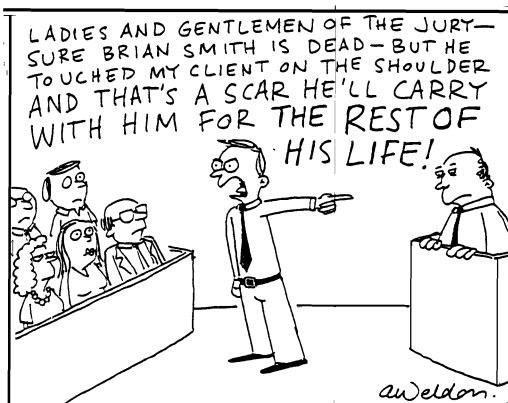


# TRANSGRESSIVE SEXUALITIES and the HOMOSEXUAL ADVANCE

Nathan Hodge

***Rigid and outdated stereotypes illustrate the need for queer notions of criminal defences.***



In the past five years Australian common law has seen the advent of a new criminal defence. In murder trials the homosexual advance defence has been increasingly argued in an attempt to reduce or nullify the culpability of the accused. Paralleling this rise is the controversy surrounding its use. The concern is that in some murder trials with an element of anti-gay bias, the perpetrators have received unreasonably light sentences. The reason for this seems to stem from the construction of the (male) victim as a homosexual and the (male) perpetrator as a heterosexual.

Since 1993 there have been 13 cases in New South Wales in which a homosexual advance has been alleged and used as the basis of the criminal defence. Of these 13 cases there have been seven jury verdicts in which the homosexual advance has been alleged. Of these seven:

- only one resulted in a murder verdict (*CD*);
- two resulted in an outright acquittal (*McKinnon* and *Bonner*);
- three resulted in a verdict of not guilty of murder but guilty of manslaughter (*Turner*, *Dunn* and *Chaouk*); and
- in the seventh case of *Green* the defendant was found guilty of murder in his original trial; he appealed and was rejected by a majority of the New South Wales Court of Criminal Appeal. *Green* subsequently appealed to the High Court where a majority ordered a new trial.

In the other six cases the defendant has pleaded guilty: one to murder (*McGregor*), four to manslaughter (*Jacky*, *G Diamond*, *PA* and *Chapman*), and one to malicious wounding (*Stevenson*).

#### Case Citations

*CD*, unreported NSW Sup. Ct, 10/2/95

*McKinnon*, unreported NSW Sup. Ct, Studdert J, 15/11/93–19/11/93

*Bonner*, unreported NSW Sup. Ct, Dowd J, 15/5/95–18/5/95

*Turner*, unreported NSW Sup. Ct, Grove J, 6/4/94–11/4/94

*Dunn*, unreported NSW Sup. Ct, Ireland J, 21/9/95

*Chaouk*, unreported NSW Sup. Ct, 11/8/93

*Green*, unreported NSW Sup. Ct, Abadee J, 7/6/94

*Green*, unreported NSW Court of Criminal Appeal, Priestly JA and Ireland J, and Smart J in dissent, 14/12/95

*Green*, unreported High Ct, Brennan CJ, Toohey and McHugh JJ, and Gummow and Kirby JJ in dissent, 7/11/97

*McGregor*, unreported NSW Sup. Ct, Newman J, 9/10/93

*Jacky*, unreported NSW Sup. Ct, Campbell J, 5/3/93

*G Diamond*, unreported NSW Sup. Ct, 15/4/94

*PA*, unreported NSW Sup. Ct, 10/2/95

*Chapman*, unreported NSW Sup. Ct, 4/10/94

*Stevenson*, unreported NSW Sup. Ct, Studdert J., 15/10/94–18/10/94

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The homosexual advance defence relies on two alternative substantive defences: provocation and self-defence. The defendant argues the victim's sexual advance was conduct which was either sufficiently provocative for the accused to lose self control and commit murder, or the advance justified the use of deadly force. The underlying basis of this line of argument is that the use of fatal force is excusable/justifiable under the principles of provocation or self-defence. In this way defence counsel have successfully reduced the charge from murder to manslaughter, or have successfully produced a verdict of 'not guilty'.

### The production of the hetero/homo binary

In the criminal justice system various modes of thought can be perceived which indicate a rigid conformity to traditional essentialist modes of analysis. More specifically within the context of the homosexual advance defence there is an endemic adherence to the hetero/homo binary. This can be seen as a concerted attempt to centre heterosexuality and to categorise all other peripheral sexualities as being primarily homosexual.

The court's essentialist script manifests in various mechanisms which operate throughout the trial. Thus the court will adhere to the hetero/homo binary by adapting peripheral sexualities within a homosexual framework so heterosexuality is kept in opposition to the (homo)sexuality under investigation. In another mechanism the court will vest various characteristics of the homo category to the victim where his sexuality is somewhat ambiguous. The construction of various stereotypes to confirm essentialised notions of sexuality and the assertion by the defendant of his complete heterosexuality are two other important ways in which the binary is maintained.

The paradoxical and heterosexist natures of such a binary are grounds to denounce it, and introduce the notion of queer as an attempt to resist such categorical thinking.

### Through the assimilation of other sexualities

In the New South Wales cases involving a homosexual advance, the victim has not necessarily been an out gay male. For example, shades of paedophilia have arisen. The treatment of such deviancy involves a characteristic disregard for self-identification. Instead their identity is assimilated to, and internalised within, homosexuality.<sup>1</sup>

One interesting feature of the homosexual advance defence is that all cases involve an older male victim and a younger male defendant (for example, *McKinnon*, defendant aged 22 victim aged 46, *Jacky*, defendant aged 25 victim aged 50, *Stevenson*, defendant aged 23 victim aged 40 and *Turner*, defendant aged 17 victim aged 64). The older male is characterised by his attraction to younger men. Though overtones of paedophilia arise in this context, the primary sexuality under investigation remains homosexuality.

Perhaps the best example of this is *Turner* where the victim, 'Old Kev', was presented as a dirty old man whose perverted reputation was widely known.<sup>2</sup> On the other hand the defendant was presented as the much younger (17 years six months at the time of the homicide) respectable, working class Aussie battler.<sup>3</sup>

A number of witnesses spoke of Old Kev's interest in young boys. One teenage male told about an incident where he and some other schoolmates were invited over to Old Kev's one afternoon. Old Kev started to talk about masturbation and began to masturbate with his hand and a milk bottle

in front of them (trial transcript at 86). Another young man spoke of a time when he stayed over at Old Kev's and woke up to 'Kev touching my body and masturbating over my face' (at 106). A third incident admitted into evidence was from a neighbour who had an argument with Old Kev. He allegedly pointed to her young son and said 'While you are at it watch him, the one with the blond hair because I could fuck him up the arse' (at 94). Another witness spoke of a book, which was given to her to photocopy for Old Kev. The material included a section on paedophilia.

Despite evidence of such tendencies that might lead to a label of paedophile, the court's characterisation of Old Kev was influenced more by other 'perversions'. The court's opinion of Old Kev's reputation 'for interest in sexual matters' (sentencing judgment at 3) involved homosexuality as much as paedophilia, and treated the two concepts as indistinguishable. In fact Grove J pointed out that the homosexual pornography found at the victim's house corroborated the assertion of the advance towards the minor (at 3). Thus the assimilation of paedophilia within homosexuality was total, so that evidence of homosexuality was used to support an assertion of a sexual advance to a minor.

While there are many sexualities which transgress the 'heterosexual' norm, the criminal justice system is unable to distinguish many of these from homosexuality, and will confuse and combine them with homosexuality. In doing so they place them in opposition to heterosexuality to arrive at questionable results.

### Through its use in categorisation

The law's inability to distinguish peripheral sexualities from homosexuality can arise in a different way; instead of subsuming another sexuality within homosexuality, the hetero/homo binary may be used to categorise the victim.

In *Dunn* little is known of the victim except he was a 'bloke dressed in girl's clothes' (trial transcript at 74). The defence assumes the victim to be homosexual. The homosexuality of the victim is introduced in the defence questioning of witnesses by using words such as 'poofter' (at 61). In the closing argument, defence counsel said:

... [the victim] heard voices in his head and a person unfortunate enough to suffer that kind of affliction manifesting itself perhaps in the kind of dressing *and behaviour* that we can gather a little about ... [at 474, emphasis added]

The victim's behaviour, according to the defence, is the attempt to have sex with the defendant. The proximity between transvestism and the homosexual behaviour, and their link to mental illness is evidence of the close connection counsel draws between the two. The reasoning is that with evidence of one transgression (transvestism) comes the existence of the other (homosexuality), so that if the victim wears female clothes he must therefore be homosexual. This 'logic' delegitimises the victim's transvestism as a separate identity and reduces it to an aspect of his homosexuality.

Binary classification arises in another way in *Green*. An interesting element in this case was the repeated description of the sexual advances as homosexual advances (see especially the judgement of Smart J in the Criminal Court of Appeal and Brennan CJ in the High Court), as opposed to 'a non-violent sexual advance of a homosexual character' (Kirby J at 39). In this way the Bench is defining the victim through his behaviour. In effect, the judges are saying that if a man has sex with a man he cannot be heterosexual, and so must be homosexual. This reflects the desire to classify

every person into either a heterosexual body or homosexual body.

The importance of the use of the phrase 'homosexual advance' as an indication of judicial essentialism becomes apparent in light of the conclusions of Smart J and Brennan CJ. Both judges accepted that a non-violent sexual advance of a homosexual character was sufficient provocation to reduce murder to manslaughter. On the other hand the judgment of Kirby J explicitly and emphatically rejects this notion.

### *Through the use of stereotypes*

Part of the hetero/homo play is the use of stereotypes to reinforce essentialist notions of homosexuality. Two examples of this are the representation of the victim as the predator (with a corresponding construction of the defendant as prey), and the representation of the homosexual as a creature at the mercy of his own lust.

Just as the hetero/homo binary informs the court's ultimate decision, so too the predator/prey binary informs the hetero/homo binary. The first step involves constructing the victim as the predator, and the defendant as the prey.

In *Bonner* the predator/prey binary was firstly achieved with a comparison in size of the victim and the defendant. Defence counsel questioned each witness as to the size of the victim (see for example the cross-examination of T. Benz, trial transcript at 6-10). In this way he was constructed as the larger man who was over six feet tall. This was then compared to the 'slim and slight' defendant (at 16).

By asking leading questions the defence counsel could depict almost any picture of the victim he chose. For example the comparative sizes of the victim and defendant were linked via this binary in one question to the medical examiner:

If you assume there was a struggle, that the larger man has grabbed a smaller man and the smaller man gets a knife and thrusts it at him ... [at 79]

In *Bonner* the predator/prey binary was also constructed through various witness observations of the defendant's behaviour. For example a barman at the hotel the defendant and victim drank at indicated he had never known the defendant to be violent.

*Bonner* is only one example where the victim is cast as the predator. As previously argued the paedophilic aspects in *Turner* were not used to construct Old Kev as a paedophile, but as a homosexual. This was achieved through evidence of his attraction to boys, and then this attraction was portrayed as predatory through the instigation of the four events previously noted. It is the predatory aspect of paedophilia that reinforces the boundary within the hetero/homo binary.

The predatory construction can also be seen in the defendant's version of events in his cock statement in *McKinnon*. He asserted he only went to the victim's house because the victim offered to sell him some marijuana. At the house the defendant stated that the victim grabbed him, pushed him onto the bed and pulled his pants down.

In this version of events the defendant is portrayed as the innocent prey lured into the victim's clutches through the promise of marijuana and in doing so ending up the innocent victim of sexual assault.<sup>4</sup>

In *Green* Brennan CJ builds up the image of the victim as the predator by using violent language to describe his actions. He said that provocation may be found in the

'attempt to violate the sexual integrity of a man' (at 5). He continued by saying that the victim's actions were revolting (accepting Smart J's language in the Court of Criminal Appeal), and thought it open to accept that the victim was trying to coerce the defendant into providing him with sexual gratification. As such, he concluded the victim 'was the sexual aggressor' (at 6).<sup>5</sup>

The judgment of Brennan CJ is interesting as the predator/prey binary is constructed in a different way to that in *Bonner* and *Turner*. Instead of using various depictions of the victim and defendant to construct the binary, he uses the construction of the victim and the ideological boundary between the predator and prey. Two main factors in this case are used to devise the boundary: the physical conflict between victim and defendant, and the essentialist script inherent in the criminal justice system. These two elements are implicitly combined in the sub-text to form the other factor necessary to introduce the predator/prey classification.

Significantly in this case, Kirby J rejected the predator/prey binary to arrive at a contrary conclusion rejecting the homosexual advance defence. For Kirby J the facts proved that the victim was not a predator. This was because the defendant 'was very soon able to achieve physical superiority over the deceased' (at 43). The idea the defendant was a prey to the victim was not sustainable because the defendant was physically fit; this was indicated by the 'course in which his violence took' (at 43). While Kirby J accepted that a sexual advance that is homosexual in character may be confronting, he did not accept that the facts indicated any threatening overtones on the part of the victim. Kirby J's judgment indicates the importance of establishing the predator/prey binary for the success of the homosexual advance defence.

Therefore, in some cases, the establishment of the predator/prey binary is a necessary device for the success of the homosexual advance defence. One result of the presence of this binary in a criminal trial is that it blurs the distinction between a sexual advance and an attempted sexual assault. In cases involving the homosexual advance defence it may be hard to prove the latter. However, when a sexual advance is combined with predator/prey imagery it moves the characterisation of the advance from amorous to violence/violation. The second result of the binary follows from this, in that the new characterisation makes it easier to shift blame for the death of the victim from the defendant to the victim.

Constructing the predator/prey binary supports an essentialist analysis of sexuality because it both draws upon and feeds the insecurities inherent within heterosexuality. These are the insecurities that require a barrier between inside and outside, and which require the protection of the barriers. These insecurities shore up the 'ontological boundaries by protecting [heterosexuality] from what it sees as the continual predatory encroachments of its contaminated other, homosexuality'.<sup>6</sup> Thus the use of predator/prey imagery supports the hetero/homo binary by feeding those insecurities which require a strict border between the two.

Another representation made about homosexuality is that all homosexuals are lust-filled creatures incapable of controlling their libido. Perhaps the most explicit example of this is seen in the defence closing arguments in *Bonner*:

... there would appear to be no dispute that Tom [the victim] was homosexual ... with the propensity with which that sexual orientation entails. What are the propensities? ... Male homosexu-

ality is not always just genuine love but it also involves lust, ravishing and it involves just as powerful a physical sexual component. [trial transcript at 140]

This shows that by labelling the victim as homosexual, the defence can then suggest their own definition. Two important aspects of this definition can be commented on. It first relies on a distinction between homosexual and non-homosexual people and so is an essentialist definition. Second, homosexuality is defined exclusively by behaviour and so is defined by performance. A behavioural definition allows defence counsel to distinguish between the desire men and women feel, and the powerful 'physical sexual component' male homosexuals feel. This second distinction is the source of the representations of uncontrolled male lust that the defence counsel uses to characterise homosexuality.

#### *By the defendant*

The defendant, through the affirmation of his own heterosexuality, upholds the hetero/homo binary. The important marker is the language of this affirmation. Heterosexuality is defined as something that is not homosexual. In *Bonner* the defendant's opening sentence in his dock statement was:

I want to make it clear, I am not homosexual, I never have been homosexual and never had a homosexual experience of any kind. [at 90]

This affirmation is again stressed at the end of his statement.

#### *On the whole*

It's important to realise the cases do not rely on any one mechanism to set up the hetero/homo binary. Each uses any number of these devices. For example in *Green*, Brennan CJ easily set up the binary in listing factors which supported the defendant's claim for provocation:

The trust which the appellant had placed in the deceased before the deceased got into the appellant's bed ... the appellant's response to the deceased's first homosexual advance that 'I'm not like this', the deceased's persistence in his homosexual advances, his grabbing and pulling of the appellant, his touching of the appellant's groin ... [at 3]

The power of this description lies in the interaction of each inscriptive mechanism. Significantly Brennan CJ begins his inventory of the victim's actions by summarising them as homosexual advances. In doing so the victim's actions are implicitly taken to be performed by a homosexual. This prejudging colours the subsequent description of the victim's actions.

A second mechanism evident in the passage involves an implementation of the predator/prey binary. Brennan CJ achieves this by focusing his description on the victim's actions as though all were initiated by the victim. It was the victim who got into the defendant's bed, the victim made a homosexual advance, and it was the victim who then persisted in grabbing, pulling and touching the defendant. Up to this point the defendant is not shown as inciting events — his actions are mere reactions to the victim. In this way the victim is portrayed as manipulating the scene. It was only with the defendant's reaction of losing self-control that the victim lost his power over the situation. Thus the victim, as the instigator of events, is made into a predator who preyed on the passive victim. The proximity of the initial characterisation of the homosexual advance with such aggressive imagery is used to transpose the predator/prey binary into the hetero/homo binary.

The final mechanism used to establish the hetero/homo binary in this passage involves labelling the victim as heterosexual. This is achieved by including a protestation by the defendant that 'I'm not like this'.

The power of this protestation to set up the binary is multiplied by linking it with the homosexual advance of the victim. This is achieved by containing both within the same provocative factor. By linking the appellant's protestation with the victim's advance, the defendant is physically placed in conflict with the victim. In doing so the hetero is placed in conceptual conflict with the homo and so the theoretical conflict within the hetero/homo binary becomes manifest within the situation. With this division in place the hetero/homo binary is firmly established.

While nothing in Brennan CJ's passage states that the victim is homosexual, the categorisation of the defendant's actions, the description of his actions, and the defendant's assertion, integrate to arrive at the point where the defendant is seen as heterosexual and the victim is deemed to be homosexual. The physical conflict between the two parallels the theoretical conflict present in the hetero/homo binary and so the hetero/homo binary is established.

#### **So what's wrong with essentialism?**

One criticism of essentialised reasoning in legal discourse is that it is used as a weapon to devalue homosexuality in the eyes of the jury. Indeed the hetero/homo binary is a product of heterosexist discourse. Halperin explains this,<sup>7</sup> saying it consists of two terms, the first of which is unmarked and unproblematised. This is the category to which everyone is assumed to belong. The second category is the other, those in it are marked and problematised. This category of people involves something which differentiates them from the norm.

The binary is heterosexist, secondly, because the marked term does not signify a predetermined class of people, but is used to determine and define the unmarked term. In this way heterosexuality represents a paradox: it implicitly involves a negation of homosexuality, and yet needs homosexuality to give it substance.<sup>8</sup>

Another criticism is its failure to reflect reality by recognising only two sexualities. One modern writer who disagrees with a binary analysis is Foucault. He argues sexuality is itself a historically constructed concept, a product of 18th and 19th century discourse.<sup>9</sup> One of his main features of sexuality is the rejection of the repressive hypothesis. He accepted that 19th century western society saw a controlling of sexual discourse by the dominant culture. However, far from quashing it, Foucault saw this as producing an explosion of discourses concerning sex. He believed that when the techniques of normalisation were applied to sexuality, a multiplication and intensification of deviant forms of sexuality resulted.

#### **Queer theory as a legal construct**

Queer theory represents an attempt to deconstruct the dominant culture's discourse of homosexuality and to reinvent this in various guises. By substituting a post-structural analysis in place of an essentialist approach, a more realistic decision may be reached. In the context of a legal framework it represents an attempt to:

... shift homosexuality from the position of an object of power/knowledge to a position of legitimate subjective agency ...<sup>10</sup>

Queer theory attempts to deconstruct the categories of identity and render them problematic. This is because it is not grounded in any positive truth. It acquires its meaning from its oppositional relation to the norm. This shows that queer is more of a relation than a category. In this way queer adopts a Foucauldian analysis of power. Power, according to Foucault, is not a linear relationship flowing in one direction. He argues that power is an all embracing concept. Nothing is outside power, and no single institution or person owns power. This organic model is perpetrated through a myriad of power relationships. Power from one institution over an individual is more precisely described as dominion, which is one type of power. This is a negative form of power. Power is also positive. As it is all embracing it can come from below in the form of resistance. As such there is nothing in particular to which it necessarily refers. Queer is thus fluid — its boundaries are flexible.

Queer can also be seen as a strategic manoeuvre, a resistance to the attempt of categorisation inherent within the dominant culture. As such it challenges the binary opposition of hetero/homo.

Within the legal discourse queer challenges the categorical thinking which, as already outlined, is the foundation of legal analysis. It challenges the idea of a marked category in which the individual is known.

The notion of any type of binary is based on categorical thinking. Any binary is categorical in that it requires two terms with identifiable features and strong distinctions between the two so that they are easily separable.

The classification taking place in the hetero/homo binary is definite and assured. A distinction is firmly drawn with the identity of the defendant who has killed the victim. This then is translated into the hetero/homo binary by a concerted effort to model a heterosexual defendant and homosexual victim who, through the act of killing, are put at odds with each other. Once this device is in place the court maintains the binary through various methods such as assimilation of peripheral sexualities into homosexuality and the use of stereotypes. There is no common ground between the two; even those otherwise heterosexual victims who have made a sexual advance to the male defendant are believed to be homosexual.

This categorical thinking is the antipathy of queer since queer transcends barriers. The queering of the hetero/homo binary can begin in any of the methods outlined to maintain the binary. It can reinvent the assimilation process by relating sexualities via their marking as the other and rejecting the idea that they can be known because they fall within the category. In repudiating this idea, queer sets the whole objectification process on its head and restores the object to the subject.

However, queer is an attempt to transcend barriers, so it can be used to confuse the boundaries between the hetero and the other. Its pluralist framework denies the notion that there is one type of heterosexuality and one type of homosexuality and in place asserts the multiplicity of sexualities. In doing so it disrupts the opposition set in place between heterosexuality and homosexuality which is vital to shifting blame from the defendant to the victim.

### Conclusion

This analysis shows there is an explicit discursive maintenance of the hetero/homo by the courts of law. The deconstruction or refusal to recognise other peripheral sexualities,

the use of stereotypes to preserve the binary, and assertion of heterosexuality evidences this type of essentialist approach by the defendants.

Queer represents an important tool to resist this dominant classification system as it transcends the boundaries that have been erected. This allows it to resist the objectification process and reinstate the victim to a subjective status, and it fractures the hetero/homo opposition.

### References

1. Fuss, D., 'Inside/Out' in *Inside/out: Lesbian Theories, Gay Theories*, D. Fuss (ed.), Routledge, 1991, p.2.
2. George, A., 'The Gay (?) Victim on Trial: Discourses of Sexual Division in the Courtroom' in *Homophobic Violence*, G. Mason and S. Tomsen (eds), The Hawkins Press, 1997, p.51.
3. George, A., *Homosexual Provocation: The Courtroom as an Arena of Gender Conflict in Australia*, A thesis submitted to the Faculty of Arts and Social Sciences in partial fulfilment of the requirements for the Bachelor of Arts (Honours) degree in the Department of Sociology and Anthropology, University of Newcastle, January 1995, p.34.
4. George, above, ref. 2, p.48.
5. The insistence in using this type of language becomes even more questionable when it is noted that the deceased characterised the victim's initial advances as gentle (unreported High Ct at 14).
6. Fuss, above, p.2.
7. Halperin, D., *Saint Foucault: Towards a Gay Hagiography*, Oxford University Press, 1995, p.44.
8. Halperin, D., above.
9. Foucault, M., *The History of Sexuality: An Introduction*, Vol. 1, translated by R. Hurley, Vintage Books, 1978, 1990 repr.
10. Halperin, D., above, p.57.

*Collins article continued from p.21*

2. Kirk, J. and Miller, M., *Reliability and Validity in Qualitative Research*, Sage Publications, 1986, p.76
3. Freeman, L.C., Romney, A.K. and Freeman, S., 'Cognitive Structure and Information Accuracy', (1987) *92 American Anthropologist* 231 at 239.
4. Statistics given to author by Victorian Public Transport Commission during visit as part of duties with NSW Police.

*Roberts article continued from p.23*

### References

1. Chesterman, M., 'Contempt by the Media: How the Courts Define It', (1986) 58(94) *Australian Quarterly* 388-97, p.395,396.
2. *Davis v Baillie* (1946) VLR 486 at 495 — where the media were allowed to warn the public of housebreakings by the accused in the course of his flight.
3. Murphy J the trial judge in *Hinch v Attorney-General (Victoria)* (1987) 61 ALJR 556 at 569.
4. Mason CJ in *Hinch* at 561.
5. Kirby, Justice M.D., 'Pre-trial Publicity — Free Speech v Free Trial', (1995) 6(3) *Journal of Media Law and Practice* 221.
6. Carroll, J., Kerr, N., Alfini, J., Weaver, F., Maccoun, R. and Feldman, V., 'Free Press and Fair Trial: The Role of Behavioural Research', (1986) 10 *Law and Human Behaviour* 187-201, p.193.
7. *Hansard*, 19 October 1994, House of Reps, p.2416.
8. Kirby, above, p.240.
9. Starke J, (1988) 62(4) *Australian Law Journal* 253-4.
10. Koomen, K., 'The Real Issues in Who Weekly', 14(2) *Communications Law Bulletin* 3-5. Subsequent comments in the text are based on this article.