ADDRESS TO AUSTRALIAN DIRECT MARKETING ASSOCIATION

SYDNEY, 15 FEBRUARY 1978, 1 p.m.

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Hon. Mr. Justice M.D. Kirby

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Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

THE AUSTRALIAN LAW REFORM COMMISSION

The Law Reform Commission was established in 1975. Its purposes are to review, modernise and simplify the laws of the Commonwealth of Australia. Under its Act, and under the Constitution, it is limited to areas of Commonwealth responsibility. However, it has an additional, unique duty to seek, in matters referred to it, uniformity among the laws of the States and Territories of Australia. It works, not upon projects of its own initiation but upon references given to it by the Commonwealth Attorney-General. It consults widely. It holds public sittings and seminars. It secures expert and public comment on its proposals. Finally it reports to Parliament with a reasoned report and draft legislation. It is not a scholarly body only. It is an instrument of government. Already one proposal has passed into law. Other major proposals have been accepted by the government and will be processed into legislation. It is not an academic institution but an instrument to assist government and Parliament to change and modernise the laws by which we are governed.

The Commission is a national body. It is located in Sydney. It has an establishment of thirty. There are ten Commissioners, three of whom, including the Chairman, are full-time. The other Commissioners come from other parts of Australia. Although they are all lawyers, the Commission has the clear view that reform of the law is too important a task

to be left to lawyers only. For this reason at every stage in its work, the Commission seeks to obtain the specialised knowledge and assistance of non-lawyers, particularly those who would be affected by proposals for reform of the law.

PRIVACY REFERENCE

During the election campaign of late 1975 the Prime Minister undertook that if the coalition parties were returned to government a reference would be given to the Law Reform Commission to review the laws for the protection of individidual privacy in Australia. Subsequently, in announcing the government's programme, a firm undertaking was given that legislation would be introduced after consideration of the Commission's report. On 9 April 1976 Attorney-General Ellicott signed a reference in the most comprehensive terms calling upon the Commission to report upon the protection of privacy in all those matters which are the responsibility of the Commonwealth. A matter specifically referred to in the terms of reference is the potential for privacy invasion in data storage and the entry on to private property of persons such as collectors, canvassers and salesmen.

Under the Constitution, the Commonwealth has specific responsibility and is empowered to make laws with respect to "postal, telegraphic, telephonic and other like services". The members of the Australian Direct Marketing Association use these services of the Commonwealth. It is within the power of the Commonwealth Parliament to enact laws regulating and controlling the use of post and telephonic services, including for direct marketing. The Commonwealth's power is subject to the limitations imposed by s.92 of the Constitution. However, for relevant purposes, it must be assumed that the Commonwealth has significant power to enact legislation for the protection of privacy in a way that could affect the operations of the members of the Australian Direct Marketing Association. The question before the Commission is whether the Commonwealth ought to enact such legislation. If so by what principles ought it to be guided?

I mention this point of constitutional power because it is constantly before the Law Reform Commission, not least in its reference on privacy protection. One of the developments of recent times most relevant for privacy is the proliferation of computing. The Commonwealth has no clear power in respect of computers as such. Yet eight and possibly nine differing regulations governing computers and their users, in the name of privacy, is a daunting prospect. It is one which greatly concerns the computing industry, not least because of United States experience, the tendency to opt for the lowest common denominator and the considerations of costs involved. Subject to the considerations of s.92, and the guarantee of freedom of trade which it embodies, no such initial difficulties face the Commonwealth in regulating the use of postal and other services to prevent privacy intrusion. It is for that reason that I am here. It will be important that the Association and the Law Reform Commission work as closely as possible in the design of laws for the protection of individual privacy.

I do not propose to spend time developing notions about the definition of privacy. Nor is this the occasion to consider the machinery that should be developed to achieve proper sensitivity to privacy. Whatever else privacy means, it includes the notion of personal solitude. Direct marketing is designed to disturb solitude, doubtless intending to advantage the recipient as well as the sender.

The Law Reform Commission has divided its reference on privacy into two projects. The first is nearing completion. It involves consideration of protections for privacy in the very special area, namely the publication of private facts. The Commission had a reference to design a new, uniform defamation law for Australia. Part of the privacy reference has been examined in this context. A draft Bill has been circulated which suggests that the law, at the same time as protecting the reputation and honour of people against the publication of false statements, should protect their privacy against the publication of a limited class of "private

facts'". The proposal has secured some support. It has also secured some opposition in a number of quarters, notably the editorial columns of the Sydney Morning Herald. This debate continues. The Commission hopes to have its report on this aspect of the privacy reference complete by the middle of 1978, at the latest. It will then be open to the critical debate in Parliament

That will not see an end of the privacy project. On the contrary, the great bulk of the exercise remains to be done. The Commission has divided the balance of the privacy reference into a number of specific categories. Work is progressing upon each of these categories. It might be of interest to you to know the particular matters that are securing our attention. They are as follows:

* Constitutional power and machinery of regulation
* Credit bureaux
* Surveillance devices
* Criminal records
* Employment records
* Statistics
* Medical records
* Research
* Medibank
* Educational records
* Confidential relationships
* Intrusions
* Informational privacy and data bases
* The concept of privacy.

The particular aspect of privacy which will concern members of the Association is that section of our work which we have called "intrusion". There is no doubt that direct marketing involves intrusion upon people. Whether, in all its manifestations, it amounts to an "invasion of privacy" remains to be seen.

I do want to emphasise that the Commission in its final report will seek to strike a balance between the individual's claim to privacy and the equally important competing claims of society as a whole. Although "privacy" is an individualistic concept, we cannot permit its content to be

defined by each individual's notion of what is or is not "private". Were we to do this, privacy would be reduced to the value system of the paranoid. The Commission fully realises that privacy is an ill-defined concept of changing value. But in this, it is not different from many other values which the law seeks to deal with. The great bulk of litigation in our courts concerns itself with the equally ill-defined notion of "negligence". Courts (judges and juries) handle this concept with facility every day of the week. Likewise courts every day flesh out such concepts as "reasonableness" and "fairness".

Nonetheless, we appreciate that privacy protection must be weighed against other values in life : including access to information, the utilisation of technological advances and the efficient operation of the economy.

I realise from reading your "Annual Report" 1976-77 that the Association has established a special projects committee dealing with invasions of privacy. I understand that a number of discussions have been held with government authorities including the New South Wales Privacy Committee. You are aware in general terms of significant developments that have happened overseas and are continuing to occur, relevant to your operations. You are right to scrutinise these developments. One of the issues before the Law Reform Commission is whether we should go in the same direction.

BRITISH DEVELOPMENTS : THE YOUNGER REPORT

In 1970 a committee was established in Britain to inquire into the general question of privacy. The Chairman of the committee was Sir Kenneth Younger. The Committee reported in 1972. The terms of reference included the consideration of whether legislation was needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons and organisations or by companies. In connection with the report, a detailed and painstaking questionnaire was prepared, designed to elicit a profile of the modern British attitude to privacy and its protection by law. One of the matters included in the survey is relevant to direct marketing.

It concerned attitudes to the receipt of "unsolicited printed matter and goods".

I think we can put the receipt of unsolicited goods to one side. Already, as in the United Kingdom, specialised legislation has been introduced in the States to deal with this special problem. Nor ought we to dally, discussing the word "unsolicited". I note from your "Annual Report" that the Association believes the word "unsolicited" is emotional and irrelevant. It is suggested that it will be better to describe such material as "advertising mail". It is feared that "unsolicited" suggests "unwanted". It is asserted that surveys have shown that "much of such mail is welcomed by the recipient". I do not know of these surveys. I should like to know of them. I do not doubt that many recipients of advertising matter do welcome its receipt. For present purposes I am not concerned with nomenclature; I leave that to you.

The Younger Committee survey took evidence about the quality and quantity of advertising material circulating at present in the United Kingdom. It described the quantity of this material as "immense".

> "Much of it concerns industrial, commercial or scientific goods or services and is directed to companies and professional people, who in the main accept it as a concomitant of their business or professional activities. We are not aware of any demand that this practice should be limited, and indeed it probably fulfils a useful commercial purpose and is generally acceptable. It is the advertising material directed to private homes which has given rise to most of the complaints made to us. The bulk of this concerned books and magazines of all kinds, life assurance and a wide range of domestic products and services. As the results of our survey show ... the weight of objection to unsolicited

delivery in the home varies considerably from one type of material to another". (para. 420). In the Younger Committee Survey 2% spontaneously mentioned invasion of privacy by material received through the post. On being prompted a further 9% mentioned such material i.e. a total of 11% categorised receipt of this kind of information as an "invasion of privacy". Material referred to included *Reader's Digest* advertising material, book, mail order catalogues and "obscene literature". Those interviewed were told "Amongst your post one morning is a fat envelope addressed to 'the occupier'. It contains a lot of glossy brochures advertising holidays in Spain." Fourteen percent regarded this as an invasion of their privacy. Eighty four percent said it was not. Eighty seven percent said they would not be annoyed or upset. Seven percent said they would be "a bit". Only 4% said they would be "very" annoyed. Fourteen percent thought that this activity should be prohibited by law. Eighty four percent thought that it should not.

Objections increased when the Spanish brochure was replaced by an illustrated manual of sexual techniques. Sixty seven percent regarded this as an invasion of their privacy. Thirty four percent said that it was not and that they would not be upset or annoyed. Forty six percent said they would be "very" annoyed. Seventy two percent thought that this should be prohibited by law. Twenty nine percent thought that it should not. This was, of course, 1972. Things may have changed since.

Leaving aside protection from "obscene" material through the post, a matter which is probably already sufficiently dealt with by the law, the question is whether the balance of the literature referred to should be subject to legal regulation in the name of privacy. The Younger Committee concluded that it was "at least doubtful" whether objections to the receipt of unsolicited material through the letterbox were, in truth, objections on the ground of "privacy". It was pointed out that the objection is not so much to the coming of unwanted material into the home (a necessary consequence of a univeral mail servic

but an objection to the contents of what comes.

In the result, after scrutinising current laws against the distribution of obscene material through the post and United States legislation, the Younger Committee reached the conclusion that no sufficient case had been made out "at the present time" for giving further protection by law against other forms of sales or promotional methods such as direct marketing.

UNITED STATES DEVELOPMENTS

In the United States since the early 1960s laws have been developed to limit the distribution of sexually oriented material through the post. These laws were in part a reaction to the stand taken by the United States Supreme Court on obscenity in relation to the First Amendment guarantee of freedom of the press. The common feature of the United States legislation is the rule that a recipient of the mails can give notice to the United States Post Office of his desire not to receive certain types of sexual printed matter. Both solicited and unsolicited advertisements of this kind must bear clear identification of their nature. A person on the protected list for more than 30 days who receives this material can present it to a post office. Violation is then reported to the Department of Justice which has flexible civil and criminal sanctions to ensure compliance with the legislation. The public response to the 1971 statute was great. Within the first six months nearly 250,000 requests were received for inclusion on the list of those wishing not to receiving sexually oriented advertisements. Mailers however complain that willing customers objected to receiving envelopes marked in such a manner that a letter carrier or a wife could get a general idea of their contents. It was argued that this involved an invasion of a willing customer's privacy. Generally speaking, the United States legislation has been criticised as "a cumbersome arrangement".

Following the enactment of the *Privacy Act* 1974 by the United States Congress a special privacy protection study

commission was established to advise whether further legislation of a specific kind was necessary to protect the privacy of United States citizens. One of the specific matters referred to that Commission was a direction to report to the President and the Congress on whether an organisation engaged in interstate commerce should be required by law to remove from its mailing list the name of any individual who does not want to have his name on it. The privacy protection study commission has now produced its report. It has recommended that a person who maintains a mailing list should *not* be required by law to remove an individual's name upon his request. The Commission points out that the balance to be struck here between the interests of individuals and the interests of mailers is "an especially delicate one". Reference is made in the report to the part which the mail has had in promoting business and ideas since the foundation of the American Republic. Evidence was taken of the tremendous bulk of the United States postal service. Each week that service delivers 2.3 pieces of unsolicited direct mail to the average American household. About $4.6billion are spent annually for the materials and postage. The total volume of business generated by this direct mail system approaches $60billion in the United States. A good index of the importance of direct mail to the national economy of the United States is in its standing among the competing advertising media. According to the U.S. report, direct mail comes third. Its users spend about half the amount spent on newspaper advertising and about three quarters of the total spent on televised promotions. Advertising in magazines and on radio each come after direct mail advertising and draw about half the income drawn by direct mail. So you will see it is big business in the United States. Clearly it is big and growing business in this country.

It must be remembered that mailing lists do not attack the "<u>average</u> house". The whole point of the exercise is to use every stratagem of science and information to enter the <u>susceptible</u> household and to seek out the <u>likely</u> customer. It is for this reason that mailing lists are compiled, compared, winnowed and refined until the potential customer is properly

identified. Obviously the computer is a great friend of those who seek to compile accurate, productive and profitable mailing lists. One witness told the United States commission:

> "[The general mailing list] is low man on the totem pole when it gets down to selling a product to a special market. For example, if I were the advertising manager of Black & Decker and had a new handy-dandy hand-tool to sell, and I had a choice of the more sophisticated breakdown [with] the names of the most recent buyers of *The Popular Mechanics Home Handyman Encyclopaedia*, I'd know where I'd start. I'd take the buyers."

PROBLEM AREAS

This is not to say that there are not problem areas in relation to mailing lists and direct marketing generally. There are, for example, some who would draw a sharp distinction between postal communications and telephonic communications. The first requires no reply. It can be consigned with minimum effort to the garbage. The second is more intrusive. It interrupts a person's solitude more effectively. It impinges upon his consciousness more directly. It may well be more effective as an advertising medium because of its very intrusiveness. In the United States, at least one device has been developed which is clearly objectionable. It involves an automatic instrument which will telephone the prescribed recipient and will continue to do so until it completes the call. It is not possible to simply hang up. Manners alone are no protection against its wiles. It is the most persistent of all salesmen. Strangely enough, this device is called the "automatic solicitor". Doubtless a sensitive legal profession would require a new description for it, were it to be introduced in this country. I gather that the appropriate officers of Telecom believe that they have this problem in hand. Clearly this is the kind of direct marketing that we cannot tolerate and should be prepared to prevent by law.

How much further should we go? As postal charges increase, the use of the telephone as an advertising medium beco

more attractive. It requires no economic genius to know that 18 cents is cheaper than 10 cents. Views differ about the intrusiveness of telephone advertisements. One member of the public has written to us suggesting that those subscribers who do not wish to receive calls of this kind should be entitled to mark with an asterisk their entry in the telephone directory. I am told that this suggestion has technical problems. A more fundamental question is whether it is really necessary, given the mischief to be struck down. It is, of course, possible to interrupt a caller and terminate a conversation. Restraints of our society probably prevent this happening in fact. I am aware of the informal steps that are taken by telephone (and mail) advertisers to collect and omit those who have signified a wish not to receive contact of this kind. The Younger Committee survey in Britain requires us to ask whether the margin of objection to this form of communication is such as to outweigh the margin of advantage and information spread by direct canvassing.

There are some who say that government mailing lists ought to be put into a separate class. Information supplied to government ought not to be generally available. In the United States the *Privacy Act* 1974 forbids federal agencies marketing mailing lists for profit. Ironically, the *Freedom of Information Act* has had the effect that numerous lists are now available and can be copied on request. Several departments in the United States have restricted the circulation of their mailing lists. For example Veterans' Administration releases the lists only to non profit organisations with functions directly related to programmes and benefits for returned men. A number of the States have introduced limitations on the availability of motor vehicle registration information. The general tradition of public service secrecy in Australia has so far prevented distribution of this kind of information being put to commercial gain. However members of the Association may regard this as an unnecessary inhibition in the free flow of information. They may well look to the forthcoming *Freedom of Information Bill* in Australia as a source for future mailing lists. Should such lists and the information upon which they can be constructed

be available from government sources and if not, with what limitations?

The United States Commission has recommended that State agencies maintaining records about individuals should devise a procedure "whereby an individual can inform the agency that it does not want a record pertaining to himself to be used" for direct mail marketing and solicitation. The U.S. Commission recommended that special attention should be paid to motor vehicle records and the practices of agencies in the United States which prepare mailing lists for the express purpose of selling, renting or exchanging them with others. Is such a law really necessary at this stage in Australia?

CONCLUSIONS

In the hierarchy of privacy intruders those involved in direct marketing in Australia are in the minor league. If the Younger Committee survey can be adapted to Australia, most of our citizens do not get terribly fussed about the receipt of unsolicited advertising material through the mail. There may be more objections to direct marketing by telephone.

This is not to say that there are no wrongs which balanced protections for privacy ought not to deal with. The use of information given by a citizen to government may be in a different class (particularly if extracted under any form of obligation) to the use made of information supplied to the private sector. A means whereby those who object to all or certain classes of material can readily avoid intrusion may be necessary and may in certain circumstances require support by legal sanctions. The use of the computer to assemble generally available information into a highly accurate pen picture of the individual in society is a universal problem best dealt with in the context of the regulation of computing. It is not apt to consider it in the context of direct marketing. This is but one of numerous uses to which the computer

is put. It must be dealt with, if at all, with a wider perspective.

One final thing should be said. I recognise, better than most, I believe, that our society lives in danger of creating "too many laws". This is a special problem for a federation. Already, last year, the various Parliaments of Australia passed 1,000 Acts, to say nothing of regulations, by-laws and subordinate legislation that was passed. Not every wrong has to be righted by a law. Self-discipline and self-regulation have a traditional part in our system. Sometimes the provision of laws may do even greater mischief than suffering an occasional wrong. It is important in designing reformed laws that they should be well thought out and put forward to Parliament to meet a specific and clearly felt need that has been identified and that plainly requires redress.

In the design of laws for the protection of privacy, it will be important for the Law Reform Commission and, I believe, for our society, not to follow every hare of privacy down its burrow with a new law. By the same token, if we are to preserve the value of privacy, particularly against the more offensive and intrusive invasions upon it, new machinery and new law will occasionally be necessary. In the design of these new laws, we seek to enlist the assistance and support of those who will be affected. We will need the help of the Australian Direct Marketing Association and its members in identifying the issues for privacy involved in their operations and in clarifying the role, if any, which the law should have to prevent unreasonable wrongdoing to fellow citizens.