



COMMERCIAL.TELEVISION AUSTRALIA

SURVEILLANCE: AN INTERIM REPORT

**SUBMISSION TO THE
NSW LAW REFORM COMMISSION**

COMMERCIAL TELEVISION AUSTRALIA

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Executive Summary

- The Commission recommends a *“broad-based system of regulation for surveillance...covering all types of surveillance, regardless of who conducts it, whether it is conducted overtly or openly in public, or the type of device used”*.
- However, surveillance is conducted in a number of distinct contexts: the workplace, the private investigation industry, law enforcement and the media. In each context, different and important public interests need to be balanced.
- In relation to the media, protection of privacy needs to be balanced against the public interest in allowing the free flow of information to the public and upholding freedom of speech. Balancing these public interests raises complex issues and is highly context dependent.
- The Commission has not examined the potential impact of its recommendations on the balance between these important public interests. Nor has the Commission established that existing laws and regimes regulating the media do not already strike an appropriate balance. Rather, the Commission has premised its recommendations on the basis that *“personal privacy should be the paramount concern”*.
- Commercial Television Australia submits that the broad-based highly regulatory regime recommended by the Commission will fundamentally restrain the media’s vital role in upholding freedom of speech and the free flow of information.
- The Commission’s approach is directly contrary to that taken by the Commonwealth which has recognised the highly context-dependent nature of privacy issues in the context of the media. The Commonwealth has adopted self-regulatory and co-regulatory approaches in relation to protection of personal information by the media and in relation to the broadcast of program content which meets community standards.
- When enacting amendments to the Privacy Act to protect personal information, the Federal Parliament specifically considered the important role of the media in the free flow of information to the public. In this context the Federal Parliament considered that self-regulatory regime was the best way to seek to “balance the public interest in providing adequate safeguards for the handling of personal information and the public interest in allowing the free flow of information to the public through the media”.
- The Commercial Television Industry Code of Practice sets out requirements for protection of privacy, including a “public interest test” that is intended to provide a balance to freedom of expression. All Australian commercial television stations accept this Code and abide by these requirements. The Code is widely publicised and stations are required to report to the ABA on all complaints received in relation to matters covered by the Code.
- Given the inevitable tension between the right to privacy and freedom of speech, some complaints are inevitable. However, the small number of such complaints is testimony to the fact that the current system is striking an appropriate balance.

- Although not as wide-ranging or broad-reaching, surveillance legislation in other states, particularly Western Australia, has already severely curtailed the ability of the media to communicate freely with members of the public on issues that are in the public interest.

1. Introduction

Commercial Television Australia Limited (“**Commercial Television Australia**”) represents all of the free-to air commercial television licensees in Australia.

This document sets out Commercial Television Australia’s response to Surveillance: An Interim Report, issued by the New South Wales Law Reform Commission (the “**Commission**”) in February 2001.

Commercial Television Australia thanks the Commission for the opportunity to attend a consultation meeting on 23 July 2002 and for the opportunity to make this submission.

2. Overall Principles

2.1 Terms of reference

The terms of reference for the Commission (report required the Commission to:

“inquire into and report on the following matters:

- the current scope and operation of the *Listening Devices Act* 1984 (NSW)
- the need to regulate the use of visual surveillance equipment, and
- any related matter.”

In so doing, the Commission was required to have regard to “protection of the privacy of the individual.”

In its interim report, the Commission has recommended a “broad-based system of regulation for surveillance” on the basis that “personal privacy should be the paramount concern”. This in effect, makes the right to privacy the foundation of the recommendations, rather than an issue to which regard should be had. In taking this approach, the Commission seems to be asserting that the right to freedom of speech is a less important public right than personal privacy.

The Commission argues that there is a close connection between privacy and technology, with advances in technology making privacy a more pressing concern at present than it has been in the past. While this may be true, technological advances do not per se mean that a broad and general extension of surveillance laws is justified. In particular, if there is to be such a wholesale shift in the balance of competing public interests (in this case, privacy versus freedom of speech) in favour of a particular right, in this instance, privacy, then we believe that it is appropriate for there to be a detailed examination of those competing interests, as well as an in-depth consideration of why it is that the rebalance recommended can be justified in all circumstances and given all competing interests. It does not appear as if this has taken place. If it has, it is not evident on the face of the report.

Over the years, a number of enquiries at both the State and Federal levels have examined the issue of whether or not a right to privacy should be enshrined in legislation. But, with the exception of State-based surveillance laws, the *Telecommunications (Interception) Act* 1979 (Cth) and the *Privacy Act* 1988 (Cth) which protect personal information, there is no generally

recognised right to privacy under Australian law. However, there is a range of Commonwealth and State legislation that governs access to people, or the publication of information relating to individual privacy (see Appendix 1). The diversity of this legislation indicates the highly contextual framework within which issues relating to privacy have been dealt with in Australia.

The recent High Court case of *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 also considered this issue at some length. The diversity of opinions expressed by the court reflects the complexity of the issues in this area. Gleeson CJ, in considering the state of surveillance laws in Australia states the following:

"There are, in a number of Australian jurisdictions, statutes which prohibit or regulate secret surveillance, and deal with the consequences of breaches ... Some may think that there ought to be legislation covering a case such as the present; but there is not. And it is only necessary to consider the complexity which such legislation, when enacted, takes, and the exceptions and qualifications that are built into it, to see the need for caution in embracing superficially attractive generalisations."

Contrary to these warnings, in the present instance, the Commission has proposed a regime which aims to establish "wide-ranging surveillance laws covering all types of surveillance, regardless of who conducts it, whether it is conducted overtly or openly in public, or the type of device used" (p.39). The Commission sees this approach as "the most effective way of achieving comprehensive privacy protection and flexible regulation of legitimate surveillance."

The main areas that the Commission considers in relation to surveillance are the workplace, the private investigation industry, law enforcement and the media. Each of these areas has distinct issues and interests that are being protected. For example:

- employers are primarily concerned with their workers' productivity and safety
- the private investigation industry is concerned with getting information required by their client (often the insurance industry which is concerned about ensuring that it only pays out on valid claims);
- law enforcement is concerned with protecting the public from criminal activity; and
- the media is concerned with upholding freedom of speech and the free flow of information to the public.

To try to implement wide-ranging laws covering these issues and interests is fraught with difficulty, in particular because the underlying principle of a general "right to privacy" is a difficult and controversial topic.

2.2 Balancing public interests

We believe that the very broad surveillance legislation being proposed by the Commission will be unduly onerous on the media, favouring, as it does, the right to privacy over the right to freedom of speech. Unfortunately, there does not appear to have been a detailed examination of the issues surrounding freedom of speech in a manner that would assure the public that these restrictions on freedom of speech are appropriate, given (in the view of the Commission) the over-riding need to protect personal privacy. We do not believe that any change to the current balance should be contemplated without a detailed examination of, and extensive consultation on, these crucial issues.

In a recent article that examines the *Lenah Game Meats* decision, David Lindsay of the Centre for Media, Communications and Information Technology Law, University of Melbourne, states:

"Balancing privacy and freedom of expression, however, raise issues of considerable complexity ... The balance to be struck between privacy and freedom of expression is highly context-dependent." (part 2, p.183)

We agree with this statement that supports a detailed and transparent examination of these various issues. The Commission states that the proposed regulatory regime will not act as a curb on freedom of speech or expression but "will merely ensure that, in upholding freedom of speech, the media respect other equally important public interests and act in accordance with the law." (p.70) However, the Commission does not investigate or put forward any evidence that the media does not already take into account other important public interests, or that the current balance or regimes regulating the media do not already strike an appropriate balance. The reality is that it both of these things are occurring now.

Further, the regime recommended by the Commission is so highly regulatory in relation to the manner in which media organisations obtain information and the uses to which that information can be put, that it is difficult to see how it will not act as a curb on freedom of speech and expression.

Given the fundamental importance of freedom of speech to our society and the vital role that the media plays in upholding this freedom, the current balance between competing public interests should not be tipped without any evidence that change is warranted. Nor should any change occur without a detailed and apparent examination of the consequences that the proposed changes will have on the balance between the competing interests.

Paragraph 6.26 of the Commission's report asserts that it would be difficult to justify a general exemption that would apply to the media conducting covert surveillance while requiring law enforcement officers and employers to obtain authorisation. We do not believe that this is correct. There are different competing interests that need to be protected in each of these areas and these different interests justify a different approach. In relation to law enforcement, the results of covert surveillance can have extremely adverse effects on the liberty of an individual and in certain circumstances can lead to imprisonment. Consequently, it is appropriate that any ability to collect and rely on such surveillance information be subject to strict controls.

In respect of employers, any covert surveillance is principally used only to protect the employer's private interests. An employer may also try to use the results of such surveillance in legal proceedings against the employee in certain circumstances. These rights need to be balanced against individual liberty from constant surveillance in a person's place of employment.

On the other hand, in relation to the media and its role in society, freedom of speech is the main competing interest to the right to privacy. This fundamental difference and the fact that the media is already subject to accountability in other areas of regulation (including self-regulation) provides justification for there being a different approach in relation to it.

2.3 Existing forums and regulation

The proposed regime is highly regulatory in respect of the manner in which media organisations obtain information and the uses to which that information can be put. Not only must any covert surveillance be conducted in accordance with eight broad and often ambiguous principles but it also prohibits covert surveillance unless it is in the public interest, which will be decided by the issuing authority. The issuing authority will also determine the purposes for which that information can be used and the manner of communication of that information to the public. This approach is directly contrary to that taken by the Commonwealth, which has adopted self-regulatory and co-regulatory approaches in relation to protection of personal information by the media and in relation to the broadcast of program content which meets community standards. While taking this different approach, the Commission does not appear to have conducted any significant investigation or consultation nor has it provided any real justification for adopting such a highly regulatory approach to the media.

Further, the Commission does not examine in any detail the existing forums that currently regulate the media. It appears to base its recommendations on a belief that the small number of complaints received by Commercial Television Australia and the Australian Press Council regarding breaches of privacy are “attributable to the absence of a single, unified and effective complaints system” (p.260). It does not, however, provide any evidence or justification for this belief and its analysis is, in fact, not correct.

The remainder of this section considers the co-regulatory regime governing program standards under the Broadcasting Services Act 1992 (Cth) (“**BSA**”). The next section (2.4) considers the regulation of the media under the Privacy Act 1988 (Cth).

(a) Commercial Television Industry Code of Practice

The Commercial Television Industry Code of Practice (the “**Code**”) covers matters outlined in section 123 of the BSA and other program content matters that are of clear concern to the community. The Code sets out requirements for news and current affairs coverage (focussing on privacy, fairness and accuracy issues) amongst other things. All Australian commercial television stations accept this Code and abide by these requirements.

There is a general requirement under the Code relating to privacy in clause 4.3.5:

“In broadcasting news and current affairs programs, licensees ... must not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, other than where there is an identifiable public interest reason for the material to be broadcast.”

This requirement clearly includes a public interest test, which is intended to provide a balance to freedom of expression.

In addition to requiring licensees to comply with all legislative requirements, the Code also contains other requirements relevant to protection of privacy, including the following:

- to have appropriate regard to the feelings of relatives and viewers when involving images of dead or seriously injured people (clause 4.3.3);

- to exercise sensitivity in broadcasting images of or interviews with bereaved relatives and survivors or witnesses of traumatic events (clause 4.3.6);
- to avoid unfairly identifying a single person or business when commenting on the behaviour of the group of persons or businesses (clause 4.3.7);
- to take all reasonable steps to ensure that murder and accident victims are not identified directly, or where practicable, indirectly before their immediate families are notified by the authorities (clause 4.3.8); and
- to broadcast reports of suicide or attempted suicide only where there is an identifiable public interest reason to do so (clause 4.3.9).

(b) Code complaints

Set out below are details of the complaints under the Code since 1996 with annual periods running from 1 October to 30 September the following year. These complaints arise from over 21,000 hours of programming broadcast annually by the commercial television licensees in Australia. Given the significant number of hours of programming, the total number of complaints is low and the total number relating to privacy issues is extremely low.

Year	Total Complaints	Privacy Complaints	% All Complaints
1995/1996	937	8	0.9%
1996/1997	1058	4	0.4%
1997/1998	831	5	0.6%
1998/1999	864	15	1.7%
1999/2000	1041	12	1.2%
2000/2001	907	14	1.5%
2001/2002	745	9	1.2%

From June 1996 to October 2002, of all the matters referred to it, the Australian Broadcasting Authority (the “**ABA**”) found breaches or partial breaches in relation to only 14 different matters that in some way related to privacy issues¹. Further, not all of these related to privacy issues that would be covered by the proposed regime.

While some may be of the view that there should be no privacy complaints, the number of complaints actually received each year is extremely low. Further, despite the high level of adherence to general privacy principles, some complaints are inevitable. This is because tension will always exist between the right to privacy and freedom of speech. Balancing these principles is ultimately a matter of judgment. It is unrealistic to expect no complaints and the low level of complaints that have occurred in relation to television confirm that the current system is working. It does not provide any justification for a new and restrictive level of regulation over the media.

(c) Publication of the Code

Under section 7.5 of the Code, licensees are required to broadcast “360 on-air spots each calendar year, across all viewing zones” which must be closed captioned, providing “information about the Code and its complaints procedures.” These spots must also

¹ Information provided by Australian Broadcasting Authority

explain how to obtain a copy of the Code. These requirements help to ensure that the public is kept informed about the avenues for complaint and the process for making a complaint. Information is also provided on Commercial Television Australia's website (www.ctva.com.au).

The Code is intended to make it as simple as possible for viewers to make a complaint about something seen on television. The Code does not require a written complaint to specify the section of the Code to which the complaint relates. Where a complaint relates to a section covered by the Code, stations treat it as a Code complaint. Commercial Television Australia is confident that the public are well informed about the avenues for complaint and do not demonstrate the level of confusion that the Commission suggests.

Accordingly, Commercial Television Australia sees no basis upon which the Commission can justify its assertion that low levels of complaint are "attributable to the absence of a single, unified and effective complaints system". Commercial Television Australia finds it unacceptable that the media should be subject to a new surveillance regime based on no more than a suspicion that more people may complain if there was one forum for complaint. The Commission should be able to point to some real grievances that have not been adequately addressed and in respect of which the public has voiced real concern before it can justify imposing such onerous restrictions on the media and consequently, shifting the balance between freedom of expression and the right to privacy so far in favour of the latter.

(d) Consequences of breach of Code

The Code provides a mechanism for privacy issues to be resolved and if the person aggrieved is not satisfied, the issue can ultimately be the subject of an investigation by the ABA. The Code was developed by the Federation of Australian Commercial Television Stations, (now Commercial Television Australia), in consultation with the ABA, as required under section 123 of the BSA. One of the ABA's primary functions is to monitor and deal with unresolved complaints made under this Code and any other codes developed under this section.

The ABA will only include a code under the register of codes of practice if it is satisfied that it contains appropriate community safeguards for the matters covered by it and that members of the community have been given an adequate opportunity to comment on the code.

If the ABA finds that the Code has been breached, as a minimum requirement the ABA must notify the complainant of the results of the investigation. The ABA may also however impose an additional licence condition under section 43 of the BSA. Any further breach would then be a breach of a licence condition that could ultimately lead to the imposition of a fine (currently \$220,000) and the suspension or cancellation of a licence.

(e) Other

Additionally, all journalists who are members of the Media Entertainment and Arts Alliance are bound by the provisions of the Australian Journalists Association Code of Ethics that contain provisions relating to privacy. Complaints regarding alleged

breaches of the Code of Ethics are addressed by a Judiciary Committee set up under the Alliance. A breach finding can lead to a fine of \$1,000 for each offence and expulsion from the Australian Journalists Association section of the Alliance.

Given that these forums already exist for addressing complaints concerning the media and that these forums are specifically set up to deal such issues, if there are any concerns being raised by the public about the media's approach to privacy then logically it is in these forums that such issues should be addressed. Any appropriate reforms should then be implemented within these forums.

In this regard, the Code must be reviewed every 3 years and a revised Code will be released for public comment later this year. This review is widely advertised, is open to public comment and involves detailed discussions with the ABA. Judging by the last review, it is likely that Commercial Television Australia will receive considerable input from the public. If the public have any significant concerns about privacy issues, then the Code review gives them an opportunity to raise these concerns.

2.4 The Privacy Act

In introducing amendments to the *Privacy Act 1988* (which apply restrictions on private organisations regarding personal information) the Federal Parliament included an exemption for media organisations where an act is done or practice engaged in:

- “(a) *by the organisation in the course of journalism; and*
- (b) *at a time when the organisation is publicly committed to observe standards that:*
 - (i) *deal with privacy in the context of the activities of a media organisation; and*
 - (ii) *have been published in writing by the organisation or a person or body representing a class of media organisations.”*

In including this exemption, the Federal Parliament recognised the important role played by media organisations in upholding freedom of speech in a context that is directly dealing with individual rights to privacy in relation to personal information. Further, the Federal Parliament acknowledged that media organisations already abide by existing privacy standards that address privacy issues in a manner appropriate to the media context and it considered that this self-regulatory approach was preferable. The Commission clearly takes a contrary view, preferring a highly regulatory approach.

In the Explanatory Memorandum for the *Privacy Amendment (Private Sector) Bill 2000*, the reason given for including a media exemption is to seek to:

“Balance the public interest in providing adequate safeguards for the handling of personal information and the public interest in allowing the free flow of information to the public through the media”, (p.43)

And in relation to clause 3 which states the objects of the Act:

“Recognises that there are important human rights and social interests which compete with privacy, such as the desirability of the free flow of information to the public through the media and otherwise.”(p.29)

The Federal Parliament decided that the best way of balancing privacy considerations with freedom of speech was for media organisations to adopt a self-regulatory approach in relation to privacy. Given this fact and given also that there are existing avenues for addressing concerns in relation to the media, it is not clear why the Commission has embraced a fundamentally different philosophical approach by advocating such a broad ranging and highly regulated surveillance regime. We do not think that such a contrary approach is either warranted or desirable.

Further, to the extent that material such as photographs and video footage are “personal information” under the Privacy Act, there would appear to be a conflict between the Privacy Act and the proposed New South Wales regime.

2.5 Constitutional issues

The publication of information of a government and political character by the media is subject to the constitutional freedom of communication. Because of this, there is a strong possibility that the proposed legislation would be constitutionally invalid, in so far as it applies to the media in some instances.

This point is made in the *Lenah Game Meats* case in which Kirby J found that covert filming of the illegal processing of possum meat related to “government and political matters” and stated that:

“The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances have occurred only because of public debate and political pressure from social interest groups. The activities of such groups have sometimes pricked the consciousness of human beings.”

While the meat processor in question was unsuccessful in preventing the broadcast of the film on other grounds, the case demonstrates that there will be many circumstances where the media engage in covert filming of matters of a “governmental or political character”, however narrowly or broadly this may be defined. This filming often occurs at short notice, on the basis of a “tip off” or anonymous disclosure and could not be the subject of prior approval. In such circumstances, preventing the media from conducting the surveillance and publishing the results of that surveillance would run contrary to the implied constitutional freedom of communication, as was found to exist in the unanimous decision of the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Similarly, it is sometimes the case that another person (such as a disaffected employee) will anonymously provide a covertly filmed videotape of an inappropriate or illegal activity to the media. Indeed, this was exactly the case in *Lenah Game Meats*, where the videotape in

question was anonymously provided to the ABC and Lenah Game Meats failed to restrain the broadcast of that tape. If the proposed legislation were in place, the opposite result would follow, because of a prohibition on the communication or publication of surveillance information that would not fall within the exceptions under recommendation 81. (**Recommendation 81** – general prohibition on publication or communication of information as a result of authorised or unauthorised surveillance unless one of the specified exceptions applies.)

It is also not clear whether the mechanism under recommendation 82 would apply. (**Recommendation 82** – when a public interest or employment authorisation is made, the order must specify the purposes for which the surveillance information may be used and the circumstances under which the information may be published or communicated. Authorisation for a use other than the purpose specified in the original authorisation can be sought after the surveillance is conducted).

A legislative provision that restricts freedom of communication if reasonably appropriate and adapted to serve a legitimate end will be valid. However, while protection of privacy can clearly be a legitimate end, the proposed restraints in the Surveillance Act are so wide ranging in their potential impact on the media and how the media communicates to the public, that it is unlikely to be a valid restraint on freedom of communication. Rather, it is a restraint that is neither reasonably appropriate nor adapted in the circumstances.

2.6 “Overt” vs. “covert” surveillance

The proposed legislation distinguishes between overt and covert surveillance. Overt surveillance occurs when the subject has knowledge that the surveillance is occurring, while covert surveillance occurs when the subject is not notified beforehand of the surveillance. Both forms of surveillance are subject to regulatory regimes, with covert surveillance being subject to much more restrictive controls.

Making the presence or absence of knowledge the yardstick by which to determine the regime the surveillance in question will be subject to is an arbitrary and inappropriate distinction. Why should a person’s knowledge of the existence of surveillance be of paramount importance in determining the level of regulation to which an organisation or person conducting surveillance is subject? This is overly simplistic in its approach to what is “private.” As Gleeson CJ stated in *Lenah Game Meats*:

“There is no bright line that can be drawn between what is private and what is not ... An activity is not private simply because it is not done in public. It does not suffice to make an act private that, simply because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford.”

By analogy, it should not suffice to make an act “private” just because the subject does not have knowledge of the surveillance. Nor should this be the sole determinant of the degree of regulation to which that surveillance is subject in all cases without regard to other relevant issues such as the importance of the story being made public. Consequently, the media should not be subject to the proposed regulatory regime in those circumstances .

3. The Specific Regime

3.1 “Overt” surveillance

The Commission recommends that overt surveillance be conducted in accordance with eight surveillance principles. Commercial Television Australia is concerned with the degree of regulation proposed in relation to overt surveillance and the generality of the proposed legislative principles including those issues set out below.

(a) Principle 1 – Reasonable expectation of privacy

Giving of notice does not override a reasonable expectation of privacy (4.41). “Reasonable expectation” is an ambiguous concept particularly in relation to how it applies to public figures. How is a person’s reasonable expectation determined? Does a person’s reasonable expectation diminish the more attention they draw to themselves? What if the person is the subject of unsolicited but warranted public scrutiny? Is that person’s reasonable expectation still lowered as compared to the ordinary citizen and as compared to the person who willingly becomes a “public” figure? Can a person ever be such a public figure (solicited or unsolicited), that he or she can no longer have any reasonable expectation of privacy? These undefined limits and unanswered questions leave the media vulnerable to inadvertent violation of this principle.

The Commission uses the Woods Case to demonstrate its point that someone in the public eye does not necessarily forfeit an expectation of privacy. In this case, the Australian Press Council found that taking photographs of Senator Bob Woods and his wife in their backyard was a blatant example of breach of privacy and that publication of the resulting photographs was not justified in the public interest. However, what the Commission ignores is that in this case, the Australian Press Council’s decision clearly illustrates that there are already appropriate forums in place that govern the media. These forums are able to adjudicate appropriately on the sometimes competing interests of privacy and freedom of speech. Accordingly, we do not believe that it is either necessary or appropriate to impose yet another layer of regulation over the actions of the media. If there is any issue about the completeness or relevance of the codes or principles regulating the media or about the remedies available for a breach, then these are matters that can and should be addressed within the ambit of the forums that already exist for regulation of the media.

(b) Principle 5 – accountability for surveillance devices

Surveillance users are accountable for their devices and the consequences of their use (4.50). How far is it proposed that this accountability extends? If material is collected overtly and then broadcast, the recommendations do not clarify the extent to which the collecting organisation will be responsible for the consequences of such broadcasting. Further, if the information has been collected overtly, why should there be any regulation on such broadcasting. It is difficult to envisage what issues are being protected by such regulation of the media.

3.2 “Covert” surveillance

Of even greater concern are the recommendations governing covert surveillance. Under the proposed regulations, covert surveillance is prohibited unless prior approval has been given by a court or tribunal that the surveillance is in the public interest. We believe that this will have a significant and unwarranted impact on the manner in which the media conducts its business.

(a) Recommendation 55 – details for authorisation

The requirement to seek authorisation prior to conducting covert surveillance will place onerous obligations on the media involving substantial paperwork for every incident of surveillance. This would make it extremely difficult for the media to conduct such surveillance in a fluid and responsive manner.

For example, under the proposed regime, an application must specify the names of all people who may use, repair, test, move, maintain, replace or retrieve the surveillance device and this may involve an entire crew. However, the identities making up a crew can change from those involved or anticipated to be involved at the time that any authorisation is sought. Also, the types and the number of surveillance devices that the media may need to use in any situation can also be dynamic, depending upon developments that occur during the course of conducting the surveillance.

These administrative requirements will be burdensome and will hinder the media from being able to act as quickly as is often essential to properly cover a news story.

(b) Recommendations 55 and 56 – pre and post authorisation

Having to seek authorisation prior to conducting the surveillance will not be practical in circumstances involving a “scoop” or an expose that by its very nature relies upon the element of surprise. News stories often break fast and must go to air fast. If the media is unable to respond quickly, the necessary element of surprise may be lost and a story will be lost because it is no longer current by the time any authorisation can be granted. With news, the currency of a story can come down to a matter of hours (or even minutes) and it is unlikely that any authorisation process (however efficient) is going to be able to consider and grant authorisations within this time frame. Even if it could do so, the time needed to prepare and lodge an application could easily destroy the currency of information in a news story.

Further, where investigative journalism is being conducted, it is not always possible to know what the surveillance will reveal and whether or not the findings will be in the public interest. The media may act on a suspicion or tip-off of criminal or untoward activity but until surveillance is conducted it will not know what exactly will be revealed. The media organisation will then make a judgment as to whether broadcast of information obtained by surveillance is justified in the public interest. It is not always going to be practicable to justify a public interest before the results of surveillance are known.

We note that the proposed regime makes provision to seek retrospective authorisation where it is “not possible nor practical to seek prior authorisation” for example, where a situation arises that is so urgent and serious that the use of covert surveillance is justified in the public interest (recommendation 56). But it is not anticipated by the

legislation that retrospective authorisation will be sought, except where a situation so urgent and serious arises that no time is available to obtain prior authorisation but the use of covert surveillance is justified in the public interest.

The reality however is that the media is only likely to seek retrospective authorisation in extreme circumstances because failure to obtain retrospective authorisation after emergency surveillance is conducted, would render the media organisation guilty of a criminal offence. This is a serious risk given the fluid nature of the concept of public interest and the difficulty in judging how the concept will be applied in any particular circumstance.

We believe that both the pre and post authorisation process will be unworkable in the framework of the media that must be responsive to the dynamic, expeditious and fast-breaking nature of news. However, Commercial Television Australia submits that the detailed information required to obtain pre-authorisation and the risk of committing a criminal offence if retrospective authorisation is not granted, will fundamentally restrain the function of the media and thus restrict freedom of speech and the free flow of information.

(c) Recommendation 82 – specification of purpose

It is proposed that a public interest authorisation must state the purposes for which information obtained from conducting the surveillance can be published or communicated. This imposes highly prescriptive regulation on the media in terms of how, when and where the media can use the surveillance information. It is inappropriate to limit freedom of expression in this manner by, in effect determining what the public can and cannot hear and consequently undermining freedom of expression and communication.

If it has been considered appropriate to authorise the media to conduct the surveillance, what further justification is there to regulate the manner in which the information is communicated? It is not clear how such additional limits on freedom of speech can be justified.

Further, the proposed manner of communication of any surveillance information may not be known at the time that authorisation is sought, which may depend upon the nature and type of information uncovered as a result of the surveillance. Given what has already been said about the fast-breaking and expeditious nature of news and media organisations, important stories may be lost if a further application has to be made after the surveillance has been conducted because the intended publication or communication changes as a result of the information obtained. This is an unduly onerous requirement with no apparent justification in relation to media organisations and the manner in which they conduct their business.

4. Other Regimes

Surveillance legislation exists in Victoria, Western Australia and the Northern Territory. These regimes differ from that proposed in New South Wales in some important aspects including that they apply to private conversations and/or activities as distinct from public conversations and/or activities. Part 5 of the Western Australian Act also enables a person to use a surveillance

device where the person is not a party to a private conversation or activity but the circumstances are so serious and of such urgency that doing so is in the public interest. A written report about that use of the surveillance device must be delivered to a judge without delay and authorisation must be obtained from a judge before the records of such surveillance are published or communicated.

Although the Western Australian Act is limited to “private conversations” and “private activities”, it has still severely curtailed the ability of the media to communicate freely with members of the public on issues that are in the public interest.

The ability to obtain a court authorisation for publication on public interest grounds is rarely used in practice because:

- there are substantial costs involved in making an application, filing affidavits, briefing Counsel and attending a hearing. Applications have generally cost about \$3,000 – \$5,000 and have involved significant time and resources to prepare;
- there is always a risk that the application might be refused, resulting in a waste of money and time in making the application, and possibly resulting in a story not being able to be broadcast at all in the absence of the relevant footage;
- the timing of the broadcast is at the mercy of the court process and there may be significant delays in hearing the application. By the time an authorisation is granted to broadcast the footage the story may have already broken, or may no longer be of relevance in light of changed events.

Therefore, the media in Western Australia have only used the authorisation procedures in rare cases and have largely chosen to work around the legislation where possible, essentially by:

- waiting until a subject appears in a public place before filming, which is extremely time consuming and costly;
- choosing not to investigate stories where footage in a public place is unlikely to be obtainable; and
- leaving out critical aspects of stories where the only footage available is footage of a private conversation/private activity.

An example of the effect of the surveillance provisions on the quality of stories broadcast can be illustrated by a recent story on *Today Tonight*. The story was an investigation in relation to how safe Perth buildings are from terrorist attack and the adequacy of security in various official state buildings. One of the aspects of the story which had the greatest impact was that a person was able to enter various government building and leave a bag unattended in various locations. However, the story that was broadcast was not able to show the footage of the bag being left unattended inside the building, as this would have comprised a “private activity”. The story had considerably less impact because the viewers were only told that the bag had been successfully left inside the building, but were not able to see the footage for themselves.

In the past, a number of current affairs ‘scoops’ have been made on the basis of video footage provided anonymously to television networks by third parties. However, the surveillance regime in Western Australia has effectively meant that such anonymously provided footage can not be broadcast, because the means by which the footage was obtained can not be ascertained. As a result of this, some stories with a legitimate public interest have simply not been broadcast.

What has suffered most from the Western Australian regime is the quality of the stories broadcast, freedom of speech and the ability and willingness of the media to conduct serious investigative journalism.

APPENDIX 1

Legislative Framework

- **Legislation protecting use of “personal information”** – *Privacy Act 1988* (Cth)
- **Criminal trespass legislation** – *Public Order (Protection of Persons and Property) Act 1971* (Cth); *Inclosed Lands Protection Act 1901* (NSW); *Trespass Act 1987* (NT); *Invasion of Privacy Act 1971* (Qld); *Summary Offences Act 1953* (SA); *Police Offences Act 1935* (Tas); *Summary Offences Act 1966* (Vic)
- **Legislative restrictions on the reporting of matters affecting or involving children** – *Family Law Act 1975* (Cth), s 121; *Children's Service Ordinance 1986* (ACT); *Children (Care and Protection) Act 1987* (NSW); *Children (Criminal Proceedings) Act 1987* (NSW); *Guardianship Act 1987* (NSW); *Mental Health Act 1990* (NSW); *Juvenile Justice Act 1983* (NT); *Child Protection Act 1999* (Qld); *Children's Court Act 1992* (Qld); *Juvenile Justice Act 1992* (Qld); *Children's Protection Act 1993* (SA); *Mental Health Act 1993* (SA); *Child Welfare Act 1960* (Tas); *Children and Young Persons Act 1989* (Vic); *Crimes (Family Violence) Act 1987* (Vic); *Victorian Civil and Administrative Tribunal Act 1998* (Vic); *Children's Court of Western Australia Act 1988* (WA); *Criminal Code* (WA), s 635A
- **Legislative restrictions on the reporting of matters affecting or involving adoptions** – *Adoption Act 1993* (ACT); *Adoption Act 2000* (NSW); *Adoption of Children Act 1994* (NT); *Adoption of Children Act 1964* (Qld); *Adoption Act 1988* (SA); *Adoption Act 1988* (Tas); *Adoption Act 1984* (Vic); *Adoption Act 1994* (WA);
- **Legislative restrictions on the reporting of matters affecting or involving coronial inquiries** – *Evidence Act 1971* (ACT); *Coroners Act 1980* (NSW); *Coroners Act 1993* (NT); *Evidence Act 1939* (NT); *Coroners Act 1958* (Qld); *Coroners Act 1985* (Vic); *Coroners Act 1996* (WA);
- **Legislative restrictions on the reporting of matters affecting or involving sexual offences** – *Evidence Act 1971* (ACT); *Crimes Act 1900* (NSW); *Evidence Act 1939* (NT); *Criminal Law (Sexual Offences) Act 1978* (Qld); *Evidence Act 1929* (SA); *Summary Offences Act 1953* (SA); *Evidence Act 2001* (Tas); *Judicial Proceedings Reports Act 1958* (Vic); *Supreme Court Act 1986* (Vic); *County Court Act 1958* (Vic); *Magistrates Court Act 1989* (Vic); *Evidence Act 1906* (WA)
- **Legislative restrictions on the reporting of matters affecting or involving jurors** – *Jury Act 1977* (NSW); *Juries Act 2000* (Vic); *Juries Act 1957* (WA); *Juries Act 1967* (ACT); *Juries Act* (NT); *Juries Act 1995* (Qld)
- **Legislative restrictions on the reporting of matters affecting or involving communication with prisoners and other detained persons** – *Correctional Centres Act 1952* (NSW); *Children (Detention Centres) Act 1987* (NSW); *Prisons (Correctional Services) Act 1980* (NT); *Corrective Services Act 2000* (Qld); *Juvenile Justice Act 1992* (Qld); *Correctional Services Act 1982* (SA); *Child Welfare Act 1960* (Tas); *Corrections Act 1986* (Vic); *Children and Young Persons Act 1989* (Vic); *Prisons Act 1981* (WA); *Child Welfare Act 1947* (WA)

- **Anti-discrimination and vilification legislation** – *Racial Discrimination Act* 1975 (Cth) and equivalent legislation in each State and Territory
- **Specific statutory provisions empowering courts and tribunals to make suppression orders prohibiting or restricting reporting of court proceedings**
- **Specific provisions which restrict the reporting of particular events or matters**, for example, *Australian Security Intelligence Organisation Act* 1979, s 92(1), *Crimes Act* 1914 (Cth), ss 3, 79 and 80, *Independent Commission Against Corruption Act* 1988 (NSW), ss 31 and 112
- **Listening devices / telecommunications interception legislation** – *Listening Devices Act* 1984 (NSW); *Invasion of Privacy Act* 1971 (QLD); *Surveillance Devices Act* 1999 (VIC); *Surveillance Devices Act* 1991 (WA); *Listening Devices Act* 1972 (SA); *Listening Devices Act* 1991 (TAS); *Listening Devices Act* 1992 (ACT); *Telecommunications (Interception) Act* 1979 (Commonwealth)
- **Family law legislation** – *Family Law Act* 1975 (Cth).