STANDARDS ASSOCIATION OF AUSTRALIA

SEMINAR ON ELECTRONIC FUNDS TRANSFER

MASONIC CENTRE, SYDNEY, 19 JULY 1984

EFT IN THE WORLD OF INFORMATICS

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Chairman of the Australian Law Reform Commission

AN INTERNATIONAL CONTEXT FOR EFT

This morning I opened the Exhibition at the State Library of New South Wales on Laser : Supretool of the 1980s. Perhaps it is a sign of the times that this is the second speech in one day on an aspect of informatics : the new information technology. Of course you all heard Mike Carlton, at 5.30 am this morning, tell early listeners on 2GB that I must make speeches in my sleep. I have not actually had that complaint. But if it is so they are about law and technology! It is the fate of this generation to live at a moment in history when three great scientific developments coincide : nuclear fission, biotechnology and informatics.

It is easy to become immersed in the concerns of one's own discipline. Nowhere is this more true than in the law. It is said that the law sharpens the mind by narrowing its focus — rather like a powerful laser beam. I have no doubt that the same could be said about communications experts, bankers and indeed all specialists. I had some diffidence in accepting the invitation to address this seminar. But I overcame it. Yet, I am certainly not competent to speak of Australian technical standards for electronic funds transfer. I am not an expert in communications technology. I have conducted no specialised study of EFT, as such.

I assume I was invited to speak to you because of the work of the Australian Law Reform Commission on privacy protection — one facet of the diamond of public policy involved in EFT. In the course of the work on privacy, I was sent to various international agencies working on aspects of informatics law and policy. These agencies are now legion. They include Unesco, the Council of Europe, the International Telecommunications Union, the OECD, the United Nations Committee on Transnational Corporations, UNCTAD, GATT and so on.

As it happened, I have, within the last week, returned from two international meetings relevant to particular aspects of informatics policy. So that you will see the debate about Australian standards for EFT in a wider context, I propose to outline some of the issues raised in the recent conferences I attended. I will then turn to a few observations about EFT as it affects privacy in Australia. Finally, I will say a few things about the role of legislation in regulating EFT.

MEETINGS IN ROME AND PARIS

First, the international dimension. At the close of June I attended a meeting of the Intergovernmental Bureau for Informatics held in Rome. Australia is not a member of this international agency. There are some Western country members, notably France. Most of the member countries are from the developing world. One after another, their representatives rose to express concern at the pace at which information technology was occurring, the complexity of the issues raised for legal and social response and the apparent helplessness of governments and parliaments to tackle many of the problems presented -- simply because of the pervasive international nature of the technology.

Amongst the concerns expressed were the following:

- the need to harmonise local laws or aspects of law affecting trans border data flows — simply because of the impact of numerous domestic laws on a single data flow having connection with many countries;
- the potential use of TDF in times of war or hostility;
- the need to reconcile the spread of informatics technology to the developing world in a way that is compatible with the legitimate right of developing countries to decide their own economic and social priorities;
- the importance of avoiding the sale of informatics equipment or material to developing countries that has been superseded in developed countries, with consequent difficulties of securing compatability, repair, replacement etc;
- the vital importance of developing trans border data flows in a context that ensures respect for and protection of diverse languages, cultures and civilisation; and
- the need for urgent review of laws for the protection of intellectual property, which laws were developed in earlier times when information was indelibly associated with physical objects.

On the other hand, a number of the developed countries of the conference in Rome, and some of the invited speakers, pointed to the generally desirable nature of free flows of information both nationally and internationally. Some said that attempts to regulate electronic data flows would be ineffective anyway because of the nature and quantity of data flows already achieved. Some said that regulation would be undesirable because of the general desirability of encouraging free flows of data between countries. Some said that it was too early to regulate : that there was, as yet, an insufficient understanding of the problem. Others said that regulation should not be attempted until experience had developed around national laws.

One very telling intervention was offered by a representative of the American Bar Association. He warned about the lessons of economic history. In particular, he referred to the efforts following the invention of the printing press to impose a British Crown monopoly in England in order to control this 'dangerous' new invention. The Crown monopoly ultimately broke down. But it took 200 years of inefficient operation of the printing monopoly law. The 'final straw' that broke the Crown monopoly in printing was provided by the enterprising printers of The Netherlands. They simply set about printing books in English (and in French because a similar Crown monopoly had been asserted in France). They sold these books without compunction and made a handsome profit. It was the flood of cheap books in the home language arriving from The Netherlands, more than intellectual conviction or passionate adherence to freedom of information, that led to the ultimate erosion of Crown monopoly in printing both in England and in France. The monopoly was replaced by the development of an entirely new regime of law, namely the law of copyright and other intellectual property.

As a society we generally pay insufficient attention to the lessons of economic history. I believe that in the business of regulation of trans border data flows (and EFT which is a species of such flows) there are lessons in earlier technology. Specifically, as the ABA representative mentioned at the Rome conference, there are lessons in the history of the Crown monopoly in printing.

Other interventions at the IBI meeting in Rome stressed:

- the legitimate right and expectation of those who invest risk capital and develop new technology to have an attractive return for their investment;
- the generally beneficial effect of the spread of information technology as quickly as possible, including to all countries;

- the need to avoid economic protectionism, even where that protectionism is presented as being grounded in some other reason of social policy;
- the need to recognise that at least 80% of present data flows are internal to large corporations, often transnational corporations, and have become the life blood of such corporations where they operate in many jurisdictions.

Last week in Paris the Working Party of the OECD on Trans Border Data Flows which I also attended reverted to similar issues. Many of the participants had been at the Rome conference. Many of them were concerned at particular aspects of this new interjurisdictional feature of information technology. Being from developed countries, they were more concerned with the problems with which Australia is familiar:

- the social issues of EFT;
- the issues of the protection of privacy generally in computerised personal information;
- the issues of updating copyright and intellectual property law for software etc;
- the need to develop new regimes of law for the so-called conflicts of laws. In other words, whose law applies where a mistake occurs in an electronic message that originates in country A, transits countries B and C, is switched in country D and is terminaled in countries E, F and G?

EFT AND THE PROBLEM OF PRIVACY

In the Australian Financial Review earlier this year (15 February 1984) there was a discussion of moves by the Reserve Bank of Australia to address some of the particular issues of electronic fund transfers in Australia.

The rapid introduction of electronic fund transfers by banks and building societies in Australia has produced important social and legal questions which are not being adequately addressed. In our apparent enthusiasm to deregulate the Australian financial system, it is important not to forget legitimate issues of community fairness — such as the proper preservation of banker/client privacy and adequate rules for consumer protection.

The recent efforts of the Reserve Bank of Australia to encourage co-operation amongst banks, building societies and others in the introduction of electronic fund transfers (EFT) to Australia are to be welcomed. However, as so often with informatics, the welcome efficiency has brought difficult social and legal questions. The Reserve Bank, the Treasury and others concerned in EFT questions should not ignore these.

The law of banker/customer privacy developed in a world of paper cheques. Now, electronic messages, rather than paper, shift funds virtually instantaneously. The advantages of efficiency are obvious. According to newspaper reports published earlier in the year, the concern of banks and building societies is to enhance that efficiency. It would be my hope that equal thought will be given to the social problems that are raised by the new technology. These include:

- giving customers a full legal right to challenge financial statements;
- placing the onus on financial institutions to justify financial statements, rather than, as at present, normally imposing the onus to disprove the statement on the customer;
- safeguarding the financial privacy and security of the electronic system and limiting access to the data in it;
- controlling the use to which financial institutions can put electronic financial and personal data eg limiting its sale or supply to associated travel companies, insurance companies or credit cards;
- defining the extent to which law enforcement authorities can, without court order, have access to instantaneous records of financial dealings by which movements of citizens can be traced;
- revising old statutes governing cheques which laws are still largely drawn in terms of paper procedures, now increasingly replaced by electronic messages.

CASHLESS SOCIETY

The rapid introduction of electronic fund transfers in Australia, together with the continuing penetration of credit cards and bank cards, present our law with a number of difficult choices.

The day is not far off, indeed in some places it has already arrived, where the purchase of goods at the retail point of sale is automatically debited to the customer's bank account. Moreover, adjustments are automatically made to stock, warehouse and repurchasing records. Cash provides a medium for anonymity and privacy. As Australia moves to the cashless society, centralised records will exist not only of buyer preferences and habits but also of buyer travel and movement.

- Should law enforcement officers have access to the records of bookshops to discover all persons purchasing books or magazines on themes perceived by someone to be antisocial?
- Should police, faced with difficult problems of investigation, be able to scrutinise, with the aid of computers, the buying pattern of citizens in a particular district?

- Should they be entitled to scrutinise the movements of citizens by reference to the 'credit trail' collected by the records of electronic fund transfers?
- If limitations are to be imposed, in the name of privacy, what should those limitations be and who will formulate them?

Unless we start formulating them soon, EFT will continue to develop. The protections for our citizens will simply not keep pace.

PRIVACY PROPOSALS

The social and legal problems presented by the linkage of computers and communications technology debated in Paris and Rome are illustrated, in microcosm in Australia, by the problems of electronic fund transfers. In the United States interference with the traditional privacy of financial dealings by EFT transactions had become a sizeable problem. As a result, a National Commission was established in 1974 which held more than 60 meetings and reported to the President of the United States in 1977. In consequence of that Commission's report, the US Congress enacted the Electronic Fund Transfer Act 1978. Amongst other things, this Act provides minimum non-variable rights as between the consumer and his financial institution. In particular, the legislation limits consumer liability for unauthorised electronic fund transfers. The aim is to increase the control which consumers had over financial transactions as they change from paper to electronic form.

The Australian Law Reform Commission drew these developments to attention in December 1983 in major report on privacy protection. We called to notice the problems for confidentiality raised by EFT. The report urged the appointment of a Federal Privacy Commissioner and the adoption by Federal Parliament of relevant privacy guidelines. At the very least, these steps would provide a focus for the Australian debate about some of the social implications of EFT. Last month Senator Evans said that a general Privacy Bill would be introduced into Federal Parliament in the forthcoming Budget Sittings, based on the Law Reform Commission's report. But more will be needed. Before too long, I suspect that comprehensive Federal legislation will be required to deal with such specific issues as consumer rights, privacy and data security and the significant modification of old laws on cheques which have not caught up with the electronic revolution.

In our apparent enthusiasm for deregulation of financial institutions, we should not forget the issues of fairness to individual citizens. Without protective regulation, theirs may be a puny voice raised against the combined might of the financial institutions and the apparatus of the modern state, all enhanced by the electronic miracles of information technology. But, of course, we should also remember the lessons of the Crown monopoly in printing, where regulation goes too far.

THE ISSUE OF LEGISLATION

The organisers have asked me to say a few concluding words about the issue of legislation affecting EFT. I could do so, in the time available, only in very general terms. It will be gathered from United States experience that that country, the leader in information technology including EFT, considered specific legislation on EFT to be necessary. In its report on privacy, the Law Reform Commission proposed, instead, general Federal legislation on privacy protection but an ongoing study of the possible need for future more specific regulation.

There are some who would keep the lawyers out of things altogether. They would do so for fear of the inclination of the legal mind to over-regulate and for the perception of the general desirability of the consequences of the new technology. But as at the international level, so in home countries. Though it is true that the new information technology brings many benefits, it also presents problems that require a legitimate social response. That response must be cautious : avoiding large bureaucracies and excessive intervention in free flows of data. The problem with leaving things to the market is that the market may be insufficiently sensitive to the social interests that compete with the free flow of information. It may be an inflexible market because the players are large, powerful opinionated and often situated outside Australia : insufficiently responsive to our social mores.

Clearly in preparing any legislation on EFT it is thoroughly desirable to do so with full opportunity for consultation with the groups most interested. I believe that a commendable initiative of the Federal Government of late has been its growing willingness to table future legislation and to allow it to lie on the table for lobby and public comment. I would certainly hope that any such legislation on EFT would follow this course. I would also express the hope that any such legislation will Federal legislation so that a national standard can be applied.

One of our problems in dealing with the social consequences of information technology in Australia is that the Founding Fathers did not, in their infinite wisdom, foresee this remarkable technological development and provide for it in the Constitution. The result may be differentiated State laws applying to a universal technology, unless we can find a proper constitutional basis for Federal laws. Such a basis exists in the case of EFT.

This comment brings me to my conclusion. The lessons of the meeting in Rome and Paris and of this seminar in Sydney today must include the importance of approaching the legal regulation of information technology with great care. The very nature of that technology presents unique challenges to our legal system. That is why I applaud the work of the Standards Association of Australia in helping to secure national and uniform approaches to technical issues. I only hope that the lawyers, the administrators and the politicians will show an equivalent concern. If they do not, there will be an uncomfortable period when inappropriate laws are inefficiently applied to new technology. We should reflect on Caxton's printing press. We should remember the lessons which the early legal responses to that printing press in England have for us, half a world away and half a Millenium later.