# An air of uncertainty: private security regulation in Victoria

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## 1. Introduction

The rapid emergence of private security in recent years represents a turning point in the nature of formal crime control in Western societies. The growth of the private sector marks a recognition by the public and industry in general that state services can no longer monopolise the control function in a cost effective manner. A number of private individuals and organisations have therefore adopted various measures to ensure that the security of their property and person is maintained by employing people specifically for the purpose of preserving their own, private interests.[1] As Shearing and Stenning[2] pointed out just over a decade ago, this model is based largely on the premise of 'self help'.

However, concern has emerged over the lack of legal accountability in this industry, particularly in areas where the public are invited to enter *en masse*. Research in both Victoria,[3] and in other Australian jurisdictions[4] has suggested criticism over the

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1 O'Malley, P., 'Burglary, Private Policing and Victim Responsibility', in Moir, P. and Eijkman, H. (eds), 1992, *Policing Australia: Old Issues, New Perspectives*, Macmillan, South Melbourne, 299-320.

2 Shearing, C.D. and Stenning, P.C., 'Private Security and Its Implications: A North American Perspective', in Rees, A. (ed.), 1983, *Policing and Private Security*, Australian Institute of Criminology, Canberra, 18.

3 Victorian Community Council Against Violence, 1990, *Violence In and Around Licensed Premises*, Melbourne.

4 Homel, R. and Clark, J., 'The Prediction and Prevention of Violence in Pubs and Clubs', in Clare, R.V. (ed.) 1994, *Crime Prevention Studies,* vol. 3, Criminal Justice Press, New York; Homel, R. and Tomsen, S., 'Hot Spots for Violence: the Environment of Pubs and Clubs', in Strang, H. and Gerull, S., (eds) 1993, *Homicide: Patterns, Prevention and Control*, Australian Institute of Criminology (Conference Proceedings, No. 17), Canberra, 53-66.

activities of bouncers, particularly on licensed premises. In Victoria, the results of an in depth study of violence in licensed premises indicated that not only were security staff involved in close to 40% of reported cases of violence on patrons[5] but there were four recurring themes relating to the security industry at these venues:

(a) management do not exercise adequate responsibility for the activities of security staff;
(b) security staff too often use unreasonable force in carrying out their duties;
(c) security staff too often initiate or otherwise participate in violence towards patrons or would-be patrons;
(d) security staff too often demonstrate inadequate capacity to defuse potential violence or in fact exacerbate violent situations.[6]

The legacy of the Victorian research was the enactment of the *Private Agents (Amendment) Act 1990* (Vic.). This Act aimed to implement some of the key recommendations made by the Council specifically in relation to the training,[7] accountability,[8] and licensing of crowd controllers,[9] despite a number of reports by the Law Reform Commission of Victoria which favoured a deregulated approach to the private security sector.[10] The new legislation has now been in force for just over six years, however little is known about the perceptions of those in the security industry as to its scope and the limitations of the legislation in relation to the operational activities of security services. These issues are the main subject of this paper.

The issues presented in this paper were part of a broader study on the nature of the crowd control function at major sporting events in Melbourne. This project has illustrated some interesting aspects relating to the legal and practical scope of the private security sector, and the implications of the private sector *vis a vis* state provided crowd control services. While the two forms of control represent different interests reflecting the legal mechanisms which govern their behaviour in areas of mass private space, there is often the potential for the operational functions of the private and

5 Victorian Community Council Against Violence, fn. 3 at 56.
6 Id at 54-55.
7 Id at 63.
8 Id at 67.
9 Id at 73.
10 Law Reform Commission of Victoria, 1989, *Inquiry Agents, Guard Agents and Watchmen, Occupational Regulation Report No.5*, Melbourne.

public police to overlap. Sporting venues are one example of where this overlap is likely to be manifested in operational practice. Both the state police and the private sector perform a crowd control function at these venues, which is often complicated by the presence of alcohol and the heightened tensions associated with the environment of the sports stadium.[11]

Further, in light of the current legal regime for the private sector, and the semi-public/semi-private nature of control at these venues, several problems in legal interpretation are evident which have the potential to impinge on the role of the security industry and the public's ability to seek redress in cases where existing powers are breached. While these concerns have been addressed to a degree in the Australian context,[12] the present study has raised these issues in the context of the 1990 legislation and recent case law.

Three key issues are to be addressed by this paper. The first section illustrates the extent of the growth of the private sector in comparison to the numbers of operational police in Victoria, and contains a summary of the key provisions of the *Private Agents (Amendment) Act 1990* (Vic.) relating to the crowd control and security guard functions. Section two outlines some of the legal difficulties which emerge from the legislation in relation to crowd controllers. This is important in order to clarify the legal powers, obligations, and the nature of administrative enforcement of the provisions in relation to private crowd controllers, and to outline any avenues of public redress in the case of injury or damage caused by the actions of crowd controllers. The final section presents the results of open ended interviews with one major in-house security organisation, and one major contract organisation dealing specifically with crowd control at major sporting venues. The aim of this data is to outline the criticisms of the present legislation from the perspective of the private sector, and some of the key problems emerging from the operational overlap of security and state policing functions. The sample of security interviewed for the present study accounts for the majority of major public events at the larger sports stadiums in Melbourne, including football, soccer,

11 Canter, D., Comber, M. and Uzzell, D.L. 1989, *Football in its Place: An Environmental Psychology of Football Grounds*, Routledge, London; Elias, N. and Dunning, E. 1986, *Quest for Excitement: Sport and Leisure in the Civilizing Process*, Basil Blackwell, Oxford.

12 Shearing and Stenning, fn. 2; Sarre, R., 'The legal powers of private police and security providers', in Moyle, P (ed) 1994, *Private Prisons & Police: Recent Australian Trends*, Pluto Press, Leichardt, 259-280.

rugby, and rock concerts. Interview data has been supplemented by interviews with members of the Victoria police involved in operational policing at sporting events. The paper concludes with some suggestions of potential reform of the current legal regime relating to crowd controllers in Victoria.

## 2. The Private Sector: The Nature of Growth and Legal Controls

Since the adoption of Peel style policing services in the nineteenth century, the state has generally maintained a monopoly over the policing function and the formal response to crime and its control. Private policing is, however, challenging this position. The rapid emergence of the private sector in all Western societies in the last two decades represents a fundamental shift from state provided policing services to a more 'user pays' model[13] designed to supplement and in some cases replace the police role. The private sector is by and large aimed at increasing the measures available to individuals and corporations to prevent crime for their own interests.[14] This development is by no means new to Western democratic societies. As Nemeth[15] and Ricks *et al*[16] indicate, the nineteenth century marked the commencement of a lengthy tradition in utilising contract policing services to protect railway and other forms of privately owned commercial property from the attacks of Indigenous populations, industrial agitators, and criminals during the period of commercial expansion into the Western frontiers of the United States. Allan Pinkerton's contract forces were employed by large businesses not only to provide guards over commercial property in the 1850's, but to actively engage in 'strike busting' and other forms of surveillance activity aimed at quelling challenges by the working classes over the largely unrestricted expansion of commercial industry in the United States.

However, it is only in recent decades that the growth of private security has actively challenged the monopoly of state policing in the provision of crime prevention services and the development of

13 Wilson, P., Keogh, D. and Lincoln, R., 'Private Policing: The Major Issues', in Moyle, P. (ed.), id at 281-295.

14 O'Malley, fn. 1.

15 Nemeth, C.P. 1993, *Private Security and the Laws,* Anderson Publishing, Cincinnati.

16 Ricks, T.A., Tillett, B.G. and Van Meter, C.W. 1994, *Principles of Security,* 3rd edn, Anderson Publishing, Cinccinnati.

crime prevention strategies. The work of Davis,[17] which views security as a bourgeois commodity perpetuating the excesses of contemporary middle class hegemony and under-class marginalisation, provides a scathing assessment of the influence of this development on the urban ecology of crime and its prevention in the city of Los Angeles. Similar work by Taylor,[18] utilising ethnographic observations of the influence of security on the environment of a middle class region in the United Kingdom, indicates that such unprecedented growth of the private sector is helping to shore up the security industry as a viable commodity in the crime prevention armoury, while state police, and individuals who are marginalised from the propertied classes, such as young people, are being forced into increasingly decrepit forms of public space to enforce the law and socialise. In a rather graphic depiction of the setting in Taylor's urban ecology, alarms and security patrols heighten the fears of the elderly and other users of private services which further reinforces or justifies the need to resort to these measures of crime prevention. Meanwhile, as in Los Angeles, less public funding is devoted to improving the public environment which reinforces its status as a 'crime zone' devoid of any sense of legitimate or hegemonic 'community'.

This development represents a fundamental shift not only in the Western society's notion of 'community' but in the ways in which society classifies and responds to crime, criminality or disorder. Private security is a loss minimisation device, which facilitates the preservation of individual property holdings, and has fundamental implications for the identification of criminal behaviour as a form of individual pathology. The emergence of private forms of control, and the concomitant reduction of community funding into state provided policing and social services to deal with crime and its control, occurs in a broader social and cultural milieu which facilitates the maintenance of middle class capitalism, at the expense of the 'otherness' of youth, drug dependency and social deprivation. As Shearing points out,[19] the rationale for this development is simple: we are witnessing a fundamental shift from

17 Davis, M. 1990, *City of Quartz: Excavating the Future in Los Angeles,* Verso, London.

18 Taylor, I., 'Private Homes and Public Others: An Analysis of Talk about Crime in Suburban South Manchester in the Mid-1990s' (1995) 35 *BJ Crim* 263-285.

19 Shearing, C.D., 'The Relation Between Public and Private Policing', in Tonry, M. and Morris, N. 1992, *Modern Policing,* (Crime and Justice: A Review of Research), vol. 15, University of Chicago, 423.

a form of protection of individual rights guaranteed by the state, to a form loss minimisation which is more instrumental and personally oriented in nature. This ultimately means that the modern urban ecology in Western societies is evolving into precincts where the middle classes exist in relative safety, while 'criminal precincts' are receiving poor social amenities (in Los Angeles this includes the removal of public toilets from areas of public space on the grounds that they are perfect sites for vagrancy and drug dealing to flourish)[20], and are patrolled by the state police services which are invariably affected by the crises in publicly subsidised funding. In addition, as state police are perceived to be losing the fight against crime, vagrancy, and drug abuse, private entrepreneurs are expanding their loss minimisation services at a rapid rate.

Fundamental difficulties arise, however, where the private sector is invoked to patrol areas of mass private space. Here there is a fundamental tension between the public's interest to enjoy such property and the interests of owners in making profits from a safe and relatively crime free environment. While it is felt by some that the public may have a 'moral right' to use such property without undue interference, property owners ultimately reserve the right to regulate the environment for the optimum profit motive. Therefore, groups of young people with dreadlocks and Metallica t-shirts hanging around a cinema in a large shopping complex may not be management's idea of the optimum environment for adult or family shoppers. As a result, security guards and crowd controllers, as agents of management, are placed in the position where they have the legal mandate to enforce the commercial interests of management and shop owners renting on the premises. This may be contrary to public expectations which deem these areas as part of the public domain.

This growth of a security ethos aimed at creating an ideal and safe public environment has been evidenced in recent years at sporting events. The overlap between private security and the state's interest in maintaining public order is of particular interest at these venues. State police are present at these events in order to enhance public safety. This is basically a historical legacy; the police have frequently been called on by ground management to quell disturbances which have threatened public order and the safety of players and umpires at a range of sports venues throughout Western history.[21] However in recent years the role of the state police has

20 Davis, fn. 17.

21 Mullen, C.C. 1959, *History of Australian Rules Football: 1858 to 1958*, Horticultural Press Pty Ltd, Melbourne; Sandercock, L. and Turner, I. 1992,

been supplemented by the private sector, signifying not only a diminution of the role of state police, but the greater recognition of the increased costs of state police resources and the perceived need for large sporting bodies to minimise loss through crime prevention strategies.

Two forms of security have emerged in this regard. In the mid-1980s management at one of the major sporting venues in Melbourne began hiring their own private security guards to act as a supplement to existing state services. It was revealed through personal communications with stadium management that members of this service were specifically selected for employment on the basis of their demonstrable expertise and qualities which management deemed would provide an effective crowd control service. The result has been the maintenance of a stable core of people who are directly accountable to ground management. In contrast, the Australian Football League (AFL) first issued a tender for contracted security services in 1989. Since then one particular firm has received the tender for most football venues in the Melbourne region. Their role has not only been crowd control at football matches, but other major events at these venues. Their rights and obligations are therefore one step removed from the accountability line to ground management. While ultimately subject to the directives of management, the security service maintains a certain degree of independence from managerial influence.

Victorian law makes no distinction between in-house and contract services. The Victorian provisions make it mandatory for both forms of security to be registered. The implications of the distinction between in-house and contract security will be outlined in more depth below. For present purposes it is enough to indicate that the combination of the two forms of security outstrips the number of operational state police by around 10%. This is illustrated by the figures in Table 1.

Table 1. Number of Registered Security Guards and Crowd Controllers in Victoria, May 1994.

*Up Where Cazaly?: The Great Australian Game*, Granada, London; Warren, I., 'Violence in Sport: The Australian Context' (1994) 6 *Criminology Australia* 20-25; Warren, I., 'Soccer sub-cultures in Australia', in Guerra, C. and White, R., (eds) 1995, *Ethnic Minority Youth in Australia: Challenges and Myths*, National Clearinghouse for Youth Studies, Hobart, 121-131.

| **Private Security Industry** | | **The Victoria Police*** | |
|---|---|---|---|
| Security Licences | 4,376 | Senior Sergeants | 498 |
| Crowd Control Licences | 2,964 | Sergeants | 1,658 |
| Dual Licences | 4,550 | Senior Constables | 4,418 |
| | | Constables | 2,203 |
| | | Probationary Trainee Constables | 538 |
| **Total** | **11,890** | | **9,315** |

* Figures include operational police members from the rank of senior sergeant to probationary trainee constables.

Sources: *Private Agents Registry*, Victoria; *Victoria Police Statistical Review, 1992/93*, pp. 164-165.

In order to better understand the implications of this growth it is necessary to outline the operational roles and obligations of the private sector in light of the current Victorian provisions. It is these issues which are of greatest importance for present purposes in light of the numerical prominence of the security sector *vis a vis* the state police.

The *Private Agents Act 1966* (Vic.), as amended by the *Private Agents (Amendment) Act 1990* (Vic.), is regulatory rather than proscriptive in nature. The main objects of the Act are to extend the administrative structure regulating the industry, and to supplement the existing common law rights and liabilities of crowd controllers. The administrative structure established under the Act creates a registration scheme which is overseen by the Victoria Police. However, unlike the state system where the rights, powers and obligations of the police are clearly delineated under statute, the *Private Agents Act* of Victoria provides few insights into the rights and powers of the private sector. This essentially remains a matter for private law.[22]

22 Freedman, D. and Stenning, P.C. 1977, *Private Security, Police and the Law in Canada*, University of Toronto, Centre of Criminology, Toronto.

The *Private Agents Act 1966* (Vic.) creates a number of classifications of security services, all of which must be issued with licenses pursuant to the Act. Under s. 3 of the Act a 'crowd controller' is a person who is paid principally to maintain order in a public place. 'Public place' is defined under the same section as any place granted a liquor licence under the *Liquor Control Act 1987*, and any place where the public have or are allowed to have access, regardless of whether or not they have to pay. A 'security guard' is also defined under s. 3 as a person who works for or by arrangement with a security firm and is 'paid to watch, guard or protect any property'.

There are a number of licensing restrictions which apply specifically to crowd controllers, which are outlined under s. 19H of the Act. These include express exclusions from obtaining a licence if the applicant has a prior conviction for either drug trafficking within 10 years of the application, or for a serious assault involving a term imprisonment for six months or more. Under s. 19H the applicant must also have successfully completed an approved training course, generally consisting of a minimum of 22 hours of classes. Once licensed, crowd controllers are to wear identification authorised under the *Private Agents Regulations 1990*, which are made pursuant to s. 41 of the Act. The form of identification is outlined under reg. 17 and consists of a number, not less than 4 centimetres in height and 5 centimetres in width, with the word 'SECURITY' in letters a minimum of 5 centimetres in height. The numbers are to be coordinated at a central crowd control register which is located at the premises where the individual is working.

The provisions stipulate that a central crowd control register is to be maintained. This is seen to act as an accountability mechanism at each venue. Each controller must maintain a register which provides her or his full personal details, records of all incidents requiring the removal of any person from a public place, and any further matters required under the *Private Agents Regulations* including the signature of the crowd controller, and a record of the time at which the crowd controller starts or finishes work at the venue.[23] The register must be produced on demand to the deputy registrar or any member of the police force, and additional requirements for the register can be introduced by legislative amendment or administrative action under the provisions.

23 *Private Agents Regulations 1990*, reg. 18.

Finally, under s. 41B of the Act it is an offence to employ a crowd controller unless the individual holds a security firm or crowd controller's licence. Security companies can also be made liable for offences under the Act attributable to individuals where that person could not or did not know of the breach.[24] The Act does not apply to State police, members of the defence force, qualified legal and accounting personnel, sheriffs of local councils, or people specifically employed under a general duty to protect or guard the property of an employer, such as internal company auditors.

In sum the legislation aims to cover the activities of a broad range of crowd control functions. Its scope extends to both in-house security personnel provided by individual night clubs and other areas of 'mass public space', and contracted security services. The legislation, however, gives rise to a number of problems relating to the definition of the crowd control function. These issues have several implications for the industry itself, the police, and the general public.

## 3. Matters of proof under the *Private Agents (Amendment) Act 1990*

There are three reasons why interpretation of the provisions relating to crowd controllers is important under the Victorian provisions. First, while the legislation does not attempt to lay down detailed rules relating to the powers of private security, it does impact on the operational practice of the security industry. It creates some scope for the assessment of the lawfulness of a crowd controller's behaviour, and outlines the nature of the control function in the public domain. The Act therefore provides some guidelines for crowd controllers which impinge on the scope of their legal authority.

Second, the definition of 'crowd controller' is an important issue for policing the legislative requirements. Section 46 of the Act makes it an offence to contravene any of the provisions of the Act which is punishable by a $2,000 fine. Under s. 41B it is an offence for a person to directly or indirectly employ another as a crowd controller at any public place unless that person holds a security or crowd control licence. Thus for the purposes of establishing that an offence has been committed, it is essential that the police have a clear understanding of the criteria for proof under the Act. In most cases, the issue in question will be whether the person is required to be registered as a crowd controller or a security guard.

24 *Private Agents Act 1966* (Vic.), s.48.

Third, aggrieved members of the public may require recourse to the provisions. As indicated above, the *Private Agents (Amendment) Act 1990* (Vic.) provides few accountability mechanisms for members of the public who have been assaulted or had their rights infringed by crowd controllers at entertainment venues. The main ground for bringing a prosecution or a civil claim would be in the case of assault. In such a case it would be necessary for an applicant to prove that the actions of the crowd controller were unlawful. In exercising the rights of property owners to maintain order at an entertainment venue, a crowd controller would be authorised to use reasonable force to prevent entry or to eject a patron. This authority is traditionally authorised under the private law action of trespass. If the crowd controller was unlicensed or wrongly licensed, it may be that there is no legal authority to use such force despite express authority from the owner to eject individuals. In the alternative, it may be that the individual can prove that the crowd controller was not exercising his or her authority in a public place as defined under the Act. In both cases, the legislation creates some difficulties in interpretation for the courts of Victoria.

In each case, the interpretation of the definition of 'crowd controller' is central to establishing the legal authority of a licensed person's actions. Under the current definition there are three elements which must be proved to establish the legality of a crowd controller's actions, or the necessity for a person engaging in a crowd control function to be registered under the Act.

### A 'paid' person

Payment automatically infers remuneration for services rendered. However, it is uncertain whether payment in kind will be deemed to be payment under the provisions. Therefore, if the premises are licensed and are deemed to be a 'public place', it is uncertain whether non-monetary rewards, in the form of meals or discounts are likely to be deemed as payment by the courts. Moreover, the reading of the Act suggests that payment must be a necessary prerequisite to registration. Therefore, if a hotel is run by a partnership, and there is a rotation system among the partners for controlling who enters the premises, the absence of any formal payment in this case may preclude registration, despite the fact that the venue may be deemed to be a public place under the Act.[25]

25 Victorian Legislative Council, 1990, *Parliamentary Debates (Hansard)*, vol. 398, 1765.

### Payment principally to maintain order

It is uncertain whether payment for maintaining order covers the situation where a person purporting to execute a security function is actually employed principally to carry out tasks other than the maintenance of order, despite the fact that order maintenance may be an incidental by-product of that person's employment. The provisions suggest that in such cases registration is not required.

The following example raised in the Parliamentary debates on the legislation is indicative of the problem which arises in this situation:

> What about someone who stands outside a picture theatre? He might be a young, athletic, brawny man from the country who is 6 feet 5 inches tall and whose job it is to collect tickets at the picture theatre. Is he required to be registered...? Obviously, if there is some aggressive behaviour, he will be called upon to maintain order, but that is not his principal job; his principal job is to ensure that only people who have tickets go into the theatre.[26]

This creates problems not only for prosecuting offences under the Act, but establishing liability for injury. Once again the legislation is vague on this point.

### The maintenance of order in a public place

This requirement lies at the core of the crowd controller's function. Registration as a crowd controller is essential if an individual is employed in a 'public place' as defined under the Act. In the case of an unregistered 'bouncer' working in private, it may be that an assault has been committed if ejection occurs without the express consent of the owner of the property.

The Act provides a two tiered definition of the term 'public place'. The first requirement is that the area is granted a liquor licence under the *Liquor Control Act 1987* (Vic.). The second is an elaboration of traditional statutory definitions of the term 'public place': any place where the public have or are allowed to have access, regardless of whether or not they have to pay.[27] This definition creates two key problems.

The first stems from the requirement that the venue is a licensed premises. While most problems associated with the violent behaviour of crowd controllers have been reported in licensed venues,[28] there are many public events where alcohol is prohibited,

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26 Id.

27 *Private Agents Act 1966* (Vic.), s.3.

28 Victorian Community Council Against Violence, fn. 3.

yet still require the presence of crowd controllers. Under age rock concerts are one example. Yet the legislation appears to overlook the licensing for crowd controllers at these venues. This means that any accountability mechanisms or potential prosecutions under the legislation will be problematic at these events. Moreover, it is questionable whether a street in front of a premises granted a licence under the *Liquor Control Act*, or a car park at the rear of such a premises will be incorporated under these provisions.

The second issue relates to the demarcation between public and private space. Traditional legal definitions of public space have caused great problems for courts in Australia and elsewhere. The key issue in this respect is how the courts are to distinguish between public and private realms, particularly in cases where the public is invited to attend *en masse*, or where there is no clear cut distinction between the public or private nature of certain property. In this respect, the courts take a variety of approaches depending on the policy the law is aimed to achieve and the environmental characteristics or common uses of the property itself.

In the case of areas of mass public space, the public arguably has a legitimate expectation of unrestricted entry subject to the ultimate invitation of the property owner. The only difference between this and private property is that there is a greater degree of public use, and hence a cultural expectation that such property will be open to the general public. In the case of shopping centres for instance:

> ...the private owner has invested members of the public with a right of entry during the business hours of his tenants and with a right to remain there subject to lawful behaviour.[29]

Similar considerations have been expressed at sporting venues:

> ...any member of the public has a legitimate expectation that upon payment of the appropriate charge he [sic] will be admitted to racecourses. They are in a practical sense 'open to the public' and indeed by announcements and advertising their owners invite and seek to encourage the public to attend. This is ... an expectation by members of the public that they will be able to enjoy the right or liberty granted to them by the owner to go onto the racecourse, ie that they will be permitted to enter along with other members of the public in response to the owner's implied invitation. That expectation exists by reason of the nature of the premises and the fact that members of the public are invited to attend and freely admitted on payment of a stated charge. The fact that the

29 *Harrison v. Carswell* (1976) 25 CCC (2d) 186 at 188, per Laskin CJC.

> owner may eject them even in breach of contract, though no doubt known to some racegoers, does not detract from that expectation, nor does the fact that the owner may refuse to admit any particular person without giving any reason.[30]

Yet the law elaborating these rights is often inconsistent, and shows signs of complexity rather than coherence. Under the current legislation, it is uncertain whether the existing common law, or other statutory definitions of the concept 'public place' are to be adopted.

The public nature of a venue has been expressly defined under the *Summary Offences Act 1966* (Vic.) which governs the powers of the police to enter certain premises to enforce the state's law. This Act provides an extensive list of areas which are deemed 'public' for the purposes of the Act, including roads, parks, railway stations, public vehicles, churches, government schools, markets, auction rooms, race-courses, football grounds, and any other place open to the public whether or not on the payment of admission.[31] There are a number of court decisions which elaborate on these definitions, however courts have generally taken a divided approach in interpreting the term 'public place' for the purposes of the police role. This is indicative of a broader problem in delineating the nature of mass private property under the law. The approach of the both Australian and overseas courts in this respect, while generally favouring the powers of police to enforce the law in such areas, provide few signs of consistency on this matter.

For instance in *R v. Barnard*[32] it was held that an enclosure on a race course which was fenced off and permitted public entry only on payment of an admission fee to those with authorised membership was private property. This was because the area was under the possession and control of the South Australian Jockey Club and was generally considered by the Club and its members to be private property. The owners could thus deny access to members of the public by activating their private right of exclusion which extended to preventing police entry to enforce the criminal law.[33] Public bars during normal trading hours have, however, been deemed to be public space.[34] In the United Kingdom it has been recently held that a public car park which requires payment for

30 *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 14 ALR 519 at 535, per Aickin J.
31 *Summary Offences Act 1966* (Vic.), s.3.
32 [1884] SALR 54.
33 Id at 57, per Way CJ.
34 *Smith v. Grieve* [1974] WAR 193.

entry is a public place for the purpose of enforcing drink driving legislation, despite the presence of visible barriers designed to prevent unrestricted entry.[35] However, a private hall where there is a meeting which members of the public are invited to attend has been deemed to be a private place.[36]

In relation to sporting venues, it has been held that a race track surrounding the perimeter of a football oval which is fenced off from the public is to be regarded as a 'complete entity and as such was a public place' for the purposes of the *Public Order Act 1936* (UK). This is so even though the public are not expected to go on to the playing surface and active steps may be taken by ground management to exclude the public[37] through the provision of either private or state police services. Similarly, in *Brutus v. Cozens*[38] demonstrators who invaded a tennis court at Wimbledon were found to have committed offences in a public place. In both cases the venue was seen as a public place in its entirety. However, it is uncertain whether these criteria will be applied to the requirements under the *Private Agents Act.*

The issue, however, becomes complicated when regard is had for judicial decisions based on the expectations of the public to enter premises of a mass private nature. In a number of cases the courts in Australia and Canada have adopted three main approaches which depend on how the rights of the public are to be balanced against the rights of the owner. As crowd controllers are ultimately the agents of property owners in these venues, these decisions are crucial in exercising the crowd control function at the operational level. However, the judicial definitions do little to clarify the scope of crowd controllers under the present legislation.

The first approach represents the current majority position in Australia in respect of individual's rights to enter and remain on mass private property. Under this approach the landowner is viewed as maintaining the same rights as the individual property holder, and thus has the ultimate power to exclude patrons at its discretion pursuant to its common law rights, regardless of the presence of a binding contract between the owner and a patron completed at the point of entry. However, in the case of organisations who are governed by statutory authority the special position and powers granted by that authority modifies the organisation's position in relation to the powers it can exert over patrons at such venues.

35 *Bowman v. DPP* [1991] RTR 263.
36 *Gooden v. Davies* [1934] VLR 143; [1934] 40 ALR 177.
37 *Cawley v. Frost* (1977) 64 CAR 20 at 23.
38 [1973] AC 854.

Therefore, in the case of *Forbes v. New South Wales Trotting Club Ltd*,[39] a trotting club, in its capacity as the controlling body for trotting in New South Wales, was deemed to have special powers granted to it under the Rules of Trotting which include the power to warn patrons off its premises. These powers were seen to carry consequences far wider than matters occurring within the confines of its own land and the courses which it operates thereon. The result was that in exercising these powers against members of the public, the club must respect fundamental principles of natural justice and provide an opportunity for individuals to be heard in the warning off process.[40] The result of this perspective was originally formulated by Aickin J in the case of *Heatley v. Tasmanian Racing and Gaming Commission*:[41]

> In deciding to exclude or to terminate the licence of any such person the owner of the premises is under no obligation to provide reasons or give the person concerned any opportunity to make representations or provide any kind of a hearing. *The principles of natural justice do not apply to the exercise of private rights in respect of property. They apply to the exercise of governmental powers and particularly to the exercise of statutory powers, and also to the powers of committees of clubs in respect of members. That power is quite different from that of the owner of the premises who may use reasonable force to eject a person whose licence to remain has been revoked.*

Therefore, as long as an individual is on the premises with the permission of the owner who has a statutory authority to provide an entertainment service, the right of a patron to be present will subsist over the right of the owner to arbitrarily eject and deny the ejectee a right of reply for the decision to exclude. Interference with these rights by crowd controllers will amount to a trespass to the person.

The second approach represents the majority decision in Canada, and has been favoured by Barwick CJ in the High Court of Australia. This position recognises that in areas of mass private space the rights of the proprietor are the same as with other forms of property. The result is that the owner, despite issuing an invitation for members of the public to enter *en masse* retains:

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39 (1979) 25 ALR 1.

40 Id at 31, per Aickin J, supported by Stephen J.

41 *Heatley v. Tasmanian Racing and Gaming Commission*, fn. 30 at 538 (emphasis added).

> as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.[42]

The dissenting judgments in the Australian cases of *Forbes v. New South Wales Trotting Club Ltd* and *Heatley v. Tasmanian Racing and Gaming Commission* are illustrative of this approach. In the *Forbes* case the issue was whether the club had the power to automatically exclude a successful punter from attendance at all current and future race meetings. The majority rejected this position, but Barwick CJ held that a proprietary approach was to be favoured. The club, not only being the key body organising the trotting regulations, but the proprietor of the venue, was seen to have a unqualified right to exclude anyone. A breach of this right therefore amounts to an actionable trespass. Private security personnel can therefore legitimately exercise a right of ejection under the direction of the owner. The result for the individual patron entering the race course is:

> ...he [sic] has no right and, in my opinion, he can have no lawful expectation of being admitted, though it can properly be said that he has a reasonable expectation or it is to be expected that the proprietor will wish to permit entry for his [sic] own interest and profit and that a member of the public presenting himself at the turnstile is justified in human terms in hoping or expecting to be admitted... The applicant had no relevant legal right other than the right, if any, which a member of the public has to enter or to remain upon a privately owned racecourse. If a member of the public has, with the consent and indeed at the invitation of the racecourse proprietor entered the course he has but a revocable licence, terminable without reason ... no member of the public has a right of entry to such a course.[43]

Despite the fact that large numbers of people are invited to and do attend these venues, under this approach the owner is seen to have the requisite control over the entire area to enable it to maintain its unqualified proprietary rights. This means that the management reserves the right to impose any terms and conditions of entry it may desire, either under legislative authority or as a consequence of the common law rights attaching to private property. This is so

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42 *Harrison v. Carswell* fn. 29 at 202, per Dickson J, Martland, Judson, Ritchie, Pigeon and de Grandpre JJ concurring.

43 *Heatley v. Tasmanian Racing and Gaming Commission* fn. 30 at 522, per Barwick CJ.

despite the fact that the common law rights may be qualified to some extent by statute.

This principle was clarified in the landmark Canadian case of *Harrison v. Carswell*.[44] In this case it was held that the owner of a shopping centre had the unqualified proprietary right to sue demonstrators for trespass after they had been told to remove themselves by the centre management. However, recent developments have watered down the extent of this private right in trespass: since the passage of the Canadian *Charter of Rights and Freedoms* this right to remove must not infringe fundamental rights of protest or freedom of movement which are expressly noted in the Charter. Thus in *R v. Layton*[45] the rights of a union representative to distribute leaflets in a shopping centre facilitated fundamental Charter rights including the rights of freedom of expression and freedom of association. These rights were seen by the court to be of greater weight than the proprietary rights of the owner which are not recognised by the Charter:

> If the occupier wishes to create and maintain private property having an essential public character as part of a commercial venture, it cannot in my view escape the responsibility or the expense of preserving at least a bare minimum of its invitees' freedom of expression guaranteed by the Charter.[46]

This position does not, however, impinge on the right of a person to enter a race venue without a political motive or a motive which is guaranteed under the Charter. Thus in *Russo v. The Ontario Jockey Club,*[47] which involved a similar exclusion order as that encountered in *Forbes*' case, the patron's right of entry was expressed as being subject to the owner's ultimate right to exclude; the right of entry did not amount to a fundamental right of the individual which is supported under the Canadian Charter. Under this position, the landowner in such a case has the exclusive right at common law and under statute to decide who is allowed to remain on the land and is not compelled to give a reason when the visitor is asked to leave.

The third position is an extension of the prevailing position in Australia and has received substantial support in Australian decisions. This view indicates that the right of the property owner is modified in light of the invitation which is extended to members of the public, who have some sort of expectation of being

44 Fn. 29.
45 38 CCC (3d) 550.
46 Id at 568.
47 (1988) 43 CCLT 1.

guaranteed entry into the premises. The modification only extends during the period that the land in question is being used for public events; when the land reverts to private use and members of the public are excluded, there is no reason why the respondent's ordinary private rights may not be exercised at those times.[48] However, when the invitation is open to the public the property owner has a right to exclude individuals who do not behave according to the rules stipulated by management. As Gibbs J explained in *Forbes'* case

> An owner who uses his [sic] land to conduct public race meetings owes a moral duty to the public from whose attendance he [sic] benefits; if he invites the public to attend for such a purpose, he should not defeat the reasonable expectation of an individual who wishes to accept the invitation by excluding him quite arbitrarily and capriciously. The rules recognise the public nature of the race meeting by placing some restrictions on the rights of the owner of the course ... the effect of the rules is that on a day on which a race meeting is being held the respondent cannot use its powers by preventing, for no apparent reason, a member of the public who is in a decent condition and behaving properly from entering the course.[49]

Thus, in the case of a sporting venue, the public's right to enter is subject to behaviour which is deemed desirable by the management. In some cases this will have some form of quasi-legislative authority, in the form of by-laws, or statutory rules. The *Melbourne Cricket Ground Regulations 1909* are an example of this, prohibiting 'indecent behaviour', damage to the property, trespass onto the playing surface, drunkenness and violent behaviour.[50] These provisions are permissible, provided that they are not arbitrarily applied.

Under these principles it is incumbent upon management to provide individuals with a hearing in the event that a permanent exclusion order is sought by management. In the cases of *Forbes* and *Heatley* the central question was whether the Racing Clubs in question could, under their legislative authority, exclude individuals not only on the occasion when the order was served, but in future cases. The majority positions indicate that although the power to exclude in such a manner exists in unqualified terms under legislative authority, in exercising these powers under law it is

48 *Forbes v. New South Wales Trotting Club Ltd,* fn. 39 at 29, per Murphy J.
49 Id at 24.
50 *Melbourne Cricket Ground Regulations 1909*, regs 7-10 and reg. 17.

necessary for the club to comply with the principles of natural justice. This essentially means that the club must give the person an opportunity to present a case before the permanent order prohibiting entry is granted. Therefore, while the right to enter will be generally unqualified, a person can be permanently excluded if it is established that there has been an opportunity to present a case in their defence, and, on balance, the club favours exclusion. This right qualifies the strict common law proprietary position which has generally been sanctioned in Australia, yet still enables the property owner to have a substantial say on the presence or exclusion of individuals from these venues.

This analysis indicates the complexity of the problems arising under the current Victorian provisions. Crowd controllers, as agents of property owners, are governed by what Salter terms a 'multitude of inexplicably different decisions'[51] relating to the definition of 'public place' which does little to create certainty in the legal role under the *Private Agents Act 1966* (Vic.). This is compounded by the lack of certainty in the public's right of entry to such venues. The legislation therefore seems to complicate rather than clarify the rights and obligations of crowd controllers. The remainder of this paper illustrates what crowd controllers themselves think of the provisions.

## 4. Interview data

The interviews conducted for this research sought to obtain the responses of crowd controllers in respect of the Victorian legislation. In particular, the interviews focussed on three main features of the legislation:

(a) What are the powers of crowd controllers?
(b) How is the private security industry made accountable under the legislation?
(c) What are the broader relationships between private security and the state police?

While further research in this area is required, there are a number of clear trends which emerge in the current legal regime in Victoria. These concerns have also been echoed by police interviewed on this topic.

The Act was viewed as an important step in developing an accountability mechanism in an industry which is still growing and is facing some mixed responses from the public. However, there

51 Salter, M., 'Judicial Responses to Football Hooliganism' (1986) 37 *NILQ* 280 at 284.

was a general concern expressed that the provisions do not go far enough. Importantly, the implications of the legislation varied depending on whether the respondent was an in-house or a contract security agent. The general perception of in-house respondents was that the registration provisions were a mere formality and did not affect existing measures of accountability between crowd controllers and management. However, as one contract security officer indicated, the legislation is limited in its scope in defining the powers of contract security:

> There were so many loopholes then and I still think...there are still too many shitheads in the industry itself...its a lot cleaner, its a lot better, its going too slow. It took off really quick, it got to this point, now its falling rapidly. They've got to maintain that standard. They've got and keep on going. We've got to actually find out more information and go out and deal with the pubic a lot more, a lot more on the...job training I think.

As noted above, there are a number of special provisions which apply specifically to crowd controllers. Yet it was felt that the roles of crowd controller are not clearly defined. In particular, confusion was expressed at the demarcation between the security guards and crowd controllers under the legislation. This was seen to stem from the failure of the Act to consider the practical similarities of the operational functions of the two forms of security. The result was a state of legal uncertainty as to the roles of a crowd controller and a security guard which led to confusion over the powers of contract security to exclude individuals from premises at the operational level:

> Because you've got definitions for a crowd controller and a security guard, they're two different jobs. One requires you to wear a number which is a crowd controller, a security guard doesn't wear a number. A crowd controller's got the right to throw someone off the premises, whereas a security guard's got the right to *escort* them off. If they won't leave, you have to call the police to escort them off. Its very difficult. Each site demands the definition to be outlined. A lot of shopping centres have gone from having security guards to having crowd controllers because you must wear a number if you want to escort somebody off. You must be identified with that security number, which is a certain measurement to throw somebody off. So we need certain definitions. There have got to be a lot more definitions than what we have now. A lot of the guards in the industry are confused. Its defined to them in their course...[but] a lot of it is learnt out in the field...and

> that's wrong because you've got lawsuits, people suing, liability. You've got people suing because they get hurt at a venue, and they sue us, and we've only got a certain amount of rules we can follow before we get into trouble.

Perhaps the most important feature to emerge, however, is the definition of 'public place' under the Act. As noted above, the concept of public space is pivotal to the crowd control role. Yet the legislation provides little guidance as to the extent and scope of this concept. While the distinction was seen to make little difference to in-house operations, given the ultimate connection between in-house security and the venue operator, these issues are problematic for contract security especially given the different rights, liabilities and accountability structures governing their role. The difficulty is particularly pronounced in areas of mass public space, where there is often a private owner but members of the public are invited to attend *en masse*:

> Are the night clubs classified as a public place or are they classified as a private place? Because once you get inside that door does that become a private area, and what goes on inside that door to do with the venue or is it still to do with the public because the public are invited in there? Or is it because the public pay to get in there so they are paying a membership basically, so are they then becoming members of that club. But then is it the same as the football? They have to pay money to go and watch it. It's not like they go down to one of the local parks here and watch an event there, they're not paying they're just going down there because its a public place. But then is the football at the MCG, once you get inside the gate, are you then part of the MCG? Its never really defined...it comes down to the ground operator themselves [sic] because they are employing contract security so really if there's a problem to say who's allowed to do what, the problem lies with them because they're the ones that really have to work out how they want to control it.

While operationally these issues made little difference once the contract was granted, they had an important impact in terms of obtaining a security licence. For the individual wishing to obtain a licence it was often difficult to work out whether to register as a crowd controller or a security guard. Moreover, while the roles were similar, the Regulations proscribed different requirements and had different legal ramifications. The most common solution was for those in the industry to obtain a dual licence (see Table 1 above).

The impact of these legislative measures was compounded by the lack of consistency in managerial practice. It was felt by members of the contract firm that the aims of management were not always consistent, particularly in relation to the classification of areas as public or private space. It was felt that the legislative regime did little to improve this position. As one respondent indicated, the management position in relation to allowing members of football crowds onto the playing surface at the Melbourne Cricket Ground varied at different times during the season. This caused confusion over operational practice at this venue:

> The problem is that when you get down to that sort of area, again, there's sort of no real concrete guidelines. If they said every sporting venue, you know, if the public aren't allowed on if its not a public area. The public don't go on there full stop. You know they don't go on there after the game to have a kick or do they? That's the other thing the MCG does. Sometimes you are allowed to go on there and sometimes you're not depending on the ground conditions. And generally the public don't know that. They may go one week when they are allowed on and the next week, `cause the ground's wet and the ground management say you're not allowed to go on this week. How do 50,000 people know that that week they are not allowed to go on?

The result is that while it is just as necessary for both patrons and security to be aware of their rights of entry onto the playing surface, management did little to assist in clarifying this issue on a consistent basis. This confused the position for both patrons and security making any reciprocal knowledge of their rights which facilitated the crowd control function difficult to achieve.

These issues were not as pronounced in the case of the in-house security staff interviewed. The security service in this case was viewed as a direct agent of management. As such, there was a clearer demarcation of roles which the management ensured was communicated to individual crowd controllers. The licensing mechanism was a mere formality which did nothing to affect the rights and obligations of security in relation to management. As ground management in this case indicated, 'security concerns are management concerns'.

The differing levels of proximity to management impacts on the powers of the two forms of security. In the case of contract security the issue was extremely complicated. As ground management placed little emphasis on delineating the powers of security personnel, there was often confusion as to the scope of the powers of crowd controllers. While venue by-laws often indicated that

management had the right to refuse entry, it was generally difficult for security to ascertain when it was legal to eject a patron once that person had entered the venue. Under current by-laws ejection is expressed as a police function,[52] which means that usually crowd controllers will call on the police to carry out any ejections or arrests. This problem was, however, most evident where there were no local by-laws indicating the scope of the rights of security. In that case, traditional common law concepts relating to the revocation of licences had to be referred to. This created problems for security services, because the laws on this area are not contained in an accessible form for the average security person to consult.

As one security guard indicated this lack of legal clarity has implications for aggrieved persons if a civil claim is to be made. The key issue for a litigant, and the court, is to decide who is the action to be brought against, particularly when the roles of the security guard are not clearly defined under the legislation:

> When it comes down to who's going to sue who I think that whoever the venue operator is, is where the buck stops. Like if it was the MCG I think it would come to the Cricket Club itself, I think, because it's their venue. I think if it was a football ground like Footscray or whatever, if it was directly an AFL problem then they would obviously try and sue the AFL. Or they would sue the ground itself, the ground management, because legally that's where it happened. I mean we would have some responsibility because we're contract security, but because we are contracted I think that what would happen to us is that we would just cease to be there. And I mean all companies are covered under their own insurance, public liability and whatever as the grounds are, so you're virtually doubly insured. But I think the grounds would take the responsibility for it. You're talking in a very broad sense though...if you got down to specifics then you would go to court and we would say who was directly responsible and fight it out there. But as we were saying...the way its set up is very, is quite vague, a very grey area in a lot of respects, because you don't really know for sure exactly where you stand as far as the legalities lie.

While there may be some recourse for individuals, the legislation does not go far enough in assisting members of the public who may have a valid claim against ground management or a security agent which requires redress. While insurance held by the security company may cover the cost, it is not compulsory under the existing law.

52 Fn. 50.

Management, however, did not always leave the operational issues up to the contract firm to implement alone. In some cases, such as major rock concerts involving international acts, management actively employed additional measures to enhance the clarity of the roles of contract security. However, this was not done in the routine events, such as weekly football matches. In these cases, it was felt that more initiatives were required to bring management, security and the police together on a concerted basis. As one contract security guard indicated:

> At the football everybody usually just rolls up and says this is it, go to work. We've got our own set, we call them operations orders, everybody's got a place to be in, everybody's got a radio and everybody's got a radio call to use and usually it works by experience. If you've worked the ground before you'll know what to do.

This feature links in with the final factor to emerge from the interview data; the absence of liaison between police and private security in operational practice. While in theory the roles of the two are separate, concern was expressed by both security services and the police that the absence of liaison had the potential to impinge on the roles of each organisation at the operational level. The result in practice is a distinct set of approaches, which, given the overlap of operational functions, had the potential to cause problems in an environment such as a sporting event.

In the case of the in-house security service the clear directives of ground management had assisted in bridging the gap between police and security at the operational level. A ground manager interviewed indicated that a concerted effort had been made at one particular venue to encourage liaison between operational police and security in order to ensure that there was a clear demarcation of the roles of each. The result was that both the police and security employed at events at this venue were made aware of their responsibilities in relation to each other, and if any concerns relating to management were expressed by either party there was usually consultation between the police and crowd controllers. While it was indicated that it took some time for this liaison to become viable at the operational level, two years of experience had shown that a coordinated crowd control effort could be reached between police and security at events at this venue.

In the case of the contract service, however, it was only in the case of major events where liaison was encouraged. This was seen to be an issue of concern for both police and security personnel. As

one police officer with 10 years operational experience at sporting events indicated:

> I think we should (liaise with security). They're there to police the crowd as well, so are we, and we can get high and mighty and say we're trained police officers, and they're security guards trying to look after police, we're trained in this, they're not really, but I think they've really got to work together. We've got to work together to get things done, to get it done properly. You say "hey security guards, you're overstepping the mark because you hit him", or "hey why didn't you do more of this? Why don't you do the gates instead of us doing the gates?" We should be working out what we're going to do and what the role is there, where the responsibility is but not the same as the police, it can't be...they can be there say for the gates, if there's a problem with the ticket checking you can say "right mate, you stay here...this is how we work it out"... Its not up to him to go moving around. I think he's got to call the police in.

Members of the contract firm also indicated that liaison was necessary, but in practice this was a matter for the individual crowd controller or police officer to initiate. Management did little to promote increased liaison to facilitate both the police and the security role. As one security officer indicated:

> It's [a] very 'see how you go' attitude, and it's up to the individual. It's up to the individual police and the individual security that are working in a similar area how they get on. They can either ignore each other or they can work together. Its just a very individual thing. And it also depends on what their instructions are too from their seniors on the day to say what they are going to do. If their seniors have got a bad attitude towards security then obviously their minions will have a bad attitude to security as well.

The prevailing informal overlap between the police and security function was seen to require clarification to encourage greater efficiency in controlling a complicated environment. Failure to do so was seen ultimately to compromise the safety of spectators at these events.

## 5. Discussion

As is evident the crowd control function in public areas involves a complex interplay of statutory, judicial and managerial concerns. The failure of the legal system, however, to synthesise these positions creates a number of problems for the private sector, the state police, and ultimately the patrons of entertainment venues.

Existing legal uncertainty of the crowd control role is merely complicated by the current provisions in the *Private Agents Act 1966* (Vic.). Failure to clearly delineate the roles of security compounds the operational problems of policing environments which are potentially hazardous, given the presence of large crowds in an emotionally charged atmosphere such as a sporting venue or rock concert. This can only complicate the mechanisms in formally maintaining order in these environments.

The legislation appears to only go part of the way in assisting the private sector in the crowd control function. While the regulatory mechanisms provide for some accountability in a largely unregulated industry, the definition of 'crowd controller' does little to clarify the legal rights and obligations of registered persons. Thus the powers of the police and the public to implement their rights and obligations under the law are vague and involve a complex range of judicial approaches which do little to ensure confidence in the existing provisions.

While the rights of owners of private property remain relatively clear and are preserved by the judiciary, difficulty arises where the distinction between the private and the public realm becomes blurred. In such cases the role of the private sector essentially remains undefined under the *Private Agents Act 1966* (Vic.). The judicial approaches on the matter, as exemplified by the majority decisions in *Forbes* and *Heatley,* do little to rectify the situation. The inconsistencies between the notion of public place for the purposes of police enforcing the criminal law, and the passage of exclusion orders by management in areas of mass private space simply complicates the matter. Recourse to decisions implementing criminal law enforcement policy is hazardous, and perhaps is not advisable given the differing policy objectives which exist between the theoretical premises behind the criminal and civil law. It appears that in general, the criminal courts are likely to favour a definition of public place which facilitates the execution of the police role in enforcing the criminal law.[53] This does little to clarify the issue of public place under the law of property or in the civil arena in Australia. It is reasonable to assume that applying criminal law enforcement theory to the issue of asserting a right of entry into mass private property is therefore fraught with inconsistencies.

One way in which these issues could be potentially resolved would be the adoption of a Charter of Rights, similar to that of Canada, which outlines concrete notions of the rights of individuals

53 Salter, M., fn. 51.

*vis a vis* the rights of owners of private property. Whilst the Canadian Charter does not overcome the problem of litigating for the interpretation of contentious conflicts of rights and obligations, it appears that such a development at least allows for the clarification of individual and communitarian rights in relation to personal integrity and the right of entry into privately owned property. Therefore, in Canada, a person who feels they have been aggrieved by the arbitrary exclusion of a shopping centre manager at least has the potential to assert an identifiable right to question such an action, whether it be in expressing freedom of protest, or exercising a right of free movement. The courts, under a system of a Bill of Rights, can balance the competing interests of owners and occupiers of mass private property, by assessing the competing legal interests of each which are stated in a concrete form. This is far preferable than the current situation in Victoria, where it seems that legislative definitions, and judicial interpretations of decisions relating to private and broader community rights, are stacked in favour of property owners. Under the current system of interpreting rights in Australia, the decisions suggest that private proprietary rights are substantially more defined than existing rights of individuals. Absence of a clearly delineated alternative rights framework empowering patrons with a countervailing right of entry, free movement and protest, simply tilts the legal balance in favour of the property owners which can lead to potential injustices, and the complex justification of implied rights which are confusing and difficult to follow.

One further way to negotiate this problem would be to pass uniform by-laws to deal with rights of entry and removal at all sporting venues and other areas of mass public space. From a law enforcement viewpoint, this development would have several distinct advantages over the current system. The rights of removal of patrons would be concretised in writing, whether they are to be exercised by the state police or security personnel. Moreover, the obligations of the public on entry would be clearly delineated, fostering a sense of certainty as to the legal limits of inappropriate behaviour. However, despite these matters of efficacy, the approach to the issue of by-laws on mass private space remains contentious. It would theoretically be quite easy for these laws to be passed without substantive and reasoned public debate from all parties concerned (property owners, police, security personnel, and members of the public). The dominance of management policy in determining the nature and scope of these laws may mean that certain community groups which have legitimate concerns in the

broader debate on individual rights and free movement are excluded from the law making process. Recent developments at Southbank in Brisbane suggest that by-laws can have potentially exclusionary effects, and as such, their invocation as a primary and global policy measure should be treated with caution.[54] However, the decision of the majority of the High Court in the case of *Forbes*[55] could be seen to temper the adverse effects of security personnel carrying out the directives of management in an arbitrary fashion against members of the public. Under this decision, legislative authority to pass by-laws generates the need for management to comply with principles of natural justice in deciding to exclude patrons from areas of mass private space. This qualification of existing property rights of owners and stadium management can work to temper the negative effects of arbitrary powers to exclude individuals from mass private space, and can ensure that an aggrieved citizen can assert some rights of free movement *vis a vis* management. Whether this occurs in fact is debatable, and problems still may arise given the piecemeal, case by case approach adopted in this area of administrative law.

The *Private Agents Act* also makes some arbitrary and confusing distinctions in its scope for regulating the private security sector. The requirement for a public place to also be licensed means that a number of venues, particularly those involving large populations of young people, do not require the registration of security personnel. While concern has been expressed that not all licensed premises having private security personnel are dangerous environments, the lack of reach of the provisions in non-licensed venues is cause for concern. Moreover, the inability of the legislation to cater for those who have a crowd control function which is incidental to a person's main employment role also needs to be addressed.

The interview data reinforces the limited scope of the legislation. While the legislation is merely a formal requirement for the in-house service interviewed, there are deeper problems relating to the contract security industry. If management lacks the vigilance to clearly define the roles of security or to encourage liaison between security and the police, problems relating to the power of the two control organisations may emerge. In the in-house service,

54 Murray, G., 1995, 'Gangsters on the Park and at the Bowls Club', paper presented at the First National Summit on Police and Ethnic Youth Relations, National Police Ethnic Advisory Bureau, International House, Univeristy of Melbourne, July 7-9.

55 Fn. 39.

an active role was played by management which worked to resolve some of the potential problems of overlapping functions. This feature requires greater practical impetus in relation to contract services. In environments such as sporting events, where the potential for large scale disorder to occur can have devastating results, uncertainty in legal powers, or unnecessary overlap of control roles can have the potential to compromise crowd safety.[56] The ultimate effects of this will be felt not by the security services or the police, but the patrons of these events.

Where the lines of accountability between management and service delivery are more remote, there needs to be greater clarity in the operational roles of crowd controllers. Legislative reform ideally should take this into account by outlining the legal powers of the industry to promote greater efficiency, and to facilitate accountability for the benefit of the general public. Formal definitions of the scope of the powers of crowd controllers, similar to those of the state police, should be encouraged to supplement existing regulatory and contractually based provisions and to improve accountability of the industry. This, it is felt, will enhance the professionalism of a rapidly growing industry[57] and would help overcome many of the confusing matters of technical legal interpretation which emerge principally from the use of the term 'public place' in the definition of 'crowd controller' under the current provisions. Moreover, legislation promoting greater management input in clarifying the obligations of crowd controllers, and making these issues known to the public should also be encouraged. The current system, which relies primarily on the civil courts for redress can often be a costly and inaccessible avenue for aggrieved individuals to adopt, particularly where there is no guidance as to who will be made liable, and individuals are claiming against large corporations with the monetary power to afford protracted litigation.

Finally, the results also highlight some concerns over the nature of the legislative process itself. It appears evident that problems associated with violence and accountability in the crowd control industry have been cause for concern, yet the research which lead to the enactment of the current provisions did little to illustrate the concerns of members of the industry itself. The absence of a clearer legislative goal appears to have resulted in a somewhat haphazard

56 Coleman, S., Jemphrey, A., Scraton, P., and Skidmore, P., 1990, *Hillsborough and After: The Liverpool Experience*, First Report, Centre For Studies in Crime and Social Justice, Edge Hill College of Higher Education, Lancashire.

57 Nemeth, C.P., fn. 15.

approach to legal reform which has created more uncertainty in the legal regulation of the private sector than was anticipated. The result is that a growing industry which is playing an important role in the current crime control debate is ultimately regulated by complex, and often dated common law principles. It remains to be seen how future research and legal reform will impinge on this complex, but growing area of law.