Victorian Internet Censorship Legislation – is it Constitutionally Valid?

Tracy Francis examines Victorian on-line censorship legislation and questions its constitutionality in light of the High Court decision in *Lange v the ABC*

By the year 1999 it is estimated that there will be 200 million Internet users globally. The Internet is a decentralised computer network initially developed for the military. Today this self-maintaining network is a global infrastructure for communications and information services of unprecedented scope, diversity and accessibility. However, much of the mainstream reaction to the Internet has been concern relating to the ease of access to pornographic and offensive materials, particularly by children.

Both Australian and international governments have responded to this concern with legislation censoring the Internet: Victoria, the Northern Territory and Western Australia have enacted legislation, as has the United States, China and Singapore. The New South Wales Parliamentary Counsel's Office has prepared a discussion draft of model legislations, and whilst this has been rejected for implementation at a national level, the status of this legislation for New South Wales remains unclear.

It is argued that censorship of the Internet is undesirable for two reasons. First, in seeking to protect children the overall diversity of the Internet will be reduced, and adults will not be able to access on-line materials they could easily buy in a newsagency. Second, it is technically unfeasible for Internet Service Providers to monitor the information they disseminate and to verify the age or users accessing their service. Consequently, to comply with the law many Internet Service Providers will be forced to shut down, again reducing diversity.

However undesirability does not necessarily equate with invalidity. This paper examines the *Classification (Publications, Films, and Computer Games) (Enforcement) Act* 1996 (Vic) (the "Act") in detail. It is submitted that on the basis of the most recent Australian case law certain provisions of the legislation could be challenged as an unconstitutional restriction on free speech. The recent American decision, *Reno v ACLU* supports this conclusion.

The Legislation

The Act was enacted in January 1996 as a response to widespread community concern about the availability of objectionable material and in particular child pornography on the Internet. The relevant provisions are sections 57 and 58.

Section 57

Section 57 is a blanket prohibition on the creation and dissemination of objectionable material through an on-line service. There are two defences provided:

> (1) where the defendant can prove on reasonable grounds that he/she believed the material was not objectionable; and
>
> (2) for a service provider where that person did not create or knowingly download that information.

The definition encompasses e-mail, newsgroups and bulletin boards, Internet Relay Chat and the World Wide Web in its scope. As a result, communications between consenting adults through a medium such as e-mail are restricted by this provision. This is contrary to the principle that adults should be able to read, hear and see what they want, provided in the Schedule to the Classification *(Publications, Films and Computer Games) Act* (Cth) 1995. Moreover, material which can be obtained at a newsagent could conceivably fall foul of these provisions. For example, articles describing in graphic detail clitorectomies performed in some parts of Africa could easily be considered to:

"describe(s)...cruelty...or abhorrent phenomena in a manner that is likely to cause offence to a reasonable adult".

These types of articles regularly appear in women's magazines such as *Elle* and *Marie Claire*.

Section 58

Increasingly strict provisions are made in relation to the publication or transmission of certain materials to minors of any age and minors of less than fifteen years old. There is a defence available for a person who contravenes the section where they either:

> (1) could not have reasonably known that the person to whom the material was published was a minor and they had taken reasonable steps to avoid contravention; or
>
> (2) where the defendant believed on reasonable grounds that the material was not unsuitable.

This defence is mirrored for the publication of material to minors of less than fifteen, and there is the added defence that the person believed on reasonable grounds that the guardian of the minor had consented.

The defence for on-line service providers in s 58 is more strict than for s 57. In s 57 a service provider is not guilty of the offence except where they create or knowingly download the prohibited material. According to s 58(3) and s 58(6), the provider is not guilty of the offence unless he or she

> *"knowingly publishes, transmits, or makes available for transmission...to a minor material unsuitable...".*

Implications

Enforcement of these provisions will significantly affect material available to adults. There is no effective way to determine the identity or age of a user who is accessing material through e-mail, newsgroups or chat rooms. In relation to the World Wide Web, only where the server is capable of processing Common Gateway Interface script ("CGI") is it possible to interrogate a user of a Web site. However, as the large commercial on-line services such as America On-line and Compuserve cannot process CGI

scripts content providers using these servers currently have no technology available to them.

In view of these facts, it will be difficult for content providers to show, in accordance with ss 58(2)(a) and 58(5)(b), that they have taken reasonable steps to avoid publication to a minor. The fact that they could not have known they were providing material for a minor will be irrelevant. In relation to service providers the defence becomes virtually useless. Most service providers will be aware that they are providing some "unsuitable" material, even if they are unaware exactly what sites are unsuitable. Therefore, they are providing an on-line information service whilst knowingly making available for transmission to a minor material unsuitable for minors.

To avoid criminal liability both content and service providers will be forced to provide only material suitable for the lowest common denominator - minors under 15. As a result, a large amount of information which is ordinarily available to adults would have to be withdrawn from the World Wide Web and diversity will be dramatically decreased.

The effect of these provisions is to limit content providers and on-line service providers to publishing materials that are suitable for minors under the age of 15. This is clearly unreasonable, and will involve the restriction of political speech. Examples that were given as contravening section 57, would also contravene s 58. The legal issue therefore is whether the regulation of political speech in this context is consistent with the implied constitutional freedom.

Lange V. ABC

Since *Nationwide News Pty Ltd v Wills and Australian Capital Television v the Commonwealth* (1991) 171 CLR 1 it has been clear that the system of representative government guaranteed by ss 7 and 24 of the *Constitution* necessitate an implied constitutional freedom of expression in Australia. However, the scope of that freedom has been uncertain until recent times. In an attempt to remedy this uncertainty the High Court of Australia on 8 July 1997 delivered a joint judgment in the case of *Lange v Australian Broadcasting Corporation* (unreported, High Court, 8 July 1997.). The definition of "political discussion" and the scope of the freedom are fundamental to an analysis of the constitutionality of the Victorian legislation.

Content of "Political Discussion"

Prior to the *Lange* case there were a number of different formulations of the definition of "political" discussion. On the one hand, Chief Justice Mason and Justices Toohey and Gaudron took an interpretation of the freedom so broad as to include the discussion of activities that have become the subject of public debate where a link can be established with ensuring the efficacious working of democracy. On the other hand, Justice McHugh limited the freedom to a right to convey and receive opinion, arguments and information concerning matters intended or likely to affect voting within the election period. Justices Deane and Brennan took a middle ground allowing communications amongst citizens about matters relevant to the exercise and discharge of governmental functions and power on their behalf. Justice Dawson, who, prior to *Langer v the Commonwealth* (1996) 70 ALJR 176 held that the implied freedom was only in respect of representative government rather than in respect of communication, in that case felt compelled by the weight of authority to accept a freedom of communication and in rejecting the legislation in question referred to Mason CJ, Toohey and Gaudron JJ's view.

The benefit of the *Lange v ABC* case is that it provides a united statement as to what constitutes political expression. The judgment states that the freedom encompasses:

> *"communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves,"*

enabling those people to exercise a free and informed choice as electors. It is now clear that the freedom is not just limited to the election period - according to the Court, most of the matters necessary to make an informed choice will occur during the period between holding one election and calling another.

Looking to the Victorian legislation it is clear that material which is political may also be "unsuitable" or "objectionable". For example, a vehement attack in extremely colourful language, for example on the policies of the One Nation party, is clearly a communication relevant to a free and informed choice as an elector, but could also easily be a publication that

> *"describes crime... in a manner that is likely to cause offence to a reasonable adult".*

Similarly, photographs published on the Internet showing the results of heroin addiction for the purpose of criticising the Federal Government for failure to deal with the problem of importation and supply of heroin could easily fall foul of the Victorian legislation. Thus, some material prohibited by the legislation will also be political.

The Extent of the Implied Freedom of Speech

However, it is clear that the freedom is not absolute. It is limited by the text of the *Constitution* and it is limited in that legislation which impinges on the freedom may, nevertheless, be valid in certain circumstances.

Textual Limitations

The *Lange v the ABC* case unequivocally affirms the limitations of the implied freedom, and is at pains to emphasise that the freedom is not a personal right. In quoting Justice Brennan's statement in *Cunliffe v the Commonwealth* the judgment says,

> *"the implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly legislative control."*

The point is that the implied freedom extends only so far as required by sections 7, 24, 64 and 128 of the *Constitution*. The Court says that insofar as statements in earlier cases appear contradictory, they should be understood as purporting to give effect only to what is inherent in the text and structure of the *Constitution*.

It is important to keep in mind that political speech will have to be relevant to the Federal arena in order to benefit from the implied freedom. In discussing the defamation defence of qualified privilege, the Court makes it clear that speech concerning, for example the United Nations or other countries, where it does not illuminate the choice for electors in an Australian Federal election, will not be protected by the freedom. It is submitted however, that discussions in relation to State politics would almost always be protected from legislation for the reason that the overlap of, at the very least, the political parties, will make it relevant to the federal arena.

Freedom Burdened but Legislation Still Valid

Nor is the restriction on legislative power absolute. This was clear even before the decision in *Lange v the ABC*. For example, in the *Langer v the Commonwealth* case a majority of the Court held that although the legislation in question burdened the freedom it was valid because it was appropriate and adapted to a legitimate legislative purpose. *Lange v the ABC* clears up the confusion in prior cases over the exact wording of the test for the validity of legislation which contravenes the freedom.

The test comprises two questions. First, does the law effectively burden freedom of communication about government or political matters, either in terms of its operation? Second, if the law does effectively burden that communication, is the law reasonably and appropriately adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 for submitting a proposed amendment of the *Constitution* to the people?

Application to the Victorian Act

It is clear from the discussion at 2A above that the Victorian legislation burdens the freedom of communication. In applying the second limb of the test, few people would argue that protection of our children from obscene and pornographic materials is desirable and compatible with representative government. The crux of the matter is whether the Victorian legislation is reasonably and appropriately adapted to that purpose.

Recent media hysteria surrounding the Internet has alleged that it is rife with pornography and is a terrorist breeding ground. However, it is submitted that the range of available software applications which more effectively censor the Internet, in a less restrictive manner, means that the Victorian provisions cannot be regarded as reasonably appropriate and adapted to the legislative end.

Programs such as "Surfwatch" and "Net Nanny" and services such as the PICS rating service allow parents to evaluate material available on the Internet, and regulate such material by password. In this way parents are able to decide what they believe their children are old enough to have access to. As the holder of the password key, their own access to material would be unrestricted. The value of these services was recognised in the recent Australian Broadcasting Authority report, *Investigation Into the Content of On-Line Services* which stated:

> *"(A) new approach in limiting children's access is required. In this regard the ABA acknowledges that the most effective controls can be applied by users."*

Furthermore, it is unlikely that Victorian legislation could be effective. As one commentator has argued,

> *"When the average school kid wants to find some pornography on the Web, they are not going to be concerned about 'buying Australian'".*

In this case, "buy Victorian" would be more appropriate, however the point remains the same. Users can easily subvert the legislation by gaining access through an interstate ISP. There is also the potential that offensive mail can be sent through "anonymous remailers" located off-shore, the result being that the material is untraceable.

In relation to services that are readily accessible by anyone (such as the World Wide Web), if there is a serious threat of enforcement content providers and on-line service providers will have to censor material transmitted or published on the Internet to leave only that which is suitable for minors of under 15 years. This clearly involves the censorship, albeit incidentally, of some political discussion. Given the alternatives available it is unlikely that the legislation can be considered reasonably appropriate and adapted.

American Authority

The application of American constitutional authority to Australia is limited by the differences of the principles embodied in their constitutions and the history of their adoption. In relation to freedom of speech the most obvious differences are that in Australia the freedom is implied, restricted to political speech, and was only discovered in the early 1990's. In contrast, the American freedom is a right rather than a prohibition, is expressly guaranteed by the First Amendment, is unrestricted on the face of the Constitution, and has been continuously legislated on since inception. However, the persuasiveness of American precedent has been noted in many cases, and in recent times has figured strongly in the High Court's consideration of the implied right to freedom of political speech. Commentators have recognised the fertility of American jurisprudence in relation to freedom of speech, and for the purposes of this essay the US is the only jurisdiction, to the knowledge of this author, where the superior court has considered the regulation of indecent or offensive material on the Internet.

In *Reno v ACLU* the Supreme Court affirmed the decision of the District Court of Eastern Pennsylvania in holding that sections 223(a)(1) and s 223(d) of *The Communications Decency Act* (the **"CDA"**) are unconstitutional. Section 223(a)(1)(b) created a criminal offence for anyone who, by means of a telecommunications device, knowingly, makes, creates or solicits, and initiates the transmission of any communication which is obscene or indecent, knowing that the recipient is under 18. Sub-section (2) provides that anyone who knowingly permits any telecommunications facility under his control to be used for any activity in paragraph (1) also be liable. Section 223(d) made it a criminal offence for anyone who uses an interactive computer to send to a specific person under 18, or to display in a manner available to a person under 18, any communication that is patently offensive as measured by contemporary community standards.

The constitutional challenge was grounded in a series of arguments. Those relevant for our purposes were that the law was unconstitutionally overbroad (thus criminalising protected speech) and unconstitutionally vague, making it difficult for individuals and organisations to comply.

In finding that the law fails the "least restrictive means" test the court found that the burden placed on adult speech was unacceptable as less restrictive means, such as software allowing parents to restrict access to material, were effective in achieving the legitimate end of the statute, the protection of children. Significantly, the court recognised that it was not technologically nor economically viable for providers of Internet services to screen recipients of information for age. They rejected credit card verification and adult password verification schemes as effectively unavailable to a substantial number of Internet service providers. Although the wording of the test is different to the "reasonably appropriate

and adapted" test in Australia, the concept is similar. Owing to the scope of the freedom in America more material would be restricted by the CDA than by the Victorian Act, but these findings of fact are valid worldwide. The point remains that there are more effective and less restrictive means of censoring the Internet.

Conclusion

The Internet is a medium with some special features. The barriers to entry are very low - anyone with a PC and a modem can become a content provider. The barriers are the same for content providers and those who access the content. As a result there is an extraordinary diversity of material on the Internet - all those who wish to speak have access, and there is a relative parity between speakers.

This accessibility means that material on the Internet is not always as sophisticated or as polished as that available from other media. However, as Justice Dalzell states in the CDA case at first instance:

> *"What achieved success was the very chaos the Internet is. The strength of the Internet is that chaos".*

By its very nature the Internet comes the closest to creating a "market place of ideas" that has yet been seen. For these reasons, censorship of the diverse viewpoints on the Internet is grossly undesirable.

The type of legislation that has been enacted in Victoria is entirely inappropriate for the Internet. In forcing ISPs to take a greater control over what they publish the costs associated with providing that service will be greatly increased. Providers will be severely affected, and as a result we can expect the diversity of content to be affected.

Fortunately, it appears that there is a strong argument that the Victorian legislation unconstitutionally restricts freedom of political expression. It is difficult to view the legislation as reasonably appropriate and adapted when there are technologically more effective solutions available.

Tracy Francis is a recent graduate in law from the University of NSW and has joined McKinsey & Co. A version of this paper was Highly Commended in the 1996 CAMLA Essay Prize.

Developing Media Industries of the Future? Telecommunications and the "New Media"

John Colette examines the way in which telcom, film and software companies are attempting to use old media concepts to exploit a new medium - and failing.

In the endless wait for the promised "information superhighway", there are no shortage of players eager to assume the role of developers for the information industries of the future. Despite the explosive growth of and interest in networked media technologies, particularly the Internet, it is unclear if these "media" have moved beyond the early adopters who champion their use, into the realm of a true "mass" medium.

What is certain, is that in what appears to be the latent business opportunity of the millennium, it is extremely difficult for companies to build substantial and profitable businesses around the new media. On one hand, looking to develop this market, are the existing telecommunication companies, whose principal experience is in the provision of engineering based services and the development of network infrastructure. Also jostling for centre stage are software companies who have experience in the development of computer software. These companies have assumed that it is a logical progression for their existing products to "dovetail" into online media.

Applying Old Models to a New Medium

What is overlooked, is that the development of an emerging media form requires a creative flair that is elusive, if not impossible to hothouse within the confines of a large, corporate entity. Previously it was assumed that film and video makers would make ideal candidates for the development of "interactive" entertainment, because they understood concepts like "storytelling". In hindsight, this is patently not true, as filmmakers make good films, and the successful products that are computer mediated "interactives" are games like Doom and Quake, which are the product of another sensibility altogether.

This is why the software companies, even with extremely deep pockets, will have difficulty in "colonising" these new electronic frontiers. People are attracted to the online environment because of the anarchic variety of content that is available to them - most of which is free. This is completely different to the products and services models upon which software and telecommunications companies have been built. The popular "chat" lines that are a big attraction of the proprietary AOL online service in the US, have their genesis in IRC (internet relay chat). In these environments, users type messages that are read by an entire group in a "chat room". This is an aspect of the medium which mimics telephony, as opposed to the "publishing and broadcasting" models characteristic of the world wide web. What is important to note here is that the "content" is provided by the medium's constituency themselves - it is the distributed nature of the network that makes online chat "work".