Independence or integrity

My other objection to charters is that they are misnamed. Who gives a damn about editorial independence? Independence from what, for what?

The prize is surely not editorial independence but editorial integrity. For journalists to assert that they are the sole custodians of integrity and owners and managers a constant threat to it is hubristic and contentious.

Is it the assertion by preponents of charters of editorial independence that owners and managers consciously want to produce periodicals lacking integrity? Surely not, since this would be bad business, resulting in readers and advertisers eventually boycotting the unreliable, untruthful newspaper or magazine.

Is it implied that owners and managers wouldn't recognise integrity if they tripped over it? That is not my observation. Sound morals and a high level of commitment to the common good are, to my perception, no less common amoung people who run businesses than amoung journalists.

Are charters of editorial independence intended to head off occasional interventions by owners and managers to have events portrayed the way they see them, or not portrayed at all? If so, I doubt the efficacy of charters.

Certainly a document espousing general principles will not have as much impact on a reasonable owner or manager as the lucid, specific arguments of an editor. On an unreasonable person, I can't see it having any effect.

"You will find I usually get my way", a tycoon for whom I almost went to work once told me with almost disarming frankness.

Preserving editorial integrity is a case-by-case, day-by-day mission in my view. It involves constant struggle with one's newsroom colleagues and, not infrequently, with oneself. In reality, struggles with owners and managers are infrequent. They tend, however, to be macro-struggles, with blood sometimes shed. Swords are more valuable than scriptures in these circumstances.

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Orders forbidding publication

Michael Chesterman discusses some recent decisions giving 'teeth' to non-publication orders

The media nowadays are frequently told by an official body having legal authority — a court, a tribunal, a Royal Commission — that they must not publish material which they have in their hot little hands, even though this material is indisputably good copy. The basis for such an order differs from case to case. Probably the two most common types of 'non-publication order' (as I will call them here) are those based on the following grounds:

(i) that publication would be in breach of an obligation of confidentiality; or
(ii) that the material in question is a report of public proceedings before an official body which the body considers should not be published, on grounds (for instance) of jeopardy to the conduct of these proceedings.

Recent cases have reached conclusions on a number of important issues which are common to both of these types of non-publication order. Generally speaking, they have made non-publication orders more effective. In this sense they have favoured suppression at the expense of publication. This article contains a brief outline of some propositions which seem to have been established.

Proposition 1

A publisher which is not formally bound by a non-publication order may, in some circumstances at least, be nonetheless liable to criminal penalties if, with knowledge of the order, it publishes the forbidden material.

In relation to interlocutory injunctions on grounds of confidentiality, this proposition was established in April of this year by what we may assume to be the last of the *Spycatcher* decisions — *Attorney-General* v *Times Newspapers* (1991). The House of Lords here held the *Sunday Times* to be guilty of criminal contempt of court on account of having published extracts from *Spycatcher* at a time when, to its knowledge, the *Observer* and the *Guardian* were restrained from so doing by an interlocutory injunction granted to the Attorney-General in confidentiality proceedings. Their Lordships vowed that they were not in any way guilty of elevating an *in personam* order (that is, an order that operates against particular persons) to the status of an order *in rem* (an order that has a general application). It was simply a matter of imposing contempt liability on a person who knowingly impeded the administration of justice in particular proceedings by acting to frustrate the clear purpose of an order made in those proceedings. But the effect in the context of confidentiality proceedings would appear to be the same — once a widely publicised injunction is granted against one intending publisher all other potential publishers are effectively bound.

The judgments of the House of Lords are formally limited to the circumstances of an interlocutory injunction made to preserve the *status quo* until a final ruling can be made. They give no real help on the crucial question of whether a similar form of 'frustration of the purpose' of a final injunction granted on confidentiality grounds might not equally constitute contempt. If this were the case, an injunction against one publisher could effectively suppress material indefinitely.

I know of no Australian case in which this form of conduct has been held to constitute contempt. But there is a clear possibility that the lead given by the House of Lords will be followed here. In my view, it is a decision with dangerous implications.

In the case of reporting prohibitions, the proposition being discussed is of less significance because most commonly such prohibitions are imposed by a court or other legal authority under statutory provisions which state that non-compliance with the order is a criminal offence. The implication is that the world at large is bound by the order, though only those persons who are or should be aware of the order will have the necessary knowledge required by the criminal law to constitute an offence. However, in those relatively few situations where an order is made by a court under a common law power, the prevailing view, at least in New South Wales, is that the order is only binding on those persons present in court when the order was made (*Attorney-General for NSW* v *Mayas* (1988)). Yet, as

with injunctions on grounds of confidentiality, the law of contempt of court provides a means whereby publishers not formally bound may still be liable to punishment if they knowingly infringe the order. Again, the criterion of liability is that they should have knowingly frustrated the purpose of the order in a way which impeded the administration of justice. It was so held recently by Justice Carruthers in *John Fairfax Group* v *The Local Court*, an unreported Supreme Court of NSW decision of 1991, following the English decision *Attorney-General* v *Leveller Magazine* (1979), the local *John Fairfax & Sons* v *Police Tribunal of NSW* (1986) and the *Mayas* case.

Proposition 2

Where a non-publication order is not binding on a publisher, the publisher has no standing to apply for revocation of the order in the court where it was made, even though (as just stated) infringement of the order by the publisher may well incur penalties.

In relation to injunctions on confidentiality grounds, this follows from the fact that the proceedings for the injunction are civil proceedings between the parties to those proceedings and there is no recognised basis on which a person who is not a party to those proceedings could challenge the order. So far as common law based reporting prohibitions are concerned, this proposition formed part of Justice Carruthers' judgment in *John Fairfax Group* v *The Local Group*. Justice Carruthers did, however, accept that publishers had standing to seek prerogative relief in a superior court in respect of a reporting prohibition imposed by an inferior court. The media could nonetheless claim that since, from a practical point of view, they are being made subject to the effect of these types of non-publication orders (although not formally bound by them), they should be acknowledged as having standing, by virtue of their 'special interest' in publication, to challenge the order in the court where it was made.

Proposition 3

A non-publication order may have effect outside the State or Territory where it was made. It would be a brave media publisher that assumed that, having been restrained by a Victorian Supreme Court interlocutory injunction from publishing specified confidential material, it could go ahead and publish with impunity in New South Wales. In the light of proposition 1 above, I would say the same also of any publisher not formally bound by the injunction. Provided that it was proved to now of the injunction, publication in New South Wales could well be interpreted by the Victorian Supreme Court as an act which frustrated the evident purpose of the injunction in a manner which impeded the administration of justice.

More significantly, the recent South Australian Supreme Court decision in *A.B.C.* v *Jacobs*, (1991) (noted by Ross Duncan, *Communications Law Bulletin*, Vol. 11, No. 2, 1991) contains a ruling that a reporting prohibition, if appropriately worded, may also have extra-territorial effect. Justice Matheson made this ruling in relation to the statutory power to impose a reporting prohibition conferred on Royal Commissioners by Section 16a of the *Royal Commissions Act 1917*. But he expressed the view that it might equally apply to the broad powers conferred on all South Australian courts by Sections 69 and 69a of the *Evidence Act 1929*. If this approach were to be adopted generally in Australia, the general assumption of the Australian media that reporting prohibitions are limited to the relevant State or Territory would have to be radically revised. It would be a matter of scrutinising each individual order to see whether it purported to operate extra-territorially.

Proposition 4

The 'qualified privilege' attaching in contexts such as defamation law to fair and accurate reports of parliamentary proceedings or of material tabled in Parliament does not apply to material which is the subject of an injunction granted on confidentiality grounds, not even (it would seem) so as to protect a report published solely within the jurisdiction of the parliament concerned.

This proposition derives from the principal judgment delivered in the much-publicised 'Westpac letters' litigation (*Westpac Banking Corporation* v *Fairfax Group* (1991)) (discussed by Bruce Burke in *Communications Law Bulletin Vol.* 10, No. 4 1990). Justice Powell gave short shrift to the submission of Counsel for Fairfax that such a privilege applied, and that it would indeed protect publication anywhere in Australia. He simply said that the authorities advanced "do not provide support for so absolute a submission" and that, at most, such a protection would be confined to the jurisdiction of the parliament concerned. He also rejected a submission that the tabling of the relevant material in parliament, without more, brought the material so much into the public domain that, under principles applied by himsel in his *"Spycatcher"* decision (*Attorney-General* v *Heinemann Publishers Australia* (1987)), an injunction to protect confidentiality could no longer be sustained.

This decision about 'parliamentary privilege' does not expressly apply to the other type of non-publication order discussed here, namely, reporting prohibitions. But it could well be held in due course to do so. What it certainly does is to undermine any easy journalistic assumption that anything said or tabled in open parliamentary session is thereby automatically freed from reporting restrictions.

In conclusion, these recent decisions show the courts using a number of common law techniques to increase significantly the effectiveness of non-publication orders. The courts appear to be saying to the media and the world at large that when they make an order of this sort they unequivocally mean business. Attempts to find loopholes in the order will be firmly discouraged.

While this attitude of the courts is understandable, it makes it all the more important for the courts and parliaments to ensure that the grounds for making non-publication orders are clear within the law, interpreted consistently and correctly, and carefully limited to the circumstances where they are truly necessary. For this outcome to be achieved, there is still, I would suggest, quite an amount of work to be done. A number of the decisions of South Australian courts under the statutory powers to prohibit reporting in that State, for example, do not measure up to these standards. The same can be said of Justice Carruthers' ruling, with little discussion, in *John Fairfax Group* v *The Local Court* that a court's common law power to prohibit the reporting of the names of blackmail victims also covers victims of threats of extortion. These two situations are not the same: anonymity for blackmail victims is much more important in ensuring that crimes are reported (and the interests of justice thereby promoted) than anonymity for extortion victims. The point which I am briefly endeavouring to illustrate by these examples is that the more effective non-publication orders become, the more important it is that they be soundly based in law and policy.

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