

Book Reviews

Big Brother Australia's Growing Web of Surveillance by SIMON DAVIES (Sydney, Simon and Schuster, 1992) pp viii, 184.

In recent times, we have witnessed an ever increasing intrusion by government and corporations into the personal lives of all Australians. This trend has been accelerated by rapid developments in information technology and the economic imperatives of recession. Simon Davies' book is an attempt to identify these and other trends which are leading to the undermining of individual rights and privacy. His message is made all the more compelling in two respects. First, the silence and speed with which our liberties are falling prey to routine government surveillance. Secondly, the overwhelming failure of the law to develop effective privacy safeguards and remedies. These considerations threaten to transform the very nature of citizen and government relations in this country as the building blocks of social control are put in place.

Big Brother is a plainly but forcefully expressed exposé of the legal and extra legal developments surrounding the nascent surveillance state. The author's choice of title, drawn of course from George Orwell's *Nineteen Eighty Four*, is an appropriately ironic metaphor for the indifference shown to the privacy issues by all but a handful of jurists and lawyers. Davies identifies the erroneous but commonly held perception that loss of freedom goes hand in hand with a future ruthless Orwellian government terrorising an unwilling populace. Instead, the real danger is a consensual legal framework where governments, corporations and the people regard privacy as an impediment to community good and a refuge to the cheat and criminal. In such a state our rights and freedoms will be but scraps fallen from the table of government indulgence. Likewise, the threat of a single, centralised all-knowing government computer has been made redundant by legislative changes allowing the networking of computers and information matching by Commonwealth departments on a vast scale. Davies suggests that the term 'Big Family' is now apposite.

The author eschews what he terms as 'enlightened social comment' on these issues. Having cut his privacy teeth in directing the 1987 campaign against the notorious *Australia Card Bill* and subsequently founding the watchdog body, Privacy International, his focus is documentary, pragmatic and argumentative. In the author's words it is an attempt to chronicle the chain of extraordinary events that are leading to the permanent decimation of individual rights and privacy in Australia.

His book is divided into two discrete sections. The first section comprehensively examines the increasing net of government surveillance in the areas of law enforcement, social welfare and taxation. The focus of the second section is upon privacy problems related to the non-government sector such as banks and private investigators. In the concluding chapter, titled 'What the

future holds', Davies returns to his earlier theme of the merging of these apparently separate private and public sector interests. He predicts a possible move towards a nationally issued smart ID card containing each individual's biological code. This intersection between the two interests is explored thoughtfully and convincingly: both parties share and identify a common interest in suppressing fraud and securing cost savings running into billions of dollars. He cites existing legislative mechanisms such as the *Cash Transactions Reporting Act* and extensions to the Tax File Numbering system in the *Taxation Laws Amendment Act*, the *Taxation Legislation Amendment Bill* and the *Social Security Act* as the precursors to such developments. These have their genesis in the overwhelming dominance of economic, as distinct from libertarian values, in the little debate that has occurred on these issues.

Chapter One, 'The Birth of a Nightmare and the Death of Privacy' sets out to redress this imbalance. Davies articulates both the classic and modern rationales of the values of privacy. He identifies the alarming coincidence between a diminution of privacy and the growth of overseas totalitarian legal and political structures. The conclusion is clear: privacy is an essential component to a functioning liberal democracy. Its depletion represents a shift in power relations between the citizen and government and a menace to future freedoms and liberties. A quick conspectus of the legal privacy rights afforded to Australians under domestic and international law follows. The paucity of these rights is shown in Davies' exposition of a series of seemingly relentless bureaucratic initiatives such as *Health Legislation (Pharmaceutical Benefits) Amendment Act* (the Pharmacy Blackbox scheme), the Cabinet authorised Law Enforcement Agency Network (LEAN), and amendments proposed by the Department of Finance to offer cash incentives to informers providing information to the fraud sections of Commonwealth departments. The reader is left in little doubt that privacy protection is *the* great understated contemporary legal issue.

A common thread throughout the book is the inability of the law and legal mechanisms to adequately protect individual rights in the technological age. This may be as much a case of ignorance and indifference amongst lawyers about the ultimate ramifications for the entire legal system of mass surveillance, as its omission from an apathetic mainstream political agenda. However, Davies carefully alerts us to a compendium of legislative and legal deficiencies, to convincingly show that, at best, privacy rights have received fairly peremptory treatment.

In the author's analysis, we are informed how pervasive and endemic information surveillance is and how token its restraints are. This is soundly illustrated by the author in his discussion on data matching programs instituted by Commonwealth government departments. The process offends privacy and civil liberties in a number of respects: it is the equivalent of a generalised warrant on the whole population without justification based on reasonable grounds. As such it reverses the normal burden of proof. For those 'flagged' as 'targets' or 'hits' in these programs, the onus shifts for them to prove their innocence. Another criticism levelled is that data matching

breaches a world recognised privacy principle that information supplied for one purpose should not be used for another purpose unless the provider consents. The impact of this practice however pales as the author examines the accuracy of information being matched. Davies shows that the meanings of terms and expressions used by a multitude of government departments are often not consistent; that the individual's circumstances, honestly stated, may change over time; and that the broad application of the practice means that persons unskilled in the art of investigation are routinely involved. The suggestion that this is of limited impact is convincingly dismissed: there is the real chance that the reality of constant surveillance will produce a chilling effect in the populace, creating suspicion, deterring participation and fostering norms of behaviour inimical to a free and democratic society.

The extent of intrusion is considerable, yet the degree of privacy protection and redress afforded under Australian law is grossly inadequate. Davies effectively portrays the almost tragic dimensions of these deficiencies. He cogently argues that even the toughest drafting of privacy laws throughout the world inevitably sanctions intrusions for reasons of law enforcement and public revenue. As such, he identifies the problem as systemic. The act of balancing competing interests inevitably favours government interests as there is an unchallenged assumption that information sought and shared is for just and fair purposes with the ultimate objective the implementation of necessary public policy. In Australia's case this assumption has underpinned successive erosions of the right to privacy.

Davies' examination of the inadequacies of the *Privacy Act* is masterly. He spares no detail in isolating its structural and operational problems. Importantly, the scope of the legislation is relatively narrow; with the exception of the credit industry, it covers only Commonwealth government agencies. Its focus is upon the protection of data, rather than providing a legislative framework to forestall other privacy invasions not involving the direct use of information. It provides no barrier against the centralisation and collation of publicly available information from diverse sources. Indeed, this omission has enabled the Commonwealth to proceed apace with its controversial LEAN scheme. The customary law enforcement and revenue protection exception in privacy legislation is magnified in the Australian Act. It has facilitated the rapid expansion of the Tax File Numbering system into non-taxation areas. The weaknesses are further highlighted by Davies when he shows that this exception enables the Tax Office to ignore privacy principles in the *Privacy Act* which limit the use or disclosure of information to its original purpose, effectively neutralising the limited protection offered by it. Starkest of all is the fact that Act actually cultivates privacy problems in the first place in the amassing of data. Information must only be collected by lawful means and for a purpose directly related to a function or activity of the collector. Indeed, the legislation may have acted as a distraction to a real appraisal of current privacy issues. This element of the co-option of the Privacy Commissioner and the *Privacy Act* as a medium for the actual erosion of privacy is one area the author may have explored further as an indication of who the real players are behind the construction of the surveillance web. It

would seem that in each privacy threatening scheme the civil liberties impact of the Privacy Commissioner has been at best minimal. His involvement has been conveniently touted by politicians as evidence of the bona fides of these schemes. Unfortunately, public interest and public relations have been jumbled together in the privacy equation.

Davies' exposition of the co-option and outflanking of privacy protection legislation is punctuated with some keen observations on the modus operandi of bureaucrats in finding practical and extra-legal means of pursuing their objective to 'bring the Australian public to heel'. Favoured amongst these is the loss of revenue argument wrapped in a tattered appeal to patriotic action against those defrauding the nation. Davies starkly estimates that our freedom and rights could be individually sold for the trifling sum of \$480 according to current Commonwealth fraud estimates. In any case, such figures have been proven to be notoriously exaggerated. There has been a massive shortfall of revenue collected by the Tax File Number and data matching schemes. The Auditor General rejected the Black Box pharmacy system as costing more than it would save. That there is no legal right of access to these estimates seriously handicaps privacy advocates in putting their case against these invasive systems. Stealth, secrecy and disinformation have been favoured bureaucratic tools elsewhere. Examples abound in the government's carefully orchestrated Australia Card publicity, the current embargo placed upon public servants discussing the LEAN scheme and its authorisation by Cabinet executive decision rather than an enabling Act of Parliament, as well as official denials that Smart Card technology is to be incorporated into the Health Communications Network, despite evidence to the contrary. All of this, documented and convincingly argued, nonetheless shies away from the emergent question of the need for a fundamental and novel reassessment of the legal regime for accountability and control of bureaucratic power in Australia. In other words, in whose interests are these schemes really propounded? At what point does the oft-cited issue of fraud prevention really become a paradoxical and massive deception of the Australian public?

The ensuing chapters tell us that reassessment has already commenced in relation to the private sector. A thorough and lively account of separate aspects of privacy related issues is provided: credit reporting agencies, informal information exchange arrangements and the impending intelligent telephone network. Rather than mere curiosity pieces, the legal reader will find interest in a number of aspects. The *Privacy (Credit Reporting) Amendment Act* which Davies discusses in detail, perhaps represents the zenith of privacy protection measures achieved in this country. Its operation may prove instructive in reform proposals generally. The NSW ICAC *Report on the Unauthorised Release of Government Information* is quickly examined by the author and reveals an involvement of lawyers in the illegal trade of information which is both distressing from an ethical perspective and in the ignorance of the legal obligations of confidentiality. There is a real danger that little will be done to implement the Report's far reaching recommendations. Davies also explores the potential for data profiling and linkage in the introduction of caller display telephone technology, an issue impinging upon professional

confidentiality and practice management. The alarm sounds again as the author notes increasing pressure from the insurance industry for more co-operation with the investigative arms of Federal agencies. The spectre of database integration looms large and real.

The closing chapter is both prescient and instructive. We are told realistically to expect little of our politicians unless there is a substantial change of electoral consciousness. Technological determinism is advanced as both the instrument and justification of surveillance systems. Davies issues a rallying call to law reform through citizen involvement with privacy interest groups and cites recent successes. In doing this, his arguments for instituting legal safeguards could have been further substantiated by a discussion of some pressing issues. These include the difficulty of change the longer privacy abuse becomes acclimatised, encouraged and rewarded within a culture; the role of interdepartmental rivalry and bureaucratic imperialism as factors to be reckoned with; and the possibility of having constitutionally entrenched privacy rights enforceable by a High Court increasingly sensitive to the presumptive qualities of representative democracy.

These are but minor blemishes in a commendable work dealing with an urgent and profound legal and public issue. Simon Davies has produced a lucid and compelling analysis of how the official embrace of technology can quietly shed a society's anonymity, rights and freedoms. His command of his brief is nothing other than impressive. We are reminded that the law is an imperfect medium in its provision of the legal framework of surveillance and its token legislative safeguards. *Big Brother* is a book that deserves to be read by all those with even a passing concern for civil liberties, lawyers and non lawyers alike.

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Income Tax: A Critical Analysis by S ROSS and P BURGESS (Sydney, Law Book Co, 1991) pp xxii, 236.

Visualise this: a first floor room in a University of Canterbury Hall of Residence, humid with trapped air and the heat from forty or so bodies. They are the bodies of tax teachers. This is a tax teachers' conference and already the hierarchies are formed, lightweights to the centre and left, heavies to the right. The joint author of a book on tax is standing in the corner minding his business when a stranger approaches, clutching a glass of execrable New Zealand cask wine which already the author has rejected in favour of the orange juice. The stranger is introduced as the reviewer of the author's book. The author looks around the room to see if he can escape but, no, he is trapped, in a corner with a book reviewer! Argh!

The author is offered an asparagus roll. He picks up this throwback snack (thinking of 1960s weddings) to discover that it is turquoise on the underside

where it has been sitting on a blue serviette and the dye has wicked up into the starch-white bread. He quietly disposes of the roll. Thank God these expenses are deductible!

A voice is chattering away but the author hears one question that he pounces on: what are the weaknesses in his book? 'There should have been more on the PAYE system and in a second edition we will be covering international aspects of taxation. Apart from that, I think it does its job very well.' The reviewer loses steam and moves away. He agrees. The book is good. The same cannot be said for the wine and this venue.

The book's cover has a blue that is deeper than the bottom of the asparagus rolls, splashed with orange colour and abstract wheels and cogs grinding away. Like the rest of the book, it does, indeed, do its job very well. The book is intended for law and commerce students who are about to start their first tax course. According to its preface, it is not intended to cover every topic exhaustively but to raise issues and stimulate discussion. It certainly does raise the majority of issues facing those who must design Australia's future tax system and it introduces students to those issues in an interesting and critical way.

I recommended it as holiday reading for a diligent student who telephoned me in January. It is ideal for getting a handle on the breadth of the issues a tax course must encompass. It meets its stated objectives: it provides an overview of the main areas of income taxation and provides a critical commentary on the doctrines that other books merely set out to describe or summarise. It also has the courage to directly address the issues of tax ethics and tax and poverty so that some of the moral dilemmas of tax professionals are introduced to students right from the beginning of their consideration of taxation.

In an area where some of the important High Court decisions can only be described as chaotic, it sets some good, solid groundwork. It is not in the usual 'law school' mould where the law is critically examined by trudging through decision after decision of appellate courts or grinding away at explaining the oft convoluted and confusing words of the *Income Tax Assessment Act, 1936* (Cth) ('the Act'), which was the first Australian statute to exceed one million words.

As an example of their approach, it is useful to make the observation, as the authors do, that the way in which problems associated with the general provision of the Act about deductibility of expenses, section 51(1), have been resolved is similar in a large number of other jurisdictions. This is despite the variation in the statutory wordings. Given that the book introduces an expectation of a highly comparative analysis, the discussion which follows, whilst providing a good overview of the Australian position, does not fulfil that expectation. A major reason for that approach is obviously the way in which the book is structured: it is short, to-the-point and introductory.

A real strength of the book is that the authors are keen on the idea of saying what they think in a straightforward and direct way. The writing is not boring. There are snippets of stories interwoven with the technical material. I especially liked the way the topic of tax accounting was introduced through an explanation of the plot of a bad 1963 movie, *The VIPs*. The story illustrates

the stereotyping of tax accountants but, more importantly, it highlights the crucial matter of timing.

You will not find any bad or obscure writing in the book. The authors say what they think. This is especially the case with the chapter on capital gains tax written by Rick Krever of Monash University. Listen to him on an issue most near and dear to the Australian electorate, exemption of the family home from capital gains tax (page 89):

The most unwelcome aspect of the principal residence exemption was not its effect on the legislation but its inequity and adverse economic impact.

He goes on to explain the inequities and adverse impact in the same direct, punchy manner.

This theme is taken up in the conclusion where the authors note that there is a crying need in Australia for changes in the Act to remove economic distortions. They point to the politically unfavourable road of abolition of the principal residence exemption or, at the least, limiting its value. They also advocate the indexation of interest income to allow for the effects of inflation thereby stimulating investment and making tax avoidance schemes less attractive. These specific issues are dealt with in a short but pithy conclusion which sets out five ways in which the taxation system can be improved. The overwhelming conclusion about the future from the final chapter and from the earlier discussion in Chapter 7, entitled 'Politicians, Bureaucrats, Courts and Tax Reform', is that for Australia to get a better, fairer taxation system some hard and unpalatable political decisions will need to be made. It is difficult to imagine any political party having the courage to set a limit on the principal residence exemption for capital gains tax or to introduce indexation whether for specific investments or as a means to compensate for the effects of inflation generally. But we can hope.

We can *always* hope, so visualise this: it is the tax teachers' conference 1994 and the wine is superb and the food is good. No-one gathers in hierarchical clumps. The Prime Minister of the day has just introduced major reforms to the tax system which mean that the length of the Act has been halved by its rewriting in simple, direct language. The High Court has reached a unanimous decision on a major taxation issue. And the joint authors have just published the second edition of their book. Best of all, now that it has a section on international tax and the chapter on income has been beefed up to include more on the PAYE system, the reviewers went wild.

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