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AUSTRALIAN CABLE AND SUBSCRIPTION COMMUNICATIONS ASSOCIATION

FIRST ANNUAL CONVENTION

CANBERRA 8 NOVEMBER 1982

CABLE T.V. - PROTECTING INDIVIDUAL RIGHTS

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

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THE TECHNOLOGICAL CONTEXT

The recent recommendation of the Australian Broadcasting Tribunal (A.B.T.) that cable and subscription television services should be introduced in Australia as soon as practicable require us, as a community, to begin thinking seriously about the implications of the new technology for individual rights.¹

Individuals rights, if presented in a television jingle, would come in two sizes. First there would be the individual as a sole human being. Secondly, there would be the individual as part of the Australian society. I plan, in this brief talk, to review the potential impact of cable and subscription T.V. upon the individual in both manifestations. Examination of the former will take us into consideration of the privacy implications of the new media. Examination of the latter will require consideration of the macro role of the media in a country which pretends to civilisation and the possible impact of the new system upon our values and culture, and what we can do about this in society, through its laws.

In every sense, I am more qualified to speak of the former subject, for privacy protection has been committed by the Federal Government to the Australian Law Reform Commission for examination and report. I have also had some experience on the international implications of the new information technology, through association with committees of the Organisation for Economic Co-operation and Development in Paris. In relation to the macro issues, as I have described them, my sole claim to authority is as a member of the Administrative Review Council, whose recent report 'Review of Decisions

under the Broadcasting and Television Act was tabled in Parliament on 27 October by Mr. Neil Brown, Q.C.² Happily for present purposes, Mr. Brown is both Acting Federal Attorney-General and Minister for Communications.

I do not have to tell this audience that cable television brings virtually new services to subscribers through the use of coaxial or fibre optic cables. Subscription television brings them in the form of a radiated television in a scrambled message which can only be viewed by subscriber leasing a decoder from the subscription television operator. In either case of cable or subscription television, substantial capital costs are involved in the provision of the basic equipment necessary to provide the service. The capital cost for each cable system has been estimated at between \$60 and \$80 million for a city of the size of Melbourne or Sydney.³ The A.B.T. report recommended against the proposal that Telecom should operate as a common public carrier to lease channels. Instead, it urged that the whole operation be left to private enterprise - with no role for Telecom, the Australian Broadcasting Commission or the Special Broadcasting Service. Instead the whole operation was to be 'the province of the private sector'. Mr. Brown has said that the report, together, now, with the somewhat different Davidson report, are to be considered by the Government. Mr. Barry Jones, spokesman for the Federal Opposition on Science and Technology has urged delay in the introduction of the new technology.⁴ His call has been taken by the Economic Correspondent of The Age, Mr. Kenneth Davidson who has declared that there is insufficient demand and insufficient clarity of broadcasting policy to introduce the new technology now.⁵

In the United States, there is no doubt that, in a much larger market scattered over a continental country, cable television has really taken off. In 1962 it was confined in the United States to some 850,000 households in middle America, mostly offered by 800 cable systems serving small townships which could not get a clear television signal. By 1968, 2000 cable systems provided services to 2.8 million of the 56.4 million American homes containing television sets.⁶ By 1982, approximately 4,600 systems serve 23 million T.V. homes and the rate is growing more than 250,000 per month. It is expected that by 1985 the cable industry will have wired up more than 40% of American homes. This expansion in the service has been accompanied by withdrawal of the Federal Communications Commission from regulation of this rapidly expanding industry.⁷

Should we in Australia now go down the same track? If so, what are the issues for the individual in our country with its somewhat different constitutional and legal set up and its rather more British traditions of public broadcasting. Can I disclose a bias? Having recently spent a month in the United States, the thing I most missed (friends apart of course) was the generally fair, authoritative and balanced service provided by our

public broadcasters (the A.B.C. and S.B.S.). Oh what a joy it was to hear that familiar trumpet fanfare at 7 o'clock - even with its new electronic variations on the theme! What a difference to the chatty, coy, folksy, brief, instant local and advertisement-ridden programs that so poorly serve the information hungry people of the United States.

THE PRIVACY ISSUE

Let me turn quickly to the privacy issue. I addressed it in greater length for the opening of Information Technology Week in Adelaide this year. The doyen of American writers on privacy, Professor Alan Westin has identified 4 main potential threats to privacy which arise from the new media.⁸ The essential risk arises from the fact that the operators managing the systems have access if only for billing purposes to an enormous pool of personal data from subscribers, covering purchase of reading material, novelty items and magazine subscriptions, details about subscriptions to special information data bases, the times owners left homes or turned off alarm systems, the position taken by viewers on survey questions, home profiles from aggregating many individual responses, including viewing of sexually oriented films and interest in various political, religious, social and charitable causes. Professor Westin's four main categories at risk included:

- * Improper commercial use of the information by the system operator, i.e. sale of composite pictures to marketing firms and sale of 'derogatory characteristics' to credit grantors such as landlords, employers and insurers;
- * Breaches of confidentiality to third parties i.e. provision to particular enquirers of extensive personal information revealed by individual viewing patterns;
- * Commercial pressure on subscribers to authorise release of data profiles. Such pressure could be heightened in Australia because of the suggestion that the initial cable licences should be provided for 15 years - giving a degree of unresponsiveness to pressure during that time and also because of the fact that during the early period it is likely that profitability will be non-existent in a small market; and
- * Government investigations: The availability of data and the potential of computer scanning matching and examination of the data may, occasionally, give rise to demands by government and its agencies for access to the data for 'special causes'. If, for example, in the Yorkshire Ripper case, there was a possibility, before Sutcliffe was apprehended, that access to computer profiles would have helped to identify the suspect, would there not have been pressure for the police to have

access to such information? Yet when we allow it for the Sutcliffe's of this world, how do we stop the availability of that data for the apprehension of jay-walkers or more threatening, the apprehension of allegedly un-Australian or un-American activities? In the United States there are certain constitutional guarantees and protections which we do not have in Australia to guard the individual. That should make us doubly concerned as we embark upon this path of the new media: heightened risks, lesser protections.

Looking to the United States experience, various forms of control, legislative and otherwise, have been devised to protect privacy in cable and subscription television services:

- * Licence conditions. First is the inclusion of specifications for the protection of privacy in licences granted to the organisations involved. No doubt that approach could be developed by the Australian Broadcasting Tribunal or other licensing body. It might become specially important if a 15 year 'free go' were to become law.
- * Self-regulation. The second approach is offered by the leading company in the United States, Warner Amex. It has developed its own privacy rules in the form of a Voluntary Code issued in October 1981. The Code contains a 500 word statement of information practices. Subscribers are informed about them. No individual information concerning viewing or responses is to be developed 'unless the subscriber has been advised in advance and given an adequate opportunity not to participate'. But this does not exclude the collection and development of information in a statistical non-identifiable form. Furthermore, a court subpoena or a judicial warrant would soon override a voluntary code's promises, no matter how well intentioned or sincerely given.
- * Legislative regulation. The third approach is the development of legislation, criminal and regulatory in order to impose a privacy code and to provide sanctions for its breach.⁹ In Illinois, a cable privacy statute has already been enacted. Similar statutes are proposed elsewhere in the United States.
- * General privacy protection. A fourth approach is the provision of a general privacy guardian, such as has been developed in data protection agencies of Western Europe and the Privacy Commissioner of Canada. The variety of the problems being identified for individuals and the Federal system of government may force Australia to opt for a mix of legislative solutions which include the provision of a general privacy 'watchdog' whose efforts are supplemented by highly detailed and specific legislation and, let it be said, industry voluntary codes of fair information practices.¹⁰

THE INDIVIDUAL IN SOCIETY

Now let me turn to the individual in society. The views I express on this issue are personal only. Of course, there are, many arguments in favour of the introduction of a form of cable television, so long as our country can afford it.

- * it will provide some additional employment at a time of unemployment;
- * it will provide the potential of a wider range of specialised programs. You and I might find a 24 hour service on baseball tedious, but if there is a market, should it not be served?
- * in times of general and possibly endemic unemployment, Aldous Huxley in his Brave New World would no doubt tell us that we must provide new electronic 'bread and circuses' for the unemployed. This would be a cynical way of putting forward an important point. Whatever happens at the end of the present economic downturn, it is likely that computerisation of society will greatly reduce the availability of repetitive, routine work. It is increasingly realised that we must prepare society for more leisure. Rightly or wrongly, the way many people like to spend their leisure to-day is watching television. Cable T.V. could supplement the entertainment leisure diet. Supporters strongly argue a case for the decentralisation of control of the media. Everyone acknowledges that this is concentrated in Australia in relatively few hands. Could cable television and subscription television provide a proliferation of services in the hands of many? Some critics have already said that this is not likely to happen if Telecom is kept out of the provision of the common carrier's role. Recoupment of the extremely expensive capital costs may put great pressure on the private sector to offer only the services that cater for the mass audience and attract the large advertisers. What a shocking fate it would be for the potential of the new media if it meant for our country nothing more than additional soap operas, more cowboy films, more repetitious sporting programs and more late-night movies, most of them imported and all repeated time and again because of their low cost. Yet that is what critics say the individual in society will get if the present proposal is accepted.¹¹

We must be cautious in modelling our approach to the new media upon the experience of the United States. There, in the spirit of the First Amendment, law review articles denounce efforts to improve public broadcasting. Sober legal journals call for a continuation of the battle 'to keep government out of the newsroom'.¹² In my travels, during a month in the United States in August-September, the people I spoke to were generally sceptical about the possibility of a public broadcaster, financed from the public purse which could nonetheless maintain a high degree of objectivity and balanced fairness, particularly in news programs. Yet the general brevity and superficiality of American news programs and the crassness of so much of the rest of

entertainment media (much of it now exported to this country) makes most thinking Australians value the British tradition of the B.B.C., happily exported to this part of the world in the form of the A.B.C. Radio Australia and the N.Z.B.C. and now the S.B.S. Strangely enough, the system appears to work in our culture, even if with occasional lapses. Yet we read that it is proposed that it should have no part at all - none at all - in the dynamic growth area of cable and subscription T.V. Frankly, that strikes me as a curious rejection of a distinctive, well established and valuable feature of broadcasting in Australia. I hope the promised land of cable and subscription T.V. will not see Australia become the broadcasting clone of the United States.

The problem of turning the use of the cables over exclusively to private owners, with the great control that such a decision may portend over the information supplied to individuals in Australian society, will require the closest possible attention. Otherwise, private individuals and companies may be put in the conflict position between their immediate financial interests and the individual citizen's interests in greater variety and a much more varied fare from that which has generally been offered by the private sector to date.¹³ Unless these issues are considered, far from opening up the rights of the individual to more variety, speciality and difference in information, the result of the new media could be a diet of more of the same. Worst still, pressure to recoup initial costs could limit the range of programs only to the interests of those with a large disposable income with little or no attention being given to less powerful and affluent minority interests and the goal of a truly pluralistic society.¹⁴

I am sure that these issues will be considered by Mr. Brown, the Federal Government and Parliament before final decisions are made on the A.B.T. Interim Report. Already, Mr. Brown has indicated his guiding star by asserting that the potential of the new media is to be judged by what it will do 'for the ordinary person' in 'opening up and widening entertainment and educational services in the home'.¹⁵

The A.B.T. Interim Report includes the suggestion that a Federal regulatory authority, responsible for cable television, should be provided with the power to impose conditions on the cable system licences and 'an effective range of sanctions' if licence conditions are not complied with. One matter which will have to be examined is the relationship between any such licencing authority and the new Federal Administrative Appeals Tribunal, which is headed by Federal Court judges. It will be important to have regard to the recent report of the Administrative Review Council. That report proposed an enhancement of the review by the generalist Administrative Appeals Tribunal of decisions made by the A.B.T., although only with the leave of the President of the Administrative Appeals Tribunal.¹⁶ A specific suggestion was also made that a decision by the A.B.T. whether or not to hold a public

enquiry or to reach a final decision without holding a public enquiry should itself be subject to review by the Administrative Appeals Tribunal. Without over-judicialising the rather special field of broadcasting media, and without getting too deeply in the mire of regulation, the great public and individual interests in the media in Australia will, I believe, increasingly force governments to look to the independent judiciary for at least some supervision of the way things are done. The Administrative Appeals Tribunal is not strictly a judicial body. But it does include, as I have said, Federal Court judges. Decisions on broadcasting and the media are, at least in my scale of values, infinitely more important than many tasks we currently assign to the highly trained and highly paid judges. The fact that this is new territory for the judiciary is no excuse. It is new territory for everyone. The media is new. The challenges presented are novel, complex, perplexing and important.

CONCLUSION

The long and short of this address is that we stand on the brink of major developments in the media of communications in Australia. Subscription and cable television will undoubtedly come to Australia. The timing is all.

When the new media comes, many issues will have to be addressed. Most of them are of a highly political character upon which it would not be appropriate for me to dwell. Many of them involve great economic questions. The system, when introduced, will have to fit comfortably into our society. But this is a society with a rather special and happy blend between features of life of Britain and Europe, on the one hand, and those familiar to people from North America, on the other.

I have mentioned two issues to be considered. The first is the due protection of individual privacy. This is a matter upon which the Law Reform Commission will be delivering a general report next year. That report will have implications for the new media and beyond.

The second is a subject of wider significance. It concerns the right of individuals to have due protection from the law, its institutions and procedures, for the pursuit of happiness in a plural society. Both issues deserve the attention of this Conference, of the Government and of the Australian people.

FOOTNOTES

1. Australian Broadcasting Tribunal, Cable and Subscription Television Services for Australia, Interim Report, August 1982. Cf report of the Committee of Enquiry into Telecommunications Services in Australia (Davidson Report), 1982 (2 Vols)
2. Administrative Review Council, Review of Decisions under the Broadcasting and Television Act 1942, report No. 16, 1982.
3. K. Davidson, 'Insufficient demand, lack of a broadcast policy mean it is too early for cable T.V.' in The Age, 20 September 1982.
4. As reported The Age, 18 August 1982, 3.
5. K. Davidson, *ibid* n 3.
6. T.E. Wheeler, 'Cable Television: Where It's Been, Where It's Headed' in the Florida Bar Journal, March 1982, 228.
7. S.M. Besen and R. W. Crandall, 'The Deregulation of Cable Television', 44 Law and Contemporary Problems, 77 (1981); L.F. Seraso, 'Communications Law' in J.E. Davidson (ed.) Annual Survey of American Law, 1981.
8. A.F. Westin, 'Home Information Systems: The Privacy Debate', Datamation, July 1982, 100.
9. See D.H. Flaherty, 'The Challenge of New Information Technology to Personal Privacy: A Canadian Perspective', unpublished paper prepared for the workshop on the 'Micro Electronics Information Technology in Canadian Society', Queens University, Ontario, May 1982, mimeo, 5-7.
10. See M.D. Kirby, 'People and Technology - The Real Impact', unpublished paper for Information Technology Week 1982, Adelaide, mimeo, 8ff. See also R. Hayes, 'Privacy and Cable Television', unpublished paper for Australian Communications Law Association Seminar, 25 October, 1982.
11. See K. Davidson, n 3 above.
12. Wheeler, 231.
13. K. Davidson, *op cit*.
14. *ibid*.
15. N. Brown cited in The Age, 18 August 1982, 3.
16. Recommendation 1 in the A.R.C. report n 2 above.