



Speaking freely

*Report of proceedings of the **Free Speech in Australia** Conference, held by the Communications Law Centre in Sydney on 10 September.*

The Mason view

The conference was opened by Sir Anthony Mason, Chancellor of the University of New South Wales and former Chief Justice of the High Court. In his address, Sir Anthony noted that, as Australians do not live in a society where free speech is not tolerated, we are not always alert to recognise the existence of hazards that may affect the existence of this freedom. Describing free speech as 'the essence of modern democratic government and the very spirit of our social life', Sir Anthony argued that, regardless of current rhetoric about political mandates, good government should aspire to the ideal of 'deliberative democracy'. By this, he meant that people are entitled to the provision by government of relevant information to informed commentary, to the benefit of continuing discussion and debate on public affairs, and to the impact such discussion and debate has on the decision making processes of government.

Good government and vibrant social life calls not only for laws protecting free speech, but also for resources providing for access to such information and informed commentary. In this regard, Sir Anthony noted, 'the Australian Broadcasting corporation has been instrumental in furthering the cause of deliberative democracy in Australia. Its current affairs programs have played, and continue to play, a vital part in bringing to light and agitating important public and policy issues, and in ensuring informed discussion of them'.

Sir Anthony then addressed regulation of the Internet, 'a monster that grows bigger and more frightening

each day'. Doubting that national regulation would be fully effective, Sir Anthony felt that we should be aiming towards an international solution to the problem - at least one acceptable to the United States, which is host to many of the Internet's service providers. Given the recent failure, on First Amendment grounds, of attempts made to regulate the Internet in the United States, Sir Anthony remarked that 'it may transpire that in a number of areas the United States' constitutional powers will ultimately play a very large part in what the acceptable international solution is'.

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Finally, Sir Anthony expressed surprise that copyright law reform was not listed for discussion. Proposals to extend the concept of copyright, currently being pushed by United States and European publishers, may impair the free flow of information and ideas as we presently know them.

The ABC's role

Donald McDonald, Chairman of the ABC, stated the importance of national broadcasters in promoting Sir Anthony Mason's ideal of deliberative democracy. National broadcasters were critical to this process, because commercial broadcasters, with an overriding duty to their clients - advertisers - regarded their audiences

as consumers rather than citizens. In New Zealand, commercial imperatives faced by the national broadcaster has led to a radical shift in news presentation. Quality and depth of coverage have given way to an emphasis on personalities, on conflicts, and on the underlying assumption that the audience was not really interested in politics.

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Mr McDonald rejected the argument that the growing profusion of pay television channels lessens the importance of national broadcasters. This argument confused numerical diversity with genuine choice, involved the misapprehension that more information meant a better informed public, and assumed that everyone could afford to pay for this information.

The high concentration of media ownership in Australia makes the ABC's role even more vital, since the sharing of resources that occurs within a media conglomerate leads to a lesser diversity of news sources and comment. CNN's coverage of the Gulf War was a case in point, as is the Melbourne commercial radio industry, where all five stations obtain their news from the same source.

Mr McDonald also wished to rebut allegations of political bias made against the ABC's news and current affairs reporting. During the recent federal election, the ABC closely monitored its coverage through its Election Review Committee and ad-



dressed any problems 'promptly and appropriately'. Overall, the Committee found the ABC's reporting was 'of high quality and balance', a view shared by a large majority of the public in research commissioned subsequently by the ABC.

Censoring the Internet

Kaaren Koomen, Manager of On-Line Services at the Australian Broadcasting Authority, outlined the conduct and recommendations of the ABA's recent inquiry into the regulation of the Internet.

Certain features made the Internet unique. The absolute freedom of expression accorded to Internet users, the immense potential size of the audience, the diversity of subject matter and its borderless character needed to be taken into account when considering regulating the Internet.

Some of the challenges facing regulators included the protection of children from harmful or disturbing material, the maintenance of community standards, consumer protection from unfair practices and the prevention of the use of the Internet to conduct criminal activity. The inquiry found that the Internet contained material that would either be classified the filmic equivalent of an R or X rating, or be refused classification. While both types of material could be accessed by the conscientious user, the former was usually preceded by a warning and/or required the provision of credit card details before the material could be viewed, while the chance of being exposed involuntarily to the latter was low.

Submissions to the inquiry showed overwhelming enthusiasm for the possibilities of the new medium, and strong support for freedom of expression on-line.

In its report, the ABA recommended that any regulatory regime

should not be applied to private communications such as email. Regarding other communications, the ABA recommended that codes of practice developed by on-line service providers, within a self-regulatory framework. These codes would include consumer and privacy issues.

In relation to undesirable material, the ABA concluded that the most effective controls are those provided by end users. Accordingly, it recommended that responsibility for preventing child access to such material be devolved to parents. This would require holders of open on-line accounts to be at least 18 years of age. To assist identification of content, the Platform for Internet Content Selection (PICS) technology would provide for the labelling of material by content providers or third parties. The end user (or their parents) could then elect whether to prevent access to material of a certain classification.

Silence on campus

Ben Richards is an editor of *Lot's Wife*, Monash University's student newspaper, whose funding was abolished by Kennett government legislation introduced in 1994, and by the Howard government's discontinuation of emergency funding. Kennett's legislation forbade the use of student union funds for purposes other than for the 'direct benefit' of student populations. In a stroke of 'breath-taking hypocrisy', the university's television and radio services could continue to receive funds, but newspapers could not. *Lot's Wife* has since found alternative funding on an ad hoc basis - being sponsored by the university's food catering service - but as a result is now 'entirely dependent on the generosity of groups whose mood swings are notable'.

Although Senator Vanstone had suggested that student newspapers rely on advertising, Richards noted

that 40% of his readership lived below the poverty line - 'hardly an advertiser's dream demographic'.

It was important that student newspapers survive, not only because of their contribution to student life and the occasional high quality of journalism found within their pages, but because, after the Internet, they are the freest area of the media our society has.

The professed aims of the Kennett legislation were to promote freedom of association (by not forcing students to contribute to causes they did not subscribe to) and to reduce student fees. In fact, the legislation had done neither. It had failed to achieve freedom of association 'in any discernible form' and, although *Lot's Wife* cost each student the grand total of \$5.40 from their annual levies of approximately \$300, fees had actually risen this year.

Richards alleged that the government's real agenda was to depoliticise campuses, claiming it was no coincidence that the legislation closely preceded the federal government's regime of funding cuts to tertiary education.

Free speech and human rights

Melinda Jones, Editor, Australian Journal of Human Rights and Senior Lecturer in Law at the University of New South Wales, addressed the conference on how situations of competing human rights may be resolved. In the present context, ideals of free speech may conflict with such rights as that of an accused person to a fair trial, or those of racial or other groups not to be subject to vilification.

Ronald Dworkin's theory of 'rights as trumps' (in which the discourse of a society's competing interests is likened to a card game and a player's possession of an identifiable 'right' trumps other cards) fails to deal with



the situation where two or more rights come into conflict. Which right trumps which?

Ms Jones proposed an outcome-oriented approach to the concept of human rights in a democratic society. If 'first order' human rights, as described in the Universal Declaration of Human Rights, involve the recognition of the dignity and worth of all members of society, then 'second order' rights were strategies to be adopted in the development towards the ideal of the just society.

This is an approach recognised by critical race scholars, who view rights as legitimate claims to participate in society's discourse. Using Dworkin's card game analogy, rights are not trumps, but ordinary cards that allow a player to play - but not necessarily win - the game. Under this model, a competition between rights can be resolved by acknowledging that 'second order rights' are discrete means to a common goal of creating a just society. Instead of 'balancing' the respective merits of various rights - which can result in a compromise solution unsatisfactory to all parties - a particular right is *circumscribed*, where this will best serve the goal of achieving a just society.

Ms Jones remarked that it was good that Australia did not have a Bill of Rights, since our judges were not well versed in human rights and there is no jurisprudential base on which to build. However, Australia needs a mechanism for incorporating international human rights jurisprudence - which is assuming increasing importance in our understanding of human rights - into domestic law. One possible approach would be to grant to the newly created Human Rights Division of the Federal Court jurisdiction to hear allegations of local infringements of international obligations, with final appeal to a United Nations body.

Film

Susan Wilson, Director of the Sydney Travelling Film Festival, remarked that the status of film festivals as self regulating organisations has changed.

The introduction of the 'Evans Amendments' in 1983 created an informal agreement between government and the film industry that films screened at film festivals would be exempt from the classification system.

Recently, however, the Office of Film and Literature Classification has made it known that film festivals are no longer to be treated as 'approved events'. The effect of this is that a film refused classification for general commercial release will also be prohibited from being screened at a festival. This new approach culminated in the banning of the Spanish film *Tras El Cristal* from the Queer Screen Festival in 1994 - a film which had been screened at festivals in Montreal, London and Berlin, as well as on Spanish television.

The diminution of diversity of voices in the media poses a great threat to the freedom of speech and discussion

While censorship in the 1960s was principally concerned with issues of sex and blasphemy, the new censorship addressed issues of sex and violence. The present wave of censorship which, she said, 'has by no means crested', could be traced to the unbanning of *Salo* (based upon De Sade's *120 Days of Sodom*). This was followed by calls for the sacking of Classification Board members and led to the 'covert debate' on censorship matters that now replaces community consultation.

Media ownership and diversity

The Communications Law Centre's Paul Chadwick argued that the diminution of diversity of voices in the media poses a great threat to the freedom of speech and discussion. He identified a trend towards increasing media ownership not only in metropolitan areas, but also regional and suburban media. Since 1987, 14 magazines have closed nationally, many of which were significant contributors to 'Australia's civic conversation'. Reporting in 1990, the Matthews Committee had concluded that increased concentrations of power were unacceptable, regardless of whether bias was evident. It resulted in insufficient channels for the expression of opinion, reduced localism in content and debilitated journalistic culture. Nor was he convinced that new technologies would necessarily lead to a burgeoning of free speech.

There were two villains in the piece, he said. The first was the unacceptable concentration of private power in the media. The second was the small elite within government that is empowered to regulate the media and fails to do so adequately.

Mr Chadwick proposed a better system of regulation comprising self regulation combined with private law, which provided compensation, particularly for intrusions into privacy and grief.

He also called for a statutory right of reply, arguing that, properly crafted, it could *add* to freedom of speech, not reduce it. The present state of the Australian press is itself such a threat to free speech that a statutory right is necessary, as 'media owners can no longer legitimately wear Thomas Jefferson's clothes'. The concentration of power is now so great that it may be time for media organisations to be treated as a common carrier. Developing momentum for these ideas is difficult, he said, because the media has not acknowledged that such a debate is necessary. □ AG