Comment

Government seeks licence to sin in secret and cloak public information

"Keep up appearances; there lies the test;

The world will give thee credit for the rest.

Outward be fair, however foul within;

Sin if thou wilt, but then in secret sin."

These are the words of Charles Churchill, an 18th century poet and wit who died young after a scandalous and dissipated life. Churchill was referring to social hypocrisy but his words apply just as well to political hypocrisy.

The desire of governments to be able to sin in secret, to avoid embarrassing scrutiny, is as old as social organisation. But just lately, the wolf has found a new sheepskin to hide under: the language and legal structures of commerce are being used to cover more and more of what was once the public sector from public scrutiny.

In February 1998, the Communications Law Centre released the first Victorian Information Audit, a survey of the public information performance of more than 50 important institutions in Victoria. Each organisation was assessed against simple objective criteria: do you produce an annual report? If so, do you charge for it? Do you have a library which is open to the public? And so on.

The results were reasonably encouraging. The public information performance of most government departments and statutory authorities was quite good (note that the information was not assessed for its quality - that is another larger research project waiting to happen).

But the audit revealed a major area of concern. Privatised government business enterprises consistently rated worst in information performance.

Several of the companies which run recently privatised power services - including United Energy, Citipower, Powercor and the Loy Yang B power station - are not obliged to produce annual reports. This is because they are wholly owned by overseas companies and are covered by the annual reports of their parent companies in the U.S. or Europe.

Often, the whole Australian operation rates only a paragraph. Citipower, for example, is mentioned in a single paragraph of the annual report published by Entergy, a U.S.-based corporation. United Energy gets two or three brief mentions in the annual report of a company called UtiliCorp United. From this year, the operations of Loy Yang A power station will be covered in the annual report of the parent company. Hazelwood/Energy Brix Australia will also become line items in the annual reports of their parent organisations. The Heatane Division of GFCV has been sold to Australian Gaslight Company and British Oxygen Corporation. Details of its operations are available only from the stock exchange.

Other privatised services, including the Port of Geelong and the Port of Portland, do not produce annual reports at all.

This is a worrying state of affairs. An effective public sphere of discourse is a key institution supporting and sustaining democracy. The quality of debate among citizens is at the core of democracy. And the quality of that debate depends to a large extent on what information individuals can access, how readily they can gain that access, and at what cost.

Democracy is much more than just the expression of choice at the ballot box. Rather, it is a vibrant process which includes scrutiny of the performance of elected representatives, open debate on issues of public importance, and active participation in the political process. Access to government information contributes to openness and accountability, providing an additional check on the exercise of government power through the scrutiny of the conduct and activities of government.

Traditionally, the various arms of government were important sources of public sphere information. This is still true but the involvement of government has been reduced in two major ways.

First, the metaphor used by government to describe itself is increasingly that of a successful business. In recent years the Victorian state government has produced a document called Enterprise Victoria, distributed free to households. It is essentially old-fashioned puffery but its presentation as a mock "annual report to shareholders" is significant. The obligations of a large and solid company to its shareholders are much more limited - to money, basically - than those of a government to its citizens.

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This "business model" of government carries notions of commercial confidentiality which are often at odds with providing information for the public sphere.

Further, the rhetoric of commerce chips away at the idea of citizenship. Citizenship envisages that individuals participate and are empowered. Citizens not only have rights but exercise them, and can influence events. Their interests extend beyond the personal to the communal.

Information is a resource for citizenship and supports the aspirations of civic society. Citizens have a right to information regardless of their ability to pay. Information is an inexhaustible resource whose value may be enhanced when it is available without restriction. But as government is modelled more on business, the individual comes to be seen more as a consumer.

The consumer's role is limited to that of purchaser; he or she has choice but little power. The consumer's concerns are private or personal rather than communal and he or she does not have a say in decision-making. Under the consumer model, information is just another commodity to be bought and sold, rather than something that has special qualities and social functions. It is regarded through the prism of commercial considerations, and the social functions of information do not enter the equation.

Information as property can be fenced in, with access restricted to those who can pay. One of the disturbing findings of the Centre's research was that a significant number of Victorian statutory authorities charge for their annual reports: the Equal Opportunity Commission, the Office of the Public Advocate and the Ombudsman are some of the more ironic names on the list.

It is important to break the nexus between efficient government and secret government. It is perfectly possible for government enterprises to be business-like, even privatised, without removing the rights of citizens to information.

To this end, the Communications Law Centre has recommended that private enterprises which have purchased a government business enterprise which delivers basic services to the community be required to publish annual reports which give detailed information about the delivery of the service. That annual report should be available under the trading name with which the public is familiar.

The Centre has also recommended that the Victorian state government extend the operation of the Freedom of Information Act to cover privatised utilities. For that sector to protest that such disclosure is impossible because of commercial confidentiality is nonsense. German sociologist Max Weber once observed that "the concept of the 'official secret' is [the bureaucracy's] specific invention". Commercial confidentiality is equally the invention of the privatised bureaucracy.

...continued page 15

Privatised Services in Victoria

Organisation	Privatised	Local Annual Report *	FoI	Library	Public Access	Website
Citipower	Sold to Entergy Corp. Jan 1996	No	No	No	-	No (one planned)
Powercor	Sold to PacifiCorp. Dec 1995	No	No	No	-	Yes (part of other)
Eastern Energy	Sold to Texas Utilities Australia, Dec 1995	Yes	No	No	-	Yes
Solaris	Sold to AGL/Energy Initiatives, Nov 1995	Yes	No	No	-	No
United Energy	Sold to AMP/State Authorities, Sept 1995	No	No	No	-	No
Hazelwood/ Energy Brix Australia	Sold to National Power, Destec, PacificiCorp and others, Sept 1996	No	No	Yes	No	Yes
Loy Yang A	Sold to Loy Yang Power, April 1997	Yes	No	No	-	No (under devp)
Loy Yang B	Sold to Edison Mission Energy, April 1996	No	No	Yes	No	No
TNT Geelong Port	Sold to TNT Australia, July 1996	No	No	No	-	Yes
Port of Portland	Sold to Infratil Australia, March 1996	No	No	No	-	No
GFE Resources	Sold to Cultus Petroleum, August 1995	Yes	No	Yes	No	No
Grain Elevators Bd	Sold to Vicgrain Ltd, May 1995	Yes	No	No	-	No (under devp)
BASS	Sold to Ticketmaster Corp, May 1995	No	No	No	-	Yes
Heatane Divi. of GFCV	Sold to Elgas, May 1993	No	No	No	-	No (under devp)
TABCORP	Sold by public float, August 1994	Yes	No	Yes	Yes	Yes

* Local annual report refers to whether the body recognised by the public as being responsible for the delivery of the service has issued a report under its trading name

Free television's big month

The digital verdict is out, and the terrestrial broadcasters are cheering. But critical decisions must now be made concerning the amount of spectrum to be released, the development of a fees regime, and what datacasting and enhanced programming services will be allowed

It's been a good month at Willoughby. First, the decision the free-to-air broadcasters had been wanting on "cable retransmission". The government will amend legislation to require cable TV operators to get a broadcaster's permission before retransmitting its signal on a cable network. Until now, the cable operators have been carrying the broadcast signals for free and using the improved reception of them as an element in the marketing of their package of channels.

Then the big one: exclusive rights to digital terrestrial free-to-air television transmission until 2008. Not just guaranteed access to the game but a shut-out for new television competitors. FACTS' Tony Branigan called it a "sensible decision" while editorials in the newspapers run by the people who'd hoped to get a better run at the new medium themselves, thundered. Murdoch's *Australian* started the ball rolling with "Government plays favourites with TV" (March 26) and Fairfax's *Sydney Morning Herald* ran "Digital TV giveaway" (March 27).

The *Australian Financial Review (AFR)* called it "Information Age Mockery" and its Chanticleer columnist Ivor Ries described the Minister for Communications as "the ultimate political pragmatist and the media moguls' best friend" (March 25). The free TV market would be protected, which would be good for its profits, but it provided such an awful service that audiences would desert it for the greener pastures of multi-channel pay TV, which would thus also win from the decision.

A second *AFR* editorial on March 31 identified a more systemic problem: there were "no political champions in the Government, or in the Labor Opposition, for a pro-market media policy". Perhaps the *AFR* was looking for something like the metropolitan daily newspaper business, where two companies have 88 per cent of the market, or the newly deregulated telecommunications business, where the major player has 99 per cent of the local call market and about three-quarters of the international and long distance markets. Or perhaps the cable TV business, where Australia's largest two companies (the ones that dominate the newspaper and telecommunications markets) have a joint venture which is now the major player.

On the opposite page, columnist Alan Kohler was equally critical of the digitial TV decision but he saw the problem differently. He asked whether the real question for 1996 had been "perhaps whether Nine and Microsoft should have been kept apart. But it's too late for that now".

The best is yet to come

While these verdicts have already been loudly pronounced, some critical issues remain to be settled.

The amount of spectrum to be made available for "datacasting" will be examined by a Planning and Steering Committee for digital television. Its first job is "to identify broadcasting spectrum not required for digital conversion of existing free-to-air broadcasters". Engineers at 10 paces. The Committee also has to consider the implications for consumers of the development of standards and compatible equipment for digital TV, though the government says the development of those standards "is a matter for industry".

Expect the free-to-airs to come up with a litany of good ideas for things they can do with their "digital frequencies". It was only days after the decision that FACTS let loose its first one for regional viewers - just a very tiny little bit of multi-channelling to allow us to better service audiences in border towns who want news broadcasts from two capital cities

The ACA and the ABA then have "to report on the structure of, and conditions for, the allocation of spectrum not required for the digital conversion of the free-to-airs". Lawyers at 10 paces.

Then a fees regime has to be developed under which the free-to-airs pay

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for any "datacasting" use they make of their new "digital" frequencies. The regime has to ensure "a level playing field between free-to-air and non-free-to-air datacasting providers". Economists at 10 paces.

The campaign's "just give everyone a go" ticket was dealt a further blow a week before the government's decision was formally announced, when Ozemail's Sean Howard told the ABC's Lateline that the government should give free spectrum to Ozemail instead of to the free-to-air broadcasters. It was going to use it for Australian technology, an open platform, etc. Minister Richard Alston's eyebrows wandered up his forehead and said it all.

And while this is going on, the government will review "the kinds of datacasting and enhanced programming (multiview) services which should be allowed". Viewer-initiated multiple views of sporting events, such as the pit-stop view and a trackside view during a motor race, are "enhanced" services so the free-to-airs can provide them. Multi-channel services are out. "Datacasting" services are in but the free-to-airs have to pay to do them. "Datacasting" is all that can be done with the frequencies made available to those other than the free-to-airs.

This is the real high wire act for the people drafting the legislation - not just because of the infinite variety of services which might be thought up to test the edges of the definitions but because of the policy which informs the separation - keep the free-to-airs and the rest equally unhappy.

Expect the free-to-airs to come up with a litany of good ideas for things they can do with their "digital frequencies". It was only days after the decision that FACTS let loose its first one for regional viewers - just a very tiny little bit of multi-channelling to allow us to better service audiences in border towns who want news broadcasts from two capital cities.

If the definitions of "enhanced services" and "datacasting" can keep free TV out of multi-channelling and the rest of the media business out of TV for three years, it will be a miracle. But by then, this improbable piece of audiovisual dingo-fencing will have served its short-term anti-competitive purpose.

Too little, too late?

A common observation of the government's decision has been that the pay TV operators, telcos, newspapers, Internet service providers and others came to the debate too late. The free-to-airs had the momentum and perhaps a deal already in the bag before the campaign against them began.

More likely, the coalition which was formed to fight the "spectrum giveaway" was a large but disparate group which agreed on only one thing - that it didn't want the free-to-airs to get free access to spectrum.

FACTS' wide distribution of a video of Rupert Murdoch arguing in the U.S. on behalf of his Fox Network, for precisely the "spectrum giveaway" that he was opposing in Australia, seems to have heavily wounded the credibility of pay TV operators.

Also, they came to Canberra to try to put some lead in Kerry Packer's digital saddle bags but discovered they had a bit in their own as the architects of overhead cabling and Rugby League's catastrophe, and with business plans which require Australians to pay for stuff they are used to getting for free. Hardly the kinds of features that have marginal seat politicians hanging out for your next visit.

And the campaign's "just give everyone a go" ticket was dealt a further blow a week before the government's decision was formally announced, when Ozemail's Sean Howard told the ABC's *Lateline* that the government should give free spectrum to Ozemail instead of to the free-to-air broadcasters. It was going to use it for Australian technology, an open platform, etc. Minister Richard Alston's eyebrows wandered up his forehead and said it all.

The big numbers

About 13 per cent of Australians subscribe to pay TV. AC Neilsen says 16 per cent of Australians used the Internet last month. But 99 per cent of Australian homes have a TV set and people watch it for an average of more than three hours a day.

In the end, it just didn't make sense - even to a government which Bill Gates says is more wired into the online world than most - to throw the industry with the really big numbers (and the people who run it) up in the air.

Finding Rupert Murdoch on the other side, for once slumming it with the little numbers, made them squirm, but the Prince of Print is sure to work out a way to look after himself.

What was that about the Dynast of Datacasting?

Jock Given

Digital TV - What the government has decided

Free-to-air television stations

- Access to a 7Mhz frequency in the VHF/UHF band for digital transmission.

- Required to commence HDTV broadcasts on January 1, 2001 in metro areas) and progressively from January 1, 2001 in all regional areas so that all areas have services by 2004. Details of HDTV requirements to be settled.

- Not able to use capacity for multi-channel TV services, though ABC and SBS might be able to do so where programs are "non-commercial" and "in line with Charter obligations".

- Able to use capacity not needed for HDTV broadcasts for "enhanced services".

- Able to use capacity not needed for HDTV broadcasts for "datacasting". Commercial broadcasters can only do so on payment of equivalent fee to that paid by others gaining access to spectrum at auction (see below). ABC and SBS can sub-lease capacity for commercial datacasting, subject to revenue sharing with Commonwealth.

- Required to hand back the frequency previously used for analogue broadcasts at the end of the "simulcast period" - currently expected to run until December 31, 1998 but will be reviewed in 2005.

- Current prohibition on additional commercial TV licences extended to December 31, 2008. Review in 2005 to decide whether new entrants to be allowed after that.

- Australian content standard (though not childrens program standard) to apply unchanged to digital broadcasts. Also captioning of programs in prime time and for news and current affairs outside prime time, to assist viewers with hearing disabilities.

Others

- Price-based allocation of spectrum not required for digital television transmission (will vary from place to place). Free-to-air broadcasters can't bid for this spectrum.

- Able to use capacity for "datacasting".

- Not able to use capacity for TV services until at least 2008.

- Required to provide capacity for one standard definition community television channel.

The Big Sleeper

- *"Prior to the introduction of digital television, the Government will also review...how legislation can be amended to reflect growing convergence between broadcasting and other kinds of media and communications services". Although there is no statement mentioning the ownership and control rules in the Minister's media releases, he has indicated that the government has no plans to review the rules before the next election.*

Microsoft wares hit by vehemence of antitrust case

Microsoft boss Bill Gates has given Australia's online aspirations a "big tick" but in the U.S. the Department of Justice's case against Microsoft widens and the former darling of the computer industry is fast becoming public enemy number one

During the past year, Microsoft's detractors in the U.S. have become more mainstream as the issue of Microsoft's behaviour in the software industry has gone beyond the preserve of Silicon Valley. Now, the U.S. Congress and Attorney Generals in several states are scrutinising Microsoft's activities. Even seasoned U.S. consumer advocate Ralph Nader has joined the fray.

The major push has been the Department of Justice's (DOJ) ongoing antitrust investigation and enforcement action which, though not new, have heightened the recent focus on Microsoft. The antitrust examination began in early 1990 with the Federal Trade Commission (FTC) conducting a wide ranging inquiry into Microsoft practices, in particular its operating systems software, applications software and computer peripherals. The FTC suspended the investigation in February 1993 because its four commissioners were deadlocked as to whether or not to pursue Microsoft further.

In August 1993, the DOJ - in a rare turn of events - picked up the investigation where the FTC had left off. The department eventually filed a complaint against Microsoft on July 15, 1994, alleging violations of the Sherman Antitrust Act. The complaint centred on Microsoft's licensing agreements with original equipment manufacturers (OEMs) that excluded them from offering or pre-installing non-Microsoft operating system software, even if a consumer requested it.

The DOJ alleged that because MS-DOS was the dominant operating system, Microsoft could use its position to dictate the terms of the contract. The offensive contract terms included a payment scheme based on the number of processors sold rather than the number of processors on which MS-DOS was installed. OEMs, therefore, would pay Microsoft a royalty whether or not they shipped a computer with MS-DOS or with a competitor's operating system software.

The DOJ charged that these contracts "help Microsoft maintain its dominance in the PC operating system market. By inhibiting competing operating systems' access to PC manufacturers, Microsoft's exclusionary contracts slow innovation and deprive consumers of an effective choice among competing PC operating systems."

On the same day that the DOJ filed the complaint it entered into a settlement with Microsoft restricting Microsoft's licensing practices with OEMs. The settlement prohibited the per processor royalty arrangements. Section IV (E) of the Consent Decree prohibited conditioning the licensing of operating system software with another product. But Microsoft was not prohibited from developing integrated products. (*United States v. Microsoft*, 1995-2 Trade Cas. ¶ 71,096 (D.D.C. 1995). Perhaps more importantly for the DOJ, the decree allowed it better access to Microsoft documents. The District Court approved the decree on August 15, 1995.

While this was happening, Microsoft was developing a new operating system codenamed "Chicago," now known as Windows 95. As part of that system, Microsoft included its Internet browser software, Internet Explorer. Internet Explorer is the competitor to Netscape Navigator which, at the time of Internet Explorer's introduction, was the market leader among browsers. Internet browser technologies along with JAVA, as developed by companies like Netscape, are potential competitors in the PC operating system market.

The DOJ's recent enforcement action explained it thus: "This potential is a result of the fact that browsers and the technology they incorporate can serve as a platform to which applications can be written and accessed without regard to the identity of the underlying operating system. The development of application programs that are written to run on or through an Internet browser, which can itself run on any operating system, is a serious threat to Microsoft's monopoly..."

On October 20, 1997, the DOJ filed a petition in the U.S. District Court to hold Microsoft in contempt for violating Section IV(E)(i) of the Consent

Decree by bundling Internet Explorer with Windows 95. The DOJ alleged that Microsoft forced OEMs to license and distribute versions of Internet Explorer as a condition of licensing Windows 95. Microsoft "threaten[ed] OEMs with cancellation of their licences to Windows 95 in order to enforce the licensing of Internet Explorer with Windows 95. One OEM [Compaq] received a termination notice when it attempted to ship Windows 95 without Internet Explorer. The crux of the DOJ's case is that Internet Explorer is a separate product as covered by the Consent Decree's prohibition."

In response, Microsoft argued that Internet Explorer and Windows were a single product and that, even if they were considered separate products, the Consent Decree allowed Microsoft to develop integrated products such as the combination of Internet Explorer and Windows 95. Microsoft is contending that Internet Explorer is an integral element of the operating system. The company views access to the internet through Internet Explorer similar to other information retrieval functions of operating systems like access to information stored on a hard disk drive or CD-ROM drive.

In December 1997, the Court declined to find Microsoft in contempt because it could not conclude by "clear and convincing evidence" that Microsoft had violated a "clear and unambiguous" prohibition found in the consent decree. The ambiguity of the term "integrated product" in the Consent Decree left open the interpretation that "the Consent Decree did not preclude Microsoft's insistence that OEMs accept Internet Explorer as part of Windows 95." (United States v. Microsoft Corp., Civ. No. 94-1564 (D.D.C. December 11, 1997).

But the judge found that further evidence was needed to determine whether Microsoft was in violation of the Consent Decree by "tying" Internet Explorer to Windows 95. The Judge issued a preliminary injunction while the case proceeded, finding, inter alia, that the DOJ had a substantial likelihood of success on the merits of its petition.

The injunction required Microsoft to offer to OEMs a separate version of Windows 95 without the browser. Microsoft's offer was shamefully inadequate. In its December 15, 1997, public response to the injunction, it offered OEMs who did not want to license Internet Explorer in order to obtain the latest version of Windows 95 two options:

1. The OEM may license a version of Windows 95 that Microsoft believes will not work; or

2. The OEM may license a version of Windows 95 that is two-and-a-half years old and is not commercially viable.

This led to the DOJ filing a further motion for contempt on December 17, 1998. After a week of hearings and with the threat of a US$1 million-dollars-a-day contempt order hanging over its head, Microsoft agreed to offer OEMs a workable Windows 95 without the browser.

Microsoft then appealed the preliminary injunction. The District of Columbia Court of Appeals will hear the appeal on April 21, 1998. Some 27 states as well as the Computer & Communications Industry Association (CCIA) have filed amicus briefs in support of the DOJ and are urging the Court to maintain the preliminary injunction against Microsoft's bundling. The District Court continues to conduct discovery on whether the bundling of Windows 95 and Internet Explorer is proper under the Consent Decree.

But while the current case involves the narrow issue of the forced tying of Internet Explorer with Windows 95, the DOJ seems to be expanding its investigation. In recent months, it has been looking into Microsoft agreements with Internet content providers and purported attempts by Microsoft to co-opt JAVA or derail JAVA's potential threat to Windows. The DOJ may be looking to bring a new case against Microsoft, examining desktop dominance as a whole or its attempt to dominate the Internet.

Several states have begun their own formal or informal investigations. In February 1998, 10 states - spearheaded by New York - issued subpoenas for material similar to that requested earlier by the DOJ. But the states are focusing on Windows 98 as Microsoft has indicated that it will include Internet Explorer in this operating system which is set to launch on June 25. The DOJ and the various state Attorney Generals have been coordinating actions with respect to the overall investigation of Microsoft.

As for the U.S. Congress, it has joined the legions of antitrust regulators in the U.S., Europe and Japan all examining Microsoft. On March 3, 1998, the U.S. Senate Committee on the Judiciary held hearings investigating the market structure of the software industry. Appearing with Bill Gates, chairman and CEO of Microsoft, were his main competitors: Scott McNealy of Sun Systems and Jim Barksdale of Netscape. They attacked Microsoft's recent attempts to leverage its monopoly in operating systems to dominate Internet online sales and content. The DOJ has included some of these points in its further investigations.

While the hearings do not indicate that Congress will at this stage amend the antitrust laws, they have been seen as a show of support to the DOJ. If the DOJ fails to curb the perceived abuses of Microsoft, there may be more legislative action on the issue. Microsoft may not be circling the wagons quite yet but it is clear that a wider portion of the American public no longer views it as the darling of the computer industry.

Maura Bollinger worked with the Federal Communications Commission and Southern New England Telephone in the U.S.

The new world legal implications of cyberspace

The Business Law Education Centre's one-day CyberLaw seminar saw Foucault meet the Internet, smartcards meet the microwave and the audience meet online casinos

The Business Law Education Centre's CyberLaw conference on April 1 addressed some key issues and concerns arising from the new "world" of cyperspace. Speakers examined a range of topics including: the consumer implications which arise from the use of electronic commerce ; security and privacy issues; the relationships and necessary in order to establish a website; the protection of business reputation on the Internet ; advertising and marketing; and the future directions of cyberlaw .

Professor Graham Greenleaf of the UNSW and AUSTLII commenced his talk with a little bit of philosophy. Drawing on writings based on the French philosopher Michael Foucault, he hypothesised that the way in which we eventually regulate cyberspace will be contingent on the way in which cyberspace is structured, which depends, in turn, on the way the codes for cyberspace are written. He argued that computer codes play the same role in cyberspace as nature plays in the real world: the codes set the outer limits for what can and cannot be done and create frameworks and structures within which activity must be based.

But why regulate the Internet? For Professor Greenleaf, regulation is crucial to ensure that an individual's privacy is protected. He described the electronic world as potentially the most pervasive surveillance mechanism ever invented, and was of the view that there are no technological barriers to the collection and misuse of private information. Rather, Professor Greenleaf opined that the only possible way of protecting against undesirable collection and dissemination of private information will be through a regulatory structure. He then discussed the current Australian regulatory vacuum for the protection of privacy, and the possible implications for Australian business of the Commonwealth government failure to introduce privacy laws which comply with the European Union Directive on privacy and the free flow of personal data.

Chris Connolly of the Electronic Money Information Centre gave an overview of the many different forms of electronic commerce (stored value cards, online payment systems, online credit cards, pure electronic money and combination electronic commerce tools such as the Mondex card and "smarties") and the forums which have been established to consider the regulation of these types of commerce. He said that from a consumer perspective, some form of regulation of electronic commerce may be necessary in order to: promote consumer confidence in these types of commercial forms so that they become viable in the first place; and to protect consumers from the usual forms of questionable commercial practices.

After the talks of Professor Greenleaf and Chris Connolly, which focused on the protection of different elements of the public from the uses or abuses of the cyberworld, the focus shifted to the protection of private rights in the online environment. Brendan Scott of Gilbert and Tobin gave a useful guide to the legal requirements and possible pitfalls in establishing a website. He noted that this involved: the protection of the website name through registration of the name; the creation of a site host agreement; the possibility of including advertising on the site; creation and regulation of the relationship with the site user and potential customer; complying with statutory requirements on record keeping; and the admissibility of electronic information as evidence.

Shane Simpson of Simpsons Solicitors focused on protecting, on the Internet, what is often a business' most important assets: its name and reputation. He noted that this will primarily be achieved by the use of the ordinary law of trade marks, and by prudent and pro-active domain name registration.

Marc Phillips of APT Strategies gave the audience some interesting facts to chew on: one-in-four Australians access the Internet in Australia; that figure is growing by 70,000 Australians per month; 60 per cent of users are male; the most dominant age group of users are people between the ages of 20-29; and the most frequently used applications are sending e-mails and Internet surfing. He also mentioned some of the key legal issues arising through Internet use as being defamation, copyright infringements, trademark infringement, sexual harassment within the workplace and some of the jurisdictional problems associated with electronic commerce online.

Rob Appel of OzEmail LawNet was given the unenviable task of speaking on the future of the regulation of the Internet. He began by graphically demonstrating (by showing an online casino) the difficulties which national governments will have in regulating the Internet. These on-line casinos are illegal in the U.S. but are effectively beyond U.S. control because they are operated from places outside of the U.S.

He suggested that, along with the decline in the power of nation states, there will be an increase in the power of international corporations and that the only effective regulation may be through some sort of international legal structure. Or perhaps through the Internet community itself by way of boycotts or voluntary codes - a new form of power to the people.

Jane Hogan

The Australian response to domain naming

A recent forum convened in Melbourne to work on proposals aimed at informing the U.S. that the wider Internet community has a stake in the outcome of the domain name debate

On March 10, 1998, Senator Richard Alston, the Minister for Communications, the Information Economy and the Arts, announced that Australia would prepare a formal response to the U.S."Green Paper on Technical Management of Internet Names and Addresses". He directed the National Office for the Information Economy (NOIE) to develop a response to the U.S. proposal after consultations with the Australian Internet industry, the business sector, and other key stakeholders.

On March 30, NOIE convened a forum of key Internet stakeholders in Melbourne to discuss a response.

Background

There is growing support for the view that the policies and practices for the management of domain names are in need of reform. Internet users are looking for improvements on four fronts:

- Increased representation of non-U.S. Internet users in the management of the domain name system;
- Increased competition in the registration of domain names;
- Improvements to the technical management of the domain name system; and
- Development of user friendly dispute resolution procedures.

There are two proposals for reform. They are often referred to as the "European" proposal and the "U.S." proposal, though that is not an entirely accurate description.

The first proposal is actually a recommendation of the Internet Ad Hoc Committee, established by the Internet Society. This recommendation is structured as a memorandum - the "generic Top Level Domain Memorandum of Understanding" (or gTLD-MOU). It has been endorsed by more than 200 signatories worldwide, including some organisations in the U.S. (Just to confuse matters, this proposal is also sometimes referred to as the CORE proposal - named after the Internet Council of Registrars).

The second proposal is from the US Department of Commerce, and is known as the "Green Paper on Technical Management of Internet Names and Addresses". This proposal provides a blueprint for a staged withdrawal of the U.S. government from Internet governance in favour of a not-for-profit corporation, established in the U.S. and operating under U.S. law.

Australian Consultations

The NOIE has not yet finalised its response to these two proposals. But at the Melbourne consultation meeting, some policy trends emerged. While there was not always a clear consensus, NOIE appeared willing to try to work the following points into its official response:

- As a first step, Australia should make a detailed response to the U.S. Green Paper, that does not reject the US' proposed reforms, but seeks improvements to them.
- The response should "acknowledge with regret" the Green Paper's failure to even mention the gTLD-MOU proposals, and argue that the gTLD-MOU proposals should be examined in a review of the Green Paper.
- The administration of the domain name system should recognise that domain names are part of the public trust, and are not commercial property - their administration should be undertaken for the benefit of the entire Internet community.
- While there is an acceptance that registries can operate as monopolies, conducting their services in the public interest, registrars should be subject to competition.
- The monopoly registries should not be private monopolies - they should be non-profit organisations, restricted from entering into any company structure which allows them to be controlled by for-profit organisations.
- There is a need for an international organisation to provide safeguards if the new registry monopoly fails to act in the interests of the public (there was no consensus as to who or what this international organisation should be - other than it should not be a purely U.S. organisation).

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APEC addresses universal access challenge

The Asia Pacific Economic Co-operation Forum's Telecommunications Working Group (the 'TEL') held a seminar in Darwin in February on "Universal Access to the Asia Pacific Information Infrastructure"

The most striking feature about the challenge of universal access to basic telecommunications services in APEC countries is how different the challenge is for different countries.

The table shows that levels of penetration of fixed and mobile telephone services in the 18 APEC countries varies hugely. Half the countries have fixed line penetration of greater than 40 lines per 100 people. All but one of the rest have less than 20 lines per 100people, with less than one line per 100 in Papua New Guinea.

The universal service challenge for more advanced economies is about access to advanced services. The objective of less developed countries is to increase "teledensity".

A paper released at the Darwin seminar prepared by a Study Group of the TEL provides important data and analysis of the current arrangements for universal service provision in the APEC countries.[1]

It reaches a very significant conclusion about who should be responsible for the universal service obligation. In countries where the network coverage of the incumbent carrier is well developed, the report concludes that the incumbent "should be more capable than the new entrants in providing universal service, at least at the initial stage of competition", though competitive pressure "could help minimise the funding required".

By contrast, in countries with a less developed telecoms sector, "greater flexibility should be allowed [in choosing the universal service provider] since the network coverage of the incumbent carrier may not be much better than those of the new entrants". The APEC report sees competition as a good spur to the expansion of services into wholly unserved areas but also thinks that because the revenue from a less-developed industry is limited, "involvement of public sector resources at the beginning could enhance the pace in which the whole community is connected to the network".

Australia, with a developed telecoms sector, is grappling with this issue now as it decides whether and how to make more sophisticated services than voice telephony universally available. The Telecoms Act 1997 imposes a licence condition on Telstra requiring it to make ISDN services accessible to 96 per cent of Australians by the end of this year. This, like the APEC report, acknowledges that the incumbent might be best placed to provide advanced services because its network is already in place.

A review to be conducted by the Minister before the end of September will explore what interventions might be necessary or desirable to ensure this higher level of service is available to the other four per cent of customers.

Income and teledensity

At the seminar, Paul Cole from International Technology Consultants argued that income alone is a poor indicator of commercial demand for telecoms services in developing economies. What matters more is the distribution of income. A country may be relatively rich in GDP/capita terms, but if its wealth is heavily concentrated in the hands of the wealthy groups in society which already have services, there may not be much of a paying market among other groups.

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But Cole stressed the significance of social and cultural mechanisms for "aggregating" spending capacity. If communities are physically and socially organised so that services can be shared (a public payphone, or a single service in one person's house), countries which have very low per capita purchasing power may still provide significant opportunities for commercial services.

[1] 'Study Project on Universal Telecommunications Service', A Report for the 17th APEC Telecommunications Working Group, March 1998

The Asian Crash

Mumtaz Ahmed, managing director of Deliotte & Touche Consulting Group in Hong Kong, told the seminar that the pursuit of universal basic telecoms service in Asian countries had received a "significant setback" as a result of the Asian financial crisis.

Revenues would be hit by lower incomes and thus capacity to pay for services, while the cost of new networks proposed to be built largely with imported technology would increase. Banks would be much more cautious about lending and the cost of capital would increase. The business plans of many new entrants into Asian telecoms markets would have to be completely reassessed. Governments' capacity to intervene to finance network expansion would also be limited by their own budgetary difficulties.

Ahmed gave a useful definition of the level of service which should be made universally available - "a call which if not made would have significant adverse consequences" - though it might be argued that "essential services" should be a positive concept rather than a negative one, stressing what it is that the service enables, not what its absence prevents.

Telephone Penetration Rates and Population Density in APEC Economies in 1996*

Countries	Density (no.per km2)	Fixed Lines (no.per 100)	Mobile (no.per 100)
Australia	2	53	25
Brunei	49	24	12.6
Canada	3	53.4	8.1
Chile	19	14.2	2.3
China	128	6.3	0.6
SAR Hongkong	5,864	53	19
Indonesia	101	1.7	0.1
Japan	333	48.6	16.7
Korea	462	43.7	10.1
Malaysia	60	18.4	7.2
Mexico	47	9.3	0.9
New Zealand	13	47.9	14
Papua New Guinea	8	0.9	0.1
Philippines	240	4.7	1.4
Singapore	4,848	51.9	16.8
Taiwan	596	46.8	4.5
Thailand	116	5.9	1.8
U.S.	28	65	16

Note: * When 1996 figures are not available, figures for 1995 are used and put in italics.

New Brunswick: Wired Province?

New Brunswick in Canada is regarded as one of the success stories of online service development. Richard LeBlanc, director of Government On-Line at NBTel, who was attempting to sell NBTel's expertise to federal and state governments while in Australia, told the seminar the province now had 40 per cent of homes connected to the Internet. It had become the call centre capital of North America.

Some significant features of the company's experience:

- NBTel's work in electronic service delivery is a partnership with the provincial government. In effect, the government has signed up as a significant content provider for the company's online service.
- Information kiosks "didn't work for us". The company found they couldn't attract a sufficient mass of users. "If people have to drive to an information kiosk, they say why not drive to the government office or wherever".

One of the biggest success stories has been the electronic provision of licences for hunting, a popular sport in the province. People who used to pay $10 for their annual licence at a licensing shopfront were offered them for $6 if they applied and paid for them over the phone, using an automated touchtone menu and a credit card. Some 84 per cent took the electronic option in the first year.

It is, of course, an odd example to trumpet as a measure of a wired society. Old technology (the telephone) and a discount.

Jock Given

Customer Service Guarantees, Mark II

How believable is the government's latest promise to provide a strengthened Customer Service Guarantee scheme and better service levels?

In 1996, the government promised that its Customer Service Guarantee (CSG) scheme would ensure that service quality would not be allowed to drop with the partial sale of Telstra.

With another election looming and legislation to fully privatise Telstra tabled, the government is promising a strengthened CSG scheme which will - this time - guarantee better service levels. But will it?

The Australian Communications Authority's (ACA) latest Quality of Service Bulletin gives the government real cause for concern, particularly for rural constituents. In the past year, Telstra's percentage of connections on or before the "Agreed Commitment Date" dropped nationally from 84 per cent to 74 per cent. In country areas, the figures were worse - from 82 per cent to 66 per cent. Fault restoration within one working day dropped nationally from 73 per cent to 64 per cent, and in country areas, from 74 per cent to 61 per cent. No wonder Senator Alston called Telstra service levels "unacceptable".

1996 legislation for the partial sale of Telstra also established the CSG scheme, giving the minister power to direct AUSTEL to set CSG performance standards. The subsequent ministerial direction was implemented in 1997 by AUSTEL successor the ACA, with the issue of three instruments covering the "Standard", the "Scale of Damages" and the "Waiver of Customer Guarantee", plus an explanatory "Guide", with the scheme to take effect on January 1, 1998.

The scheme covers only a standard telephone service and enhanced call handling features. And aspects of the service covered by the scheme can only be those determined by the minister - which now include service connection time, fault repair time and times involving appointments with customers.

The actual standard for connection times is set by reference to the "relevant planning document" defined in the "Guide" as either the timelines set by AUSTEL in 1996 for Telstra's universal service obligation, or a universal service plan approved by the minister. Because the minister has not yet approved Telstra's universal service plan, the CSG connection times are still those set out in 1996.

Those timelines extend from one week for towns and communities which are readily accessible to existing infrastructure, to up to 27 months for areas with less than 200 people and not readily accessible to infrastructure. The standard telephone service review recommended that those timelines be substantially reduced. Telstra's universal service plan which proposed a reduction to 21 months has not yet been approved by the minister.

The universal service obligation was intended as a safety net to ensure eventual connection. But because of the need for consistency between Telstra's obligations under the CSG scheme and its USO obligations, the USO requirements have become the defining timelines for all providers of the standard service covered.

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Fault rectification times are not part of the USO and, therefore, closer to what should be expected: in metropolitan areas, the end of the first full working day after receipt of the reported fault; in non-metropolitan (not remote) areas, until the end of the second full working day; and for remote areas, until the end of the third full working day.

The intention of the government was to encourage voluntary compliance with the scheme and so a breach of its standards are specifically not considered a breach of the Act. Enforcement is to be by the customer through court proceedings.

The major change to the scheme contained in the Telstra (Transition to Full Private Ownership) Bill 1998 is with enforcement of standards.

The ACA will be able to give written directions to a CSP subject to CSG standards, requiring action to ensure compliance with the standards or that

the extent of compliance with the standard reaches or exceeds a specified goal or target.

Further, the amendments will specifically forbid a CSP from contravening an ACA direction on compliance. In other words, a breach of an ACA direction is a breach of the Act and as such, can be enforced through a Federal Court injunction in relation to contraventions of the Act.

Interestingly, the government has talked about the possibility of fines of up to $10 million for contravention of CSG standards. But those fines are only available under the Act for contravention of "civil penalty provisions". Yet neither the provisions of the Act establishing the CSG scheme nor the proposed amendments make contravention of the scheme subject to civil penalty provisions.

There are ways to strengthen the CSG scheme. The minister could approve Telstra's USO Plan, which would immediately shorten CSG connection times. The government could make contravention of an ACA direction under the scheme subject to civil penalties, or make compliance with CSG standards a Service Provider Rule and enforceable as such.

The minister's Second Reading speech also suggested the government would consider tightening requirements on CSPs to inform customers of their rights under the scheme, and a review of CSG standards within a year.

In the longer term, it may make more sense to move the CSG scheme into the provisions for ACA's monitoring of carrier and carriage service provider service, allowing the ACA to make specific determinations in relation to carriers or CSPs generally, or in relation to a specific carrier or CSP, and to determine standards on connection and fault repair times and the other service quality issues affecting the public.

Holly Raiche

Domain Naming

...continued from page 11

- There should be universal representation on the governing body for the administration of the registry functions. Key stakeholders including end users should be represented.
- All gTLDs need not necessarily be administered by one single organisation (there was no clear consensus on this point) but one body should act as a coordinator.
- The question of the creation of new gTLDs (the Green Paper proposed five new gTLDs but provided no further details) should be dealt with in a separate paper as the issues were different.

NOIE also agreed to conduct some further investigations into possible options for the resolution of disputes and for the "oversight" of the registry monopoly by a non-U.S. organisation. It was agreed that more information was required on these points before an official response could be made.

The U.S. Green Paper has actually helped in the development of an Australian policy approach to the administration of the Domain Name System by forcing an early consultation and research effort. But whether Australia can have any influence on issues which are so dominated by the U.S. remains to be seen. It is important to let the U.S. know that the wider Internet community has a stake in the outcome of this debate, and the efforts of NOIE are welcomed in this regard.

NOIE will provide a response to the U.S. Green Paper by mid-April 1998. It is willing to receive public submissions. Information is available at the NOIE web site: http://www.noie.gov.au

Chris Connolly

Comment

... continued from page 4

Both concepts have occasional and limited legitimacy; but both are abused by those in power, becoming a one-size-fits-all excuse for concealment.

Commercial confidentiality is a legitimate reason for secrecy only when the consumers of a company's products and services have a wide choice in a genuinely competitive market.

The problem is that the old definition of government - as those organisations which are created by statute and use public money - is no longer adequate. Now that private enterprise is entrusted with many vital functions in society - from running prisons, to public transport, to the power supply - a new definition of government is needed. This definition should be based not on an organisation's legal structure but on its function.

What matters is the citizen's perspective. That control of, say, the water supply has shifted from a public enterprise governed by statute to a privately owned company matters not a whit to ordinary people. Their needs and interests - in a clean, affordable and environmentally responsible water supply - have not changed. Their rights to information should not change either.

Any company which operates a service which is basic to the life of the community, and which constitutes a monopoly or near-monopoly, has many of the characteristics of government. It therefore has many of the same responsibilities, including providing the public with the information it can legitimately demand.

The Victorian Information Audit is available from the Communications Law Centre, tel (02) 9663 0551 or order online at http://www.comslaw.org.au

Vic Marles