (AJA). The AJA has jurisdiction only over those journalists who are union members, has not achieved significant public awareness of its complaint procedures, and has limited powers of enforcement.¹⁰ The lack of public accessibility to adjudications is of particular concern

⁵ Mr J Herman, Executive Secretary, Australian Press Council, *Official Committee Hansard*, Sydney, 5 February 1998, p. 21.

⁶ Mr P Bongiorno, *Official Committee Hansard*, Canberra, 15 April 1998, p. 290.

⁷ Mr J Herman, Executive Secretary, Australian Press Council, *Official Committee Hansard*, Sydney, 5 February 1998, p. 13.

⁸ Mr J Tebbutt, Monash University, *Official Committee Hansard*, Melbourne, 6 February 1998, p. 94.

⁹ Australian Privacy Charter Council, Submission 21, p. 8.

¹⁰ Mr M Pearson, “Press Self-Regulation in Australia”, *Tolley’s Journal of Media Law and Practice* (1991), p. 117, Submission 24.

to those who would like to see effective regulation of journalists.¹¹ These criticisms have been countered by arguments that inhouse guidelines compel appropriate behaviour from journalists¹² and, regardless, regulation of other media does not directly regulate those who gather information.

- 2.3.6 The APC appears to have recognised some of the criticisms of the self-regulatory regime applying to the print media, and has foreshadowed some changes such as improvements to the timeframe for the complaints procedure, public awareness, locations for hearings.¹³ Labor Senators support the APC's endeavours to respond positively to criticism. Continued advancements will improve the self-regulatory scheme and this is encouraged.

2.4 Television:

- 2.4.1 Australia's television stations operate within a co-regulatory framework in which Codes of Practice are developed and managed under the supervision of and with the assistance of the statutory body, the Australian Broadcasting Authority (ABA). Commercial broadcasters subscribe to a Code developed by the Federation of Australian Commercial Television Stations (FACTS) and registered with the ABA. The national public broadcasters, the ABC and the SBS, have developed their own Codes, which are registered with the ABA.
- 2.4.2 Evidence of overtly intrusive activities, such as those to which Mrs Colston was subjected,¹⁴ are acknowledged by industry representatives as illustrating the need for ongoing attention to the review and

¹¹ Mr M Pearson, "Press Self-Regulation in Australia", *Tolley's Journal of Media Law and Practice* (1991), pp. 117-118 in Submission 24.

¹² Mr P Bongiorno, *Official Committee Hansard*, Canberra, 15 April 1998, p. 292.

¹³ Mr M Pearson, "Press Self-Regulation in Australia", *Tolley's Journal of Media Law and Practice* (1991), p. 117, Submission 24.

¹⁴ Mrs D Colston, Submission 20.

development of self-regulatory mechanisms directed at avoiding such invasions of privacy.¹⁵

2.4.3 There was some disagreement in evidence to the Committee relating to the effectiveness of the current regulatory system. Those involved in the industry and its regulation support the existing arrangements.¹⁶

2.4.4 It appears, from evidence to the Committee, that instances of unprincipled behaviour are not common. FACTS argued in its submission that in spite of these instances of unacceptable actions, with ongoing work to bring the industry up to the requisite standards, the present system based on self-regulation will continue to offer the most appropriate and effective way to regulate the industry.¹⁷

2.4.5 The principal criticisms of the existing system brought to the attention of the Committee were that:

- There is a lack of public awareness of the complaints-handling procedures available.
- The time taken to deal with complaints is excessively long.
- The ABA is failing to adequately monitor compliance with the Codes of Practice.
- There is a lack of meaningful penalties for broadcasters who breach the Codes.

2.4.6 FACTS coordinates an ongoing educational campaign implemented by public information “spots” on commercial broadcasters. FACTS considers this adequate in light of the requirement under the Code that

¹⁵ Mr P Manning, *Official Committee Hansard*, Sydney, 22 April 1998, p.343 (note: expressing personal view).

¹⁶ Mr G Tanner, Australian Broadcasting Authority, *Official Committee Hansard*, Sydney, 5 February 1998, p. 51; Mr P. Harvey, *Official Committee Hansard*, 22 April 1998, p. 391; FACTS, Submission 29, p. 2.

¹⁷ FACTS, Submission 29, p. 5.

broadcasters advise complainants of their right to refer their complaint to the ABA. The ABA has no ongoing mass education campaign.

2.4.7 There is no specified timeframe within which the ABA must deal with complaints referred to it. The ABA considers that it has now addressed previous deficiencies in timeframes for dealing with complaints and these improvements in efficiency are being maintained.¹⁸

2.4.8 It has been alleged that the ABA is failing to adequately monitor compliance with the Codes of Practice even though this is one of its primary functions pursuant to section 158 of the *Broadcasting Services Act* 1992 (the Act). The ABA's principal means of monitoring compliance is through scrutiny of complaints, both those which are brought to the ABA for adjudication and those which are summarised in the complaints statistics provided to the ABA by FACTS which relate to complaints resolved by the broadcasters. Mrs M Murdoch of the Australian Children's Television Action Committee advised the Committee:

I would ask that when a station receives a complaint they send a copy of that complaint to the ABA. The ABA should monitor how often the various networks put to air the way in which a complaint should be made, and it should fairly frequently be put to air, not just when a licence is coming up for renewal.¹⁹

2.4.9 The national public broadcasters have indicated their support for the self-regulatory scheme and the success of its operation.²⁰

2.5 Radio:

2.5.1 Co-regulation of the radio industry by the Federation of Australian Radio Broadcasters (FARB) and the ABA mirrors the co-regulatory scheme covering television broadcasters. The radio industry Codes of

¹⁸ ABA Annual Report 1996-1997, p. 104. Report can be downloaded from: <http://www.aba.gov.au/about/information/anrep.htm>.

¹⁹ *Official Committee Hansard*, Melbourne, 6 February 1998, p. 144.

²⁰ ABC, Submission 22, p. 3; SBS, Submission 14 pp. 1-3.

Practice and Guidelines are registered with the ABA, complaint-handling procedures are equivalent in substance, and the ABA has powers of enforcement like those for television broadcasters.

2.5.2 Regulation of the radio industry has been the subject of recent scrutiny as a consequence of the ABA's 'Cash-for-Comments' Inquiry into commercial arrangements between radio presenters and corporations. The ABA has reported the findings of its investigation into Radio 2UE and announced that it will impose disclosure conditions on Radio 2UE's broadcasting licence pursuant to its findings that Radio 2UE:

- breached the Act on five occasions;²¹
- breached Code 2 of the Commercial Radio Codes of Practice on sixty occasions;²² and
- breached Code 3 of the Commercial Radio Codes of Practice on thirty occasions.²³

2.5.3 The ABA's action in response to its findings is welcomed by the ALP; however the Government must move urgently to legislate for across-the-board disclosure requirements, like those imposed on 2UE's licence.²⁴ Action on individual stations as a result of Code breaches is inadequate to safeguard against such blatant disregard of the Codes of Practice. The only effective solution is to impose disclosure requirements upon all commercial radio broadcasters, irrespective of the outcome of the continuing investigations into 6PR Perth, 5AD Adelaide and 3AW Melbourne.

²¹ 2UE contravened clause 4(2) of Schedule 2 to the Act, and as a result breached the condition on its licence imposed by clause 8(1)(i) of Schedule 2 to the Act.

²² Clause 2.2(d): Australian Broadcasting Authority, *Report of the ABA Hearing into Radio 2UE Sydney Pty Ltd*, February 2000; available at: http://www.aba.gov.au/what/investigate/commercial_radio/reportindex.htm

²³ Clause 3.1(a): Australian Broadcasting Authority, *Report of the ABA Hearing into Radio 2UE Sydney Pty Ltd*, February 2000; available at: http://www.aba.gov.au/what/investigate/commercial_radio/reportindex.htm

- 2.5.4 That these breaches occurred and were not detected by the ABA in its monitoring of compliance reveals serious flaws in the regulatory scheme for commercial radio. The FARB's position that it is not its proper function to play a role in monitoring compliance.²⁵ The ABA's apparent failure in this respect, highlights the necessity for appropriate governmental action to prevent the recurrence of these pervasive breaches, which undermine the self-regulatory regime, by making serious remedial action available to the ABA.

2.6 Telephony & the Internet:

- 2.6.1 The regulatory issues faced by the telecommunications industry are, in some respects, unlike those discussed for the other communications media. There are two distinct regulatory systems in this industry which apply to regulation of the carriage and regulation of the content of information.
- 2.6.2 The self-regulation of carriage is achieved under the *Telecommunications Act* 1997 and deals with carriers and their procedures and policies relating to carriage of information. The Telecommunications Industry Ombudsman (TIO) Scheme and the development of self-regulatory Codes and ACA industry standards are the self-regulatory elements of carriage.
- 2.6.3 Recent amendments to the *Broadcasting Services Act* 1992 created a system to regulate the content of information on the Internet. Labor did not support this new system.²⁶ Since that time, pursuant to a Senate resolution, the Government is required to table six monthly reports in the Senate on the effectiveness and consequences of the Act. These reports

²⁴ As per Media Statement, Mr S Smith MP, Shadow Minister for Communications, 28 March 2000.

²⁵ *Official Committee Hansard*, Canberra, 11 June 1998, p. 550.

²⁶ See Labor Senators' Minority Report on the *Broadcasting Services Amendment (Online Services) Bill* 1999, Senate Select Committee on Information Technologies; and Second Reading Speech, Senator M. Bishop, *Senate Hansard*, 24 May 1999, p. 5135 ff.

will be prepared by NetWatch.²⁷ Labor has said it will continue to review the effectiveness of the Act.²⁸

- 2.6.4 Criticism directed at the self-regulatory scheme for carriage focused on concerns regarding the development and coverage of the Codes, and apparent ineffectiveness of monitoring and enforcing compliance. These are matters which should be afforded consideration by the industry and regulatory bodies.

3. Privacy

- 3.1 Labor Senators are very concerned at evidence elucidating the privacy implications of databases storing personal and financial information on individuals for consumer purposes.²⁹ It is of particular concern to the ALP that the gathering of information constituting an invasion of privacy, including via the Internet, is largely unregulated. Standards for data protection were criticised by the Australian Privacy Charter Council for their inadequacy.³⁰ It is recommended that the industry adopts or amends Codes consistent with the principles for an Australian privacy scheme advocated by the Privacy Commissioner, as a minimum standard and interim measure until further privacy controls can be put into operation.
- 3.2 Reports of the information and communications industries involvement in such activities have been corroborated by those involved.³¹ On 30 November 1999,

²⁷ For further information, see Supplementary Budget Estimates Hearings, Senate Environment, Communications, Information Technology and the Arts Committee, *Official Committee Hansard*, 2 December 1999, p. 79.

²⁸ *Senate Hansard*, 30 September 1999, pp. 9220-9224.

²⁹ See ABC Online Inquiry Public Hearing, Senate Environment Communications, Information Technologies and the Arts References Committee, *Official Committee Hansard*, 17 March 2000, p. 19ff and pp. 44-47. See also discussion in Supplementary Budget Estimates Hearings, Senate Environment, Communications, Information Technology and the Arts Committee, *Official Committee Hansard*, 2 December 1999, p. 57ff. regarding Australia Post customer lifestyle survey.

³⁰ Australian Privacy Charter Council, Submission 21, p. 3.

³¹ Ian Grayson, "Packer sets up Big Brother data store", *The Australian*, 30 November 1999, p. 33. Available at <http://technology.news.com.au/news/4277059.htm>.

The Australian reported that Kerry Packer's Publishing and Broadcasting Limited (PBL) is involved in a joint venture with Acxiom, a US direct marketing services provider, to develop a database on Australian consumers.³²

3.3 Concerns about such databases include:

- unregulated, the information they provide could be inaccurate and misleading, with potential implications for an individual's credit rating, for example;
- moral objections to infringement of a person's right to confidentiality of personal information;
- the inability of consumers, in the absence of regulatory controls, to know when information is being collected, who is collecting it, how that information will be used and to whom it will be disclosed;³³
- the resultant uncertainty in the community might inhibit the development of e-commerce industries in Australia.

3.4 Ms M Scollay, Privacy Commissioner, Human Rights and Equal Opportunity Commission informed the Committee of evidence that there is considerable community concern at the potential for privacy invasions on the Internet.³⁴ Labor will await with interest the introduction of the Privacy Amendment (Private Sector) Bill 2000 announced by the Attorney-General on 29 March 2000.³⁵ Upon its introduction, we will examine whether its detail comprehensively covers the identified issues of particular concern in these industries.

3.5 It is noteworthy that several submissions to the Committee raised privacy issues concerning harassment and intrusion in personal matters by media journalists and photographers. The existing regulatory industry Codes of Practice and various ethical guidelines address this issue to some degree,

³² Ian Grayson, "Packer sets up Big Brother data store", *The Australian*, 30 November 1999, p. 33. Available at <http://technology.news.com.au/news/4277059.htm>.

³³ Similar concerns have been discussed at recent Senate Committee Hearings. See references cited in footnote 29.

³⁴ *Official Committee Hansard*, Sydney, 5 February 1998, pp. 40-41.

³⁵ News Release, 29 March 2000, Attorney-General, the Hon. Daryl Williams. Available at http://law.gov.au/aghome/agnews/2000newsag/719_00.htm.

although arguably inadequately, particularly if enforcement is unsuccessful. However, it appears those instances of unacceptable behaviour are not typical of industry conduct. Should evidence to the contrary become available this issue would require reconsideration. In those circumstances there could be justification for additional regulatory measures for the industry, taking account of the possible detrimental consequences on freedom of speech and public information which are critical to democratic society.

4. Conclusions

- 4.1 Labor Senators consider that there is insufficient evidence to support a conclusion that self-regulation of the communications and information industries has failed to a substantial degree, with the obvious exception of the radio industry. Labor does not conclude that there are significant numbers of complaints evidencing regular and systematic breaches of the relevant codes or standards of practice in the print and television media.
- 4.2 The range of matters covered by the self-regulatory schemes is often comprehensive, and where omissions become apparent, there is scope for appropriate alteration. Even though doubts as to the level and enforcement of industry compliance have been raised, Labor Senators do not consider it appropriate, at present, to diminish or override the impact of the regulatory schemes and risk compromising the media's freedom of speech.
- 4.3 In the case of the radio industry, the Government must move urgently to legislate for across-the board disclosure requirements,³⁶ like those imposed on Radio 2UE's licence by the ABA. Labor Senators believe that action on individual stations in response to Code breaches is an inadequate safeguard against future blatant disregard of the Codes of Practice. Labor Senators recommend the imposition of disclosure requirements upon all commercial radio broadcasters, irrespective of the outcome of the continuing investigations

³⁶ As per Media Statement, Mr S Smith MP, Shadow Minister for Communications, 28 March 2000.

into 6PR Perth, 5AD Adelaide and 3AW Melbourne, as the appropriate solution.

- 4.4 Labor Senators are very concerned about the privacy implications of databases storing personal and financial information on individuals for consumer purposes. It is recommended that the industry adopts or amends Codes consistent with the principles for an Australian privacy scheme advocated by the Privacy Commissioner, as a minimum standard and interim measure until further privacy controls can be put into operation. Labor will await with interest the introduction of the *Privacy Amendment (Private Sector) Bill* 2000 and we will then examine whether its detail comprehensively covers the identified issues of particular concern in these industries.
- 4.5 It is critical that the whole issue of regulation of the communications and information industries is kept under review, as although there is presently insufficient justification for further government intervention in the industry, with the exception of those areas discussed, that might not always be the case. In addition, industry convergence is anticipated to have a considerable impact on the information and communications industries, and this necessitates ongoing examination of the effectiveness of regulatory schemes in these industries.
- 4.6 Continued monitoring of the efficacy of enforcement procedures in these industries is required to identify and recurring and regular failures by industry groups to abide by standards prescribed in the regulatory regimes or efforts to enforce those standards. In the various ongoing reviews of self-regulatory schemes, media groups should afford the concerns raised with the Committee during this Inquiry due consideration.
- 4.7 Labor does not support the Chair's proposal for the establishment of a Media Complaints Commission for the principal reason that, with the exception of the commercial radio industry, we do not believe breaches of the existing regulatory system that have been identified are of such number, so systematic,

so recurrent, or of such a structural nature to warrant the creation of an overarching body.

SENATOR MARK BISHOP

A.L.P. (W.A.)

