AUSTRALIAN COMPUTER SOCIETY INCORPORATED

SOUTH AUSTRALIAN BRANCH

CONFERENCE, RENMARK, 26 FEBRUARY 1984

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

DAME EDNA SPEAKS

When I was asked to present this paper, I thought that what would be expected of me would be the compulsory reference to 1984 and George Orwell. Hence the title of my paper 'It's 1984 : How Do You Feel?' Being a judge, one gets used to doing what is expected. Accordingly, I was all geared up to present you with a detailed analysis of Orwell's 1984 and intellectual scrutiny of Orwell's predictions as against Australia's modern realities.

But then, a fortnight ago, my eyes fell upon the photograph of Dame Edna's alter-ego Barry Humphries sitting on Bondi Beach staring at the water, declaring himself to be 'not unlike Dirk Bogarde in Death in Venice'. You will recall that Humphries has reached 'the big F', ie his 50th birthday. Out of a feeling of delicacy, he would not disclose Dame Edna's age. But in an uncharacteristic moment of acidity, he disclosed that some early archive film had been found of Dame Edna Everage:

> It's classier than the Thorn Birds and not as boring as 1984 and James Orwell. Boy, am I fed to death with James Orwell.[1]

Terrified that you too may be 'fed up to death' with Orwell — even James Orwell — and his predictions, I thought I should confine my remarks to two events of December 1983. I leave it to you to reach 1984 and to make your own conclusions about Orwell, his books and his predictions. The first event is the tabling in Federal Parliament on 14 December 1983 of a three-volume 1 400 page report of the Australian Law Reform Commission on privacy. The second event was a symposium of the Organisation for Economic Co-operation and Development (OECD) on trans border data flows. I attended this symposium in December. I plan to tell you something of the social and legal issues that were identified at it.

PRIVACY REPORT

Beyond computers. The privacy report was itself the vehicle for an interesting innovation. The third volume was entirely on microfiche. So far as I know, this is the first time a Federal statutory authority has presented a statutory report on microfiche to the Federal Parliament in Australia. I am now looking to the day when we will simply deposit a floppy disk or other computerised version of our report, leaving it to the Federal politicians, bureaucrats and others to convert the proposals to readable electronic messages. We can laugh at such an idea. But it would certainly be more economic and the forests of the world, depleted for an ever-increasing number of official reports, would be saved just in time.

The Law Reform Commission's report on privacy was prepared under the direction of Associate Professor Robert Hayes. It represents the results of a seven year inquiry. According to Jane Ford, Technology Correspondent of the Australian, we showed 'impeccable timing' in releasing it on the eve of 1984.[2] At the risk of incurring the denunciation of Dame Edna, we adverted to Orwell and the significance of 1984 in the summary at the front of the report:

> Ever since George Orwell wrote 1984, that year has stood as a symbol of the way in which authoritarian attitudes and intrusive modern technology could undermine freedom and individual privacy. 1984 might have been a fantasy and a parody for Orwell. However, enough reality already exists to constitute a warning to Australia that carefully designed legal responses are needed.[3]

Identified in the report as the chief threats to privacy in modern Australia are:

- growing official powers of intrusion;
- new invasive business practices;
- new information technology, computers linked by telecommunications;
- new surveillance technology, telephone taps, listening devices and hidden cameras.

Addressing himself to the problems for privacy beyond computers in Australia, Professor Hayes said, at the time of the tabling of the report, that Australians now live in 'glass houses':

> All Australians, rich or poor, celebrated or notorious, distinguished or undistinguished, now live in glass houses. Physical barriers of distance and matter no longer protect us from the spy or voyeur, or the thief of valuable information. Ordinary Australians are no more insulated by the mundane and repetitious nature of their lives than the rich and powerful are by sophisticated counter-surveillance technology. What is boring can become interesting when massed together in a computer data bank for purposes such as market research or direct marketing. With every advance in data security and debugging techniques comes a technical change capable of thwarting its fleeting protection. The law in this area cannot be expected to stand in the way of societal change wrought by the new technology ... But the law can ensure that technological change meets human needs by shaping and modifying it so that its worst features are less destructive and its impact less immediate. That is what the Privacy report has attempted to do.[4]

The central recommendation of the Law Reform Commission's report on privacy was the proposal to establish a 'privacy watchdog'. But there were many other proposals:

- enlargement of the Human Rights Commission to assume new and special resposibilities for privacy protection as contemplated by the International Covenant on Civil and Political Rights;
- provision of statutory guiding rules for the evaluation of complaints about privacy invasion;
- specific limitations on specially invasive body cavity searches by Federal officials;
- new Federal legislation to control secret surveillance by listening and optical devices;
- extension of present legislation to tighten up rules against telephone tapping and intrusions into the privacy of the mail.

In developing its proposals, the Australian Law Reform Commission called attention to the need to:

- expand the suggested model so that it will apply in the States, whose laws presently govern the great part of privacy regulation in Australia;
- expand Federal regulation by utilising relevant Federal heads of constitutional power such as those which permit laws on banking, insurance, corporations and external affairs; and
- develop Australia's laws in the context of international developments in information technology and fast-expanding international rules governing informatics (the linkage of computers and telecommunications).

The Australian Law Reform Commission's report specifically rejects the creation of a vague and general tort of privacy protection. It also rejects confining privacy protection to computerised personal information systems. It acknowledges the general desirability of facilitating the free flow of information which can sometimes lead to a clash with privacy interests. It suggests that privacy laws should be developed to supplement present Australian laws which already partly protect this interest. But it urges early attention to its recommendations:

> Unless legislative and other actions are taken for the better protection of privacy, this important attribute of freedom may be irretrievably lost.

Information privacy. The Commission's report declared that one of the most important sources of danger for privacy of the Australian today arose from the remarkable technology of informatics. I use that word, although I know that it has not yet gained universal currency. To refer to computers is now inadequate, for computers have been married by telecommunications. To refer to 'computications' as one French Minister did, is unacceptable because it is irretrievably ugly. 'Information technology' is a mouthful. In any case, it will remind most ordinary citizens of propaganda machines or conjure up images of a compositor or a printing press. I now make my bid for 'informatics'. It is a simply single word increasingly accepted in the OECD. We should get used to it in Australia. Informatics — the word and the phenomenon — is here to stay.

The features of informatics mentioned in the privacy report as increasing the risk to individual privacy include:

- the vastly increased amounts of personal information that can now be stored virtually indefinitely;
- the enormous increase in the speed and ease of retrieval of such information now technologically possible;
- the substantial reduction in the cost of handling, storing and retrieving such information which makes it tempting to keep it just in case it may prove useful;
- the constant establishment of cross-linkages between information systems permitting searching and matching of data supplied for numerous purposes;
- the capability of building up a compositive profile, but one which is no more accurate than the many sources of the data and which may, in aggregate, distort and misrepresent the data subject;
- the creation of an entirely new profession, 'computerists', or 'informaticists', largely unrestrained by law and unevenly restrained by established professional codes of conduct;

- the greater ease of accessibility to personal data, despite codes and occasional encryption, when the technologist is really determined;
- the tendency to centralise control of personal data;
- the rapid advance of international telecommunications, diminishing the power of domestic governments and lawmakers to enforce local perceptions of fairness and privacy.

The Law Reform Commission's recommendations address these problems and propose adoption of a series of principles by which complaints of privacy-offending conduct can be evaluated and dealt with by the Privacy Commissioner. In addition, the proposals adopt the so-called 'golden rule' of privacy protection found in legislation in Europe and North America. This is the right of the data subject normally to have access to personal data about himself. It is a right of access which must succumb to exceptions in certain circumstances. The approach taken is:

- there should be a right, enforceable under Federal law, by which the individual will be entitled, unless excluded by law, to have access to both public and private sector records of personal information held about himself;
- where it is found that this information is incorrect, incomplete, out of date or misleading, procedures for correction of the record or addition of appropriate notations should be available;
- in addition to this enforceable right, rules are proposed to govern the use, disclosure and security of personal information. Suspected breach of these rules can be investigated by the Privacy Commissioner and be the subject of ombudsman-like remedies.

The Law Reform Commission's report expands and clarifies the right of access, already found in the Federal, Victorian and proposed New South Wales freedom of information legislation. It clarifies the right and pushes it for the first time into the private sector in the context of Federal regulation of the Australian Capital Territory. The report makes it plain that the Law Reform Commission was limited by the terms of its reference and the Australian Constitution from expanding this central privacy right of access to a much wider field in the private sector. It leaves any such expansion of privacy protection as a task for the future.

Privacy principles. It also leaves for the future the question of whether any of the other information privacy principles -- largely derived from the OECD Guidelines on Trans Border Data Flows and the Protection of Privacy -- should be developed into enforceable rules ie rules which, like the right of access, can be directly enforced by the data subject. For this reason, it is perhaps useful to state the 'information privacy

principles'. They are set out in a schedule annexed to the draft Privacy Bill which is in turn attached to the Law Reform Commission's report. Under clause 7 of that Bill it is declared that:

> where a person does an act or acts in accordance with a practice that is contrary to or inconsistent with anything set out in the schedule, the act or practice shall be taken to be an interference with the privacy of a person.

These are the information privacy principles proposed by the Law Reform Commission:

Collection of Personal Information

1. Personal information should not be collected by unfair or unlawful means, nor should it be collected unnecessarily.
2. A person who collects personal information should take reasonable steps to ensure that, before he collects it or, if that is not practicable, as soon as practicable after he collects it, the person to whom the information relates (the 'record-subject') is told —
   (a) the purpose for which the information is being collected (the 'purpose of collection'), unless that purpose is obvious;
   (b) if the collection of the information is authorised or required by or under law — that the collection of the information is so authorised or required; and
   (c) in general terms, of his usual practices with respect to disclosure of personal information of the kind collected.
3. A person should not collect personal information that is inaccurate or, having regard to the purpose of collection, is irrelevant, out-of-date, incomplete or excessively personal.

Storage of Personal Information

4. A person should take such steps as are, in the circumstances, reasonable to ensure that personal information in his possession or under his control is securely stored and is not misused.

Access to Records of Personal Information

5. Where a person has in his possession or under his control records of personal information, the record-subject should be entitled to have access to those records.

Correction of Personal Information

6. A person who has in his possession or under his control records of personal information about another person should correct it so far as it is inaccurate or, having regard to the purpose of collection or to a purpose that is incidental to or connected with that purpose, misleading, out-of-date, incomplete or irrelevant.

Use of Personal Information

7. Personal information should not be used except for a purpose to which it is relevant.

8. Personal information should not be used for a purpose that is not the purpose of collection or a purpose incidental to or connected with that purpose unless —

(a) the record-subject has consented to the use;

(b) the person using the information believes on reasonable grounds that the use is necessary to prevent or lessen a serious and imminent threat to the life or health of record-subject or of some other person; or

(c) the use is required by or under law.

9. A person who uses personal information should take reasonable steps to ensure that, having regard to the purpose for which the information is being used, the information is accurate, complete and up to date.

Disclosure of Personal Information

10. A person should not disclose personal information to another person unless —

(a) the record-subject has consented to the disclosure;

(b) the person disclosing the information believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of record-subject or of some other person; or

(c) the disclosure is required by or under law.

The report does not confine itself in its application to personal information to informatics personal data. In other words, it is neutral as to the technology by which the personal information is kept. This conclusion was reached partly as a result of the Commission's terms of reference, partly from considerations of the Australian Constitution but partly also from reflection upon the dangers that can just as readily arise to personal privacy from an old-fashioned paper notebook or a manilla folder in the bottom drawer. Strictly speaking, then, this is not a data protection and data security statute, such as has been enacted in many European countries and proposed in England. The Australian Law Reform

Commission's proposal addresses generically the problem of privacy protection. It is neutral as to the medium used for the abuse of privacy. It is candid in its declaration that future legislation, specific to informatics, may be needed. The report frankly acknowledges that its proposals can be seen as simply a step on the long path of protecting social values that are challenged by the new information technology.

Future issues. It is appropriate to refer to the last chapter of the Law Reform Commission's report which deals with 'The Future'. This discloses remarkable developments of informatics which threaten still more the 'vanishing veil' of individual privacy. Among considerations listed in this chapter are:

- the possible introduction of cable and subscription television, with the collection, for billing purposes, of data on personal viewing habits;
- the rapid expansion of personal computers, with the burgeoning growth of personal information systems not readily susceptible to regulation and policing as to their fair use;
- offshore key punching in developing countries to save costs and to keep procedures running three shifts a day. Such developments diminish the capacity of domestic laws to protect and regulate effectively the privacy of local citizens;
- trans border data flows, with the rapidly expanding amounts of personal information circulating around the world via satellite and otherwise, also diminish the power of local parliaments to alone control the destiny of their citizens;
- the use of satellites linked to computers, the so-called 'spy in the sky', reportedly permits monitoring of international telecommunications and even activities of humanity on earth.

Clearly these and other technological developments outlined in the Law Reform Commission's report present a formidable array of challenges to the preservation of individual privacy in modern Australia.

Tabling the report and the handy 40-page summary prepared for general public consumption, the Federal Attorney-General, Senator Gareth Evans QC, himself a past member of the Australian Law Reform Commission, offered hope of early action:

> It is an extremely thorough and thought-provoking document. It details and analyses threats to privacy raging from the powers of public officials to intrude into the lives and property of the individual to the challenges posed by the new information technology. The Report presents a balanced and flexible approach to the problems faced in the area of privacy protection in relation to Commonwealth activities and in the Territories, especially the ACT. The Commission recognises that, notwithstanding their importance to the individuals affected, privacy interests are not absolute and must be weighed against such competing public and private interests as the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way. The Commission proposes a flexible mechanism to handle complaints of privacy invasion and to regulate practices which have serious privacy implications ... The government will be giving serious consideration to the matters raised in the report and the recommendations of the Commission. I will be bringing the report to the attention of responsible Ministers in the States and the Northern Territory and will be proposing discussions with them on aspects of the report that are of mutual concern.

Clearly, the Law Reform Commission's proposals were advanced in the context of limitations imposed on it, that are frankly acknowledged in the report. These limitations included :

- the limited powers of the Federal Parliament under the Australian Constitution, written long before the advent of informatics;
- the limited terms of reference given to the Law Reform Commission, which concentrated primarily on the Federal public sector and the Federal Territories;
- the international context within which privacy (data protection and data security) laws are being developed to address the international technology of informatics;
- the speed with which technological innovation is changing the base upon which laws must operate;
- the considerations of costs and benefits that must be weighed in designing specific machinery of protection, whether licensing, registration or dependence upon individual citizen initiative.

The proposals for reform must also be considered against the backdrop of important Federal legislation and legislative proposals relevant to privacy protection. Important privacy protective rights, such as the right of access to information, had already been granted under a number of recent Federal statutes. Current proposals to enhance the powers of the Human Rights Commission and to enact a Federal Bill of Rights Act must also be kept in mind. In today's Australia, the dangers to privacy still arise from physical intrusions, such as the intrusions of public officials and harassment by private organisations. But more and more it is realised that the basic dangers arise from new information technology : whether optical devices, listening devices, telephonic interceptions or automated personal data. The fundamental question posed by the Law Reform Commission's report is whether our society will have the will and the means to respond to these challenges.

OECD SYMPOSIUM

Sleepers Waking. The present Federal Minister for Science and Technology, Barry Jones, is, as every Australian knows, an ex quiz champion. But he is also a ministerial stirrer determined to shake Australia into a 'shock of recognition' of the impact of science and technology on society. You will not have forgotten that in late September 1983 Mr Jones convened a national technology conference, dubbed by journalists 'the Technology Summit'. 140 delegates gathered at the Canberra Rex Hotel to hear the Prime Minister, Mr R J Hawke, offer a strong commitment to new technology. Whilst condemning Australia's technological development record as 'pathetic', Mr Hawke pointed to Australia's 'poor record' in product development and commercialisation. He maintained that years of protection against imports had 'dulled the enterpreneurial spirit' and reduced competitive pressures in manufacturing industry:

> The record is pathetic. The gap between research and product development must be closed. The slow rate of technology transfer into new products and processes must be accelerated. We must learn, not only how to develop the product but also to focus on what is required to market it. Australia's research institutions are too isolated, intellectually and physically, from industry; academia has given insufficient attention to possible economic implications of its research; and industry has not conducted enough of its own in-house research and development.

At the close of the conference, Mr Jones took a theme from his recent best-selling book 'Sleepers Wake!' (OUP):

> Candour compels me to say that the 'shock of recognition' has not been as successful. The sleepers may be waking. But they are still very drowsy. In the OECD tables, Australia ranks 23rd of 24 nations in the value of technology-intensive imports over exports, with an imbalance of 9.5:1. This figure alone suggests the need for ringing a few alarm bells or the cackling of geese — but the conference appears to have taken it very calmly.

Coinciding with the technology conference came announcements of 100% taxation concessions to enterprises devoted to 'high technology' in Australia. The new policies attracted favourable comment in the media. Typical was the Australian (17-18 September 1983):

> It should be the first of many steps to link government encouragement with private endeavour so that this country will be able to take full advantage of the age of digital culture whose day has now come.

Recent statements made by the Prime Minister during his Asian visit indicate the growing realisation, at the top level, of the need to shift Australian towards its informatics future.

According to the 1981 Astec publication on micro-electronics in Australia[5]:

> Astec has estimated future Australian demand for micro-electronic devices to be worth some $300 000 000 annually by the late 1980s. Current Australian production is estimated to be worth about $4 000 000. Unless significant increases in Australian production are generated, the majority of this future demand will have to be met by imports. Australian production of micro-electronic devices is almost entirely for specialised uses such as medical electronic devices, alarm systems and communications equipment ... Apart from research undertaken by the two main producers, micro-electronics reseach in Australia is limited to a few tertiary institutions, to a small group in CSIRO, and, to a very limited degree, to other government agencies. In these establishments capacity is for limited decision and/or fabrication at the laboratory scale only and in government agencies, apart from CSIRO, is mainly to maintain an awareness of the technology. Present government support for the micro-electronics industry has been limited to contract arrangements, a small degree of investment, and policies such as preference to Australian manufacturers in government purchases, tariffs and imports and offsets.

As a result very largely of the indefatigable urgings of Mr Barry Jones, the CSIRO (of which I am an Executive Member) is now planning important new initiatives in the field of informatics. But much more will be needed if our country is to respond to the informatics destiny and if the sleepers are to wake.

Trans border law. At the international level, consideration of some of the economic, technological and socio-legal issues of informatics were addressed at the symposium of the OECD on trans border data flows held in December. One of the keynote speakers was the United Kingdom Minister for Science and Technology, Mr Kenneth Baker MP. I was also asked to deliver one of the opening addresses. In my speech, I outlined a number of problems which are now posed for domestic laws by advances of TBDF:

- the need for new laws on computer crime to cover incidents involving simultaneous manipulation of data in numerous jurisdictions;
- the need for new laws on vulnerability of society in the event of terrorism, industrial action or breakdown of computers;
- the advance of laws on privacy and freedom of information (see previous item);
- the development of copyright and contract law to take into account computer transactions;
- the need for international computer insurance and laws to match;
- the need for new rules on conflicts of laws to determine the legal regime to apply to transactions having instantaneous connection with multiple jurisdictions through interacting computers;
- the provision of new laws for the admission of evidence in courts on a reciprocal basis where the evidence is produced by computer or even generated by computer.

Much of my intervention was designed to urge attention to these issues at an international level. I cited three reaons for greater international co-operation in this area of lawmaking than has generally been the case in municipal law to date:

- the great complexity of the problems posed;
- the interaction of technology making purely domestic laws ineffective or inefficient; and
- the demonstrated value of international initiatives, such as those of the OECD guidelines on privacy which were adopted by the Australian Law Reform Commission in the development of its proposals for privacy protection.

The problems I have mentioned are just a few of those which will have to be considered by our society and its lawmakers in the years ahead. A fundamental question is posed by the advance of so many new problems coming upon our society and its legislators so quickly. This is whether our democratic parliamentary institutions can keep pace with the needs for appropriate regulation.

At the London symposium, there were at least a few businessmen who spoke. They urged the lawyers to keep out of things. They were very fearful of new laws. They were afraid of 'restrictions' that would be imposed by the law. Yet, virtually in the same breath, they called for 'rules of the road' or 'regulations'. 'Regulations' are 'rules of the road' which we like. 'Restrictions' are 'rules of the road' which prevent us earning an honest buck! The need for rules of the road is demonstrated clearly all the time. The current litigation between Wombat and Apple (not yet completed) indicates the problem of seeking to apply legislation (in this case the copyright statute) to new circumstances which were simply not envisaged at the time the legislation was originally drafted. Laws will be needed. The basic question is whether we in Australia can develop the institutions to deliver the legal goods.

CONCLUSIONS

This is a sobering review. I have mentioned the Law Reform Commission's major report on privacy. I have referred to the catalogue of legal questions presented by trans border data flows. I have called to attention the sorry record of Australia in research and development affecting information technology, so vital to our future. Happily our political leaders are at last seeing more clearly this importance. It is to be hoped that their perception will be shared and will be evidenced by appropriate government policies and private initiatives. Everything is happening so fast that it is difficult for the human mind to keep pace. That is the ultimate danger to our institutions. Perhaps the developments of artificial intelligence which are now proceeding so vigorously, particularly in Japan, will come to our aid. But that, and its social implications, are the subject of another paper and another time — perhaps another opportunity to visit Renmark.

FOOTNOTES

1. Weekend Australian, 11 February 1984, 1.

2. The Australian, 15 December 1983, 3.

3. Australian Law Reform Commission, Privacy, AGPS, Canberra, 1983, Vol 1, xli (Summary).

4. R Hayes, media release, Australian Law Reform Commission, 13 December 1984.

5. Australian Science and Technology Council, Micro-Electronics — a Report to the Prime Minister, AGPS, 1981.