FORUM

Law of the Surf Forum

Convened by Associate Professor Brian Fitzgerald
Head of the School of Law and Justice
Southern Cross University

Byron Bay - 16 December 2000

Preface

This article represents views of eminent jurists, academics, environmentalists and surfers from the Law of the Surf Forum held at Byron Bay on the 16 December 2000. In the 1960s, 70s and the early 80s surfing spots were relatively uncrowded. Surfers devised and abided by the unwritten rules of surfing, based on common sense and courtesy. Since the late 80s the sport has seen a spectacular increase in the number of surfers. As a result surfing has become more aggressive, particularly in the more popular surf spots like Burleigh Heads, Kirra, Byron Bay, Hawaii and the United States. This has been further exacerbated by the popularisation of a huge range of different surf crafts, such as the short and long surfboards, kneeboards, bodyboards, surfskis, sailboards, and jet skis for "tow in" surfing. It is fair to suggest that in today's overcrowded surf, 99% of surfers still abide by the etiquette of surfing. However, there are a small number of surfing individuals, whose surfing behaviour violates the rules of surfing and provokes verbal abuse and/or physical violence by one surfer towards another surfer. This antagonistic behaviour is commonly referred to as "surf rage". The objective of the Law of the Surf Forum was to promote the universally accepted lore of surfing recognised by the surfing community so that surfing remains free of government regulative intervention and preserves the Free Spirit of Surfing.

Geoffrey Clarke BA (JCU) LLB graduate Southern Cross University 2000 and surfer.

Introduction to Forum

Associate Professor Brian Fitzgerald

Chairperson and Editor

Brian Fitzgerald studied law at the Queensland University of Technology graduating as University Medallist. On completion of his law degree Brian worked as a Barrister, before spending a year as a research associate with the High Court of Australia. Brian returned to practice for a year before taking on a Commonwealth Scholarship to Oxford University where he completed the Bachelor of Civil Laws (BCL). Brian later studied at Harvard Law School in the USA where he completed a Master of Laws degree. In February 1998, Brian was appointed as Head of the School of Law and Justice at Southern Cross University in New South Wales, Australia. Brian teaches and researches in the areas of intellectual property and information technology law. He is co-editor of one of Australia's leading texts on E Commerce, Software and the Internet - Going Digital 2000 - and has published articles on Law and the Internet in Australia, the United States, Canada, Europe and Japan. He is also a surfer.

Background

The Forum was designed to consider the role (if any) law should play in regulating surfing, in particular in the case of what has come to be known as "surf rage".

The impetus for the Forum was the growing public perception that the popularity of surfing and the overcrowding of famous surf breaks has led to a situation where risk of injury to others through aggression is socially unacceptable. This public concern begs a solution, which will not come easy. This Forum was aimed at being a step towards such a solution.

As a surfer, the last thing I would like to see is the surf being colonised or taken over by lawyers - surfing would lose its soul. We surf to get away from the confines of everyday life: to get wet, have fun and feel free. However it is inevitable that, as on land, society will not tolerate unjustifiable aggression to others. And to this end the law will eventually step in to prevent harm to others in the surf. But there are different ways it might do this. A measure of last resort would to be to have very restrictive legislation made by parliament that regulates the fine detail of surfing and surfing equipment. A more appealing route is to reinvigorate and publicise the self-regulatory measures – the customary or ethical norms - that have been employed by surfers for

generations to bring order to surfing. While surfers themselves have often been portrayed, rightly or wrongly, as a tribal and somewhat anarchic subculture, there is strong evidence that surfers have commonly upheld principles such as fairness and respect for other surfers and the surfing environment. These norms are not formal laws made by the parliament but they act to influence the way we do things much the same way as law does. The sanction for not obeying them is not a monetary fine or time in jail but rather a rejection by the community of surfers.

This Forum came to the unanimous conclusion that surfers should try and solve the issue of harmful conduct in the surf first and foremost through these self-regulatory cultural norms. While a number of difficulties will arise with such an approach the Forum challenged us to reconsider how we regulate social activities. It called for a deeper level of understanding as to how ethical behaviour can be encouraged not only by law but also by customary or cultural norms (lore).

The Forum consisted of surfing experienced presenters Justice Greg James of the Supreme Court of NSW, The Honourable Ian Cohen MLC, Professor Stanley Yeo of Southern Cross University School of Law and Justice, Mr Neil Lazarow of the Surfrider Foundation, Professor William (Terry) Fisher III of Harvard University Law School (USA), Ms Melanie Mott Allgirls Surfriders Club, Mr Peter Coroneos Executive Director of the Internet Industry Association, Mr Nat Young one of Australia's and the world's best known surfers, former world champion and surfing historian, Mr Jaimie Massang of Pipers Patent and Trade Mark Attorneys and Mr Wayne Deane current Australian long board champion and long time surfer and surfboard manufacturer along with in excess of one hundred (100) members of the audience including surfing innovators George Greenough and Rusty Miller, current world long board champion Beau Young, former Australian women's long board champion Colleen Deane, Executive Director Surfing Australia Allan Atkins and Australian over 35's short board champion Max Perrot.

The Forum was run as a special session of Southern Cross University's Annual Summer Law School in Byron Bay. It was free and open for all the community to attend. It generated interest from across Australia and across the world being reported in the New York Times. While many may have thought the idea of running this type of event in one of the major surfing centres of Australia in the middle of the summer was meant to be a joke or at least a good excuse for a holiday, the high level of expertise of the participants ensured serious and fruitful discussion which will be of enormous value in setting the agenda for this issue in the future.

Forum Discussion

Justice Greg James

(Judge of the Supreme Court of NSW)

Justice Greg James was appointed to the Common Law & Criminal Divisions of the Supreme Court of NSW on 14 April 1998. Justice James has worked in the Equity Office of the Supreme Court of NSW, NSW Public Solicitor's office and in private practice. His Honour was appointed as Queen's Counsel in 1982. Justice James until recently was part-time commissioner of the New South Wales Law Reform Commission. His Honour was Senior Prosecutor in the Australian War Crimes Trials in South Australia – 1990-1994. Justice James appeared in many Royal Commissions and Inquiries including the Royal Commission into British Nuclear Tests in Australia, Aboriginal Deaths in Custody, WA Inc., New South Wales Building Industry, and the Independent Commission Against Corruption Inquiry into Parliamentary Pension of Mr Smiles. His Honour has until very recently surfed continuously, developed a discussion paper and participated in other forums about 'Surfing Etiquette'.

Discussion

One of the things that should be kept in mind is that the people here tonight are lawmakers. Much of the law that regulates people's activities, particularly criminal law, is common law. It is made and developed by the judges from the attitudes of people towards particular activities. Legislation depends on the political will, which turns also on people's attitudes. In that sense, the people here, the people who recently have shown their consciousness that they want the surf to stay free of formal legal regulation but want people in the surf to act in a way that does not require, for everyone's safety and happiness, formal legal regulation, are making law. But it is a form of non-interference law.

Law is at its best when it does not force people to conform. Law is at its best when it exists only for that one dramatic occasion to ensure that all people, who need to live, surf and act together, do so.

Therefore, you will find talk of regulation but opposition to it, not surprisingly, all over the world, in the sixties in Hawaii, now in Indonesia and Fiji, in California since the earliest days and along the northern beaches of New South Wales certainly since the earliest days, wherever there have been people surfing, whose surfing has impacted on

other peoples surfing. In those days, along the northern beaches at least, surfers were regulated, and were given stickers to put on their surfboards, we were only allowed to surf in designated areas. There was a huge amount of dissension between surfers and surf lifesavers. After a while the stickers died out, the dissension died out and people tended to be surfing with some degree of, if not affection, ability to tolerate each other. That was without the formal regulation of the surf under the various Acts of Parliament that do apply to it, by the various people who had legal coercive powers. There were incidents, however, and people were arrested.

In California the problem has occurred to the extent that legislation was proposed to designate surfboards as dangerous weapon and the inflicting of injuries with them as felonies and, of course, under present Californian law, three strikes and you are incarcerated. No one wants mandatory sentencing and jail sentences or apprehended violence orders to exist in the surf. But there is violence; there is violence by those that claim proprietary areas that they can sell to surf camps. There is violence by individuals seeking individual waves. The competitiveness and the eagerness for waves tend to set the climate for people to get violent with each other because surfing is an athletic and vigorous sport. It is only if surfers can develop and maintain a culture that permits not only board riders, not only long board, short board and surf ski riders but those on belly boards, boogie boards and if necessary, and I always found it particularly easy to stay out of the way of, surf boats. A culture that develops to allow others to have so much, at least of the surf and of an individual spot, that they too can get a wave.

Nat [Young] recently produced an anthology of articles by journalists and surfers (titled *Surf Rage*) looking at the same problem ranging from the southern most areas of Australia through to the Northern Hemisphere. It is a sharing of resources problem. Either the problem can be handled by some form of code of conduct or it might have to be handled by some form of code of law and remember that law always expands to fill anywhere that it seems to think has a vacuum, has an unregulated moment, which can be covered by some form of regulation. It has not in Australia because the law is there but has not had [to] be called on. It nearly did in California. It will if there are incidents or notorious events that the legislator insists be met by passing laws.

Some two years ago in Sydney there was a rash of home invasions, where people broke into houses and took the occupants hostage, seeking to obtain money. Although it was treated at the time in the press as a dramatic occurrence there was nothing new about that, that has been going on in English and Australian history and indeed in any

culture for a long period of time. The New South Wales Parliament has just passed, in 1998, the *Home Invasion Occupants Protection Act*, dealing with that special circumstance. The law always did recognise defence of yourself and your home. What surfers do not want is, on the analogy that happened with protecting your home by legislation, to see someone decide that surfers should be regulated in the surf, that surfers should have a code set out in such a fashion that it should be enforced, as it was suggested in California, by surf police on jet skis and the horrible thought that you might have to stand on the beach, along side one of those machines they have in the delicatessen, and take a ticket with a number on and wait until your number comes up to be able to enter the water. And the only way that surfers will be able to ensure that they retain the freedom of the sport, the freedom of the waves and the beach, is by being willing to share it.

The expansion of the legal regulating role is even spreading to that most unlikely recipient, the New South Wales Court of Appeal. In the recent decision of *The Council of Municipality of Waverley v. Bloom* [1999] NSWCA 229, that court looked at how the local council had assumed a duty to care for people in the surf and upheld an award of damages against the council for injury to the plaintiff who was hit by a person riding a surfboard out of control while swimming between the flags. [*Editorial note – contrast the recent decision by the same court in Sutherland Shire Council v Kukovec; Elouera Surf Lifesaving Club Inc v Kukovec [2001] NSWCA 165*]. Now that sounds a good thing but when that happens and a council is forced to pay out money it sooner or later is going to want to regulate the surf to prevent the payment of that money. The responsibility for regulating the surf should be on those using the surf. The consciousness that it needs to be done, or the law will regulate it for us, has got to be expanded. This conference as with the Surf Elders Conference that was recently held also at Byron Bay, convened by Ian Cohen represents a consciousness by a number of people that it is important this message, at least, be spread.

Professor Stanley Yeo

Southern Cross University

Stanley Yeo is Professor of Law and Director of Teaching at the School of Law and Justice, Southern Cross University. He completed his law degree at the University of Singapore and holds a PhD from the University of Sydney. Stanley has received a University award for teaching excellence, and edits the Criminal Law Journal, which is the leading specialist journal on criminal law, criminal procedure and evidence in Australia and New Zealand. He has previously held

lectureship positions at the University of Sydney and the National University of Singapore. His fields of teaching and research are criminal law, especially comparative criminal law, criminal justice administration, criminology and torts.

Discussion

This is a short overview of the legal liability of surfers. In this forum, I think we would be most interested, not so much in the legal liability of local councils or surf lifesaving clubs towards surfers, but what happens out there in the surf among surfers themselves.

We have been fortunate so far in Australia that there has never been a civil action for negligence brought by one surfer against another surfer. But the potential for that kind of civil claim is always present. Basically, the tort of negligence operates as follows. The court must first decide whether there was a duty of care owed by one surfer towards another. The answer to this question will inevitably be "yes", since it is clearly the case that the law imposes a duty of care upon one surfer towards another. A more contentious issue is whether that duty of care has been breached. So far as the general rules of the tort of negligence are concerned, what the court will do is to hypothesise a reasonable surfer and consider how such a surfer in those particular circumstances might have behaved or what precautions he or she might have taken. Who is this "reasonable surfer"? The answer is that codes of behaviour, custom and general practice would be matters that the court, if called upon to decide, would take into consideration to help define the "reasonable surfer". But does the sport of surfing presently have such a code of behaviour, custom or practice for the court to rely upon? That is something, which will hopefully be further considered in this forum.

Another interesting feature of the tort of negligence is that, when applying the concept of the reasonable person, inexperience is not taken into account. Therefore, if you are a new surfer riding the waves, your conduct will be compared with that of an experienced reasonable surfer. This explains why the reasonable person test in tort law is regarded as a fiction since, obviously, surfers with different levels of skills will find themselves having to share the same waves with other surfers. Again, this situation creates the potential for a civil action in negligence for damages brought by one surfer who is injured by the inexperience of another surfer.

A further interesting aspect of the tort of negligence is the concept of voluntary assumption of risk. As a surfer, you would be well aware that there might be other surfers who are not as competent as yourself,

and that things might go wrong in the water because of their inexperience. To what extent would a court take into account the fact that you consented to exposing yourself to the risk of injury occurring in the surf? While it is clear that a court will take into consideration a surfer's voluntary assumption of risk when deciding a civil action based on negligence, the extent to which this will influence its decision is uncertain.

The other legal matter facing surfers is criminal liability, that is, not a civil claim for damages but where the police are involved. The usual criminal charge will be physical assault, which could happen as much on land as in the surf, with incidents ranging from fist blows to being hit by a surfboard. Fortunately, it appears that such incidents of physical assaults are still relatively uncommon among surfers. However, with the increase in the number of surfers vying for the same limited number of waves, "surf rage" and with it, assaults, may well be on the rise.

Honourable Ian Cohen MLC

The Honourable Ian Cohen is a pioneering community based environmental and social justice activist and a keen surfer who was a founding member of Stop the Ocean Pollution and Clean Seas Coalition. He is a specialist exponent of non-violent direct actions and community organisation for social change. Ian has fostered a specific interest in the concept of "theatre of the environment" as an educational and community empowerment technique. Ian was a founder of the Sydney Peace Squadron and the Brisbane Peace and Environment fleet, and came to international attention in 1986 when photographed hanging onto the bow of a nuclear armed US warship in Sydney Harbour on a surfboard. In March 1995 Ian was elected to the NSW Legislative Council as its first Green member. In September 1995 Ian was involved in organising a parliamentary delegation to protest against French nuclear testing in the Pacific and sailed into the test zone on a Greenpeace expedition. He is the author of the book Green Fire, an account of the Australian environmental movement, a movement that has transformed Australian politics.

Discussion

Certainly, listening to Stanley, it makes for quite a scenario if you think about the implications of regulating the surfing experience that virtually everyone in this room has had in some form over the years, that is part of that basic Australian ethos. Then putting that into a courtroom and trying to explain the nature of the wave and the nature

of a situation on a wave and the very issue of waves. How many waves do you get that are exactly the same even if you go out for a session? It is such a fluid volatile situation in the water itself, before you even start talking about the people involved.

It is difficult to explain to a non-surfer what it is all about. You get those people who come out starry eyed as though surfing is something that is akin to some sort of religious crusader's voyage for people. Then you try to bring that down to a relationship in a courtroom. For me, having been a surfer since the late sixties and seeing many issues of surf rage, it is an interesting historical journey from seeing a shape-up on the beach to the fact that we now have the potential for dealing with this sort of situation in a court of law. It is certainly a worrying thing.

As was mentioned before about the online ABC Internet forum [*Editorial note - sponsored by ABC Local "The Backyard" and JJJ the week before this Byron Forum featuring Ian Cohen, Neil Lazarow and Brian Fitzgerald as online panellists*] it was interesting to see in the "chat room" how many people were still reacting with a degree of rage to any comment on regulation, or to how we have to start thinking a little differently about these situations. It was interesting to see the sort of vehemence that was created in terms of the defence of freedom. But whose freedom is it?

What we are trying to do is say "yes, regulation is an option". But another option would be a maturation of cultural attitudes and ideals, and communication between people. I think that is why the elders of the surf, (partly as a reaction to recent events), want to address the situation of violence we see right across the surfing fraternity at particular times.

Why a forum here in Byron Bay? I guess it is because so many aging surfers live here, we almost have a vested interest in having some sort of sense of decorum in the surf these days. But also because Byron Bay represents very much a cosmopolitan example of what surfing could be all about. It is a far cry from those tiny encampments where often it was brutality ruling the waves. There are a lot of people here, a lot of people who have travelled a long way to get to Byron Bay to enjoy the ambience, the cultural experience, something that is very different to a lot of other areas of Australia. Byron Bay is a place where there are a significant number of women surfing. In terms of ameliorating that "dog eat dog" attitude that we have seen in the past in the surf and creating a situation where there is a degree of flexibility, a degree of acknowledgment that we are all there together, Byron Bay is essentially the right place for that to happen.

That essence of surfing is a very individualistic thing. Surfers are all part of a community and we have to talk to those people on the beach, in the community and therefore we need to create another ethos. I think that is all part and parcel of a maturation of an Australian ethos too; surfers have something to offer the world in that regard. In Australia the flowering of the sixties and seventies and that drop out scene and then going through the surfing experience is very much part of the development of that ethos. Then we see the competitiveness, the aggression in the surf media, official competitions and the issues between competitive surfers taking over a particular part of the beach at certain times and those who just want to have an enjoyable surf. The pressure is on, especially at places like Bondi and at the Pass here in Byron Bay. I was reading Nat Young's book *Surf Rage* about the ethos predominating up at Burleigh Heads in recent times and it is like driving in peak hour traffic and when it gets like that it is very difficult.

The Institute of Criminology when talking about the majority of assaults in society, is talking about people in their late teens, early twenties with a lack of empathy and aloof to the suffering of others and of an inability to delay impulses. This is what we are dealing with. In a very physical sport a significant number of people are passing through an initiation, if you like, trying to find out their own identity in a world that is pretty crazy at times. Then you mix that with a blend of "it is my break" localism and that "always elusive wave" that generally one person is going to get, then you have either got a potential for violence and significant problems or you have got a training ground where you can come and accept that surfers are all part of society.

What is it going to be? In the past it has been "he", it is usually a bloke who is top surfer, top dog, king of the break, most aggressive. You have got that situation. But where does that get them? They do that for a significant number of years and at some stage injury or old age or whatever it might be, drugs often, that situation is going to change. So where are they? What we need to do, Surf Elders, Spirit of Surfing and other organisations, not necessarily in a conscious way, is to look at transferring someone who is top surf dog to someone who is perhaps a surf elder, someone who is part of a community being able to pass on information and being able to help evolve to a situation where we are going to have a continuation of surfing with a degree of decorum and enjoyment for a significant number of people.

The crowds are not going to go away. We are not going to solve the problem by creating artificial surf breaks. In certain circumstances that might be realistic, but it is not going to solve the problem with attitude, as we are going to fill up those artificial surf breaks and we are going to be in the same situation once again. Crowds can cause the problems,

however it does not need a crowd to have a problem. I am sure many surfers here have been out in the water with three or four people, or even less, and one individual will come out and insist on paddling inside and taking every wave and doing a few snakes [*Editorial note – "stealing" wave priority*]. You can have a terrible situation with just a few people in the water.

Often in these forums the issue of localism comes up and I think we all have an element of localism in us. When you go out in the water, you know most of the people, and it is a very pleasant experience. It is one of the things I like about this area because you are surfing with friends so there is a degree of give and take, which makes it a far more pleasurable experience. Surfers accept that other surfers visit this well-known area and if they abide by the rules, it can continue to be a pleasant experience. However, localism has created very ugly situations in many circumstances but we are not going to solve the issue of localism just by saying you are going to make rules and regulations that somehow change the situation. What hopefully we are developing, with looking at these issues and having forums such as this, is a situation where localism can also develop, evolve if you like. At one stage we had people protecting their waves, protecting their patch, "bugger off anyone else who comes in, we'll slash your tyres or violate you in the surf". We can now create a localism where the whole culture is growing. So people protect their break in terms of acknowledging the overall environmental situation.

A classic example of this is Look at Me Now Headland at Emerald Beach north of Coffs Harbour. A bunch of surfers are living in a local little coastal community and the authorities wanted to put a sewerage outfall in the area. This community went from one of the most conservative social environments in Australia with something like one arrest a year to the highest rate of arrests outside of Redfern in a period of a few months when the local protest happened. Now it has gone to the other side of the situation where you have got the forest growing on the Headland, the National Parks are in there involved in regenerating the whole area. Kangaroos are back on the coastal strip, the people are living in, once again, a conservative social environment where there are, very few arrests. I am told the bush is growing, the outfall is not there, the water is pristine and it is a very harmonious environment. That is the sort of thing we would like to see in terms of surfer localism; being creative, looking after your environment and moving into an awareness that surfing is something very special that we have as terrestrial beings. To be able to go out in the water and take so much enjoyment from the ocean rather than stirring up the passions and anger. Hopefully surfers can focus in a positive way and create a situation where surfers do become custodians and guardians of our

particular piece of coastline and create a very positive ethos out of localism. And if people are doing that out in the water, taking responsibility for their area, and I have seen it in our local area here, it is fantastic. At Broken Head Nature Reserve where I surf a lot, just down the beach from here, there are many of people that come up and talk to me about how we can clean up the beach, and how we can stop people walking over the sensitive areas.

There is a real awareness that is growing in the surfing community at the present time and I think that is going to be reflected in forums like this and its creating an attitude where we are really going to see surfing at the forefront of social change and environmentalism. After all, we are a coastal community, and therefore we will achieve a great deal of the lessening of violence in the whole of society hopefully through people going surfing in a co-operative fashion.

Neil Lazarow

National Project Director and President of Eastern Beaches Branch of Surfrider Foundation Australia

Neil Lazarow is National Project Director and President of the Eastern Beaches Branch of Surfrider Foundation, Australia. He also works for Ocean Watch Australia and is doing a Masters Degree at Macquarie University on a comparative study of coastal management systems in Australia. He has worked extensively as an environmental consultant specifically in the areas of public participation and stewardship in natural resource management. He has a Diploma in Youth Leadership (Institute for Youth Leaders, Jerusalem), a BA in Philosophy (Monash University) and a Post Graduate Diploma in Political Science (Melbourne University).

Discussion

Firstly I wanted to relate a story to you. When I go surfing all I think about is surfing. I do not think about my next meal or work or anything like that. Every other issue in my mind is gone. I let go of everything else, it is one of those activities that I like to usually undertake in isolation. If there is a nice crew around it helps enhance the moment but it is always been for me something that I have undertaken with Mother Nature and hopefully Huey [*Editorial note - "Huey" the surf god that controls the elements of nature that are essential for good surf - wind, tides, swell and sand movement*] doing the right thing and providing waves.

I guess times have changed over the last few years. I joined Surfrider a couple of years ago because I was concerned about a lack of respect for our beaches. It sickened me and it still sickens me now that people can be privileged enough to go surfing but not care about the environment they go surfing in. I see a lot of people go out to the beach to surf and it is a use and abuse attitude, it really bothers me, that is one of the reasons that I joined the Surfrider Foundation. I think what has come out of that, is that I started surfing with a couple of like-minded souls - people who respect the beach and respect each other. What it has done for me is, it has grown my heart immeasurably towards surfing as an experience that I now undertake, rather than by myself, with a group of people and it makes the experience a lot more enhancing.

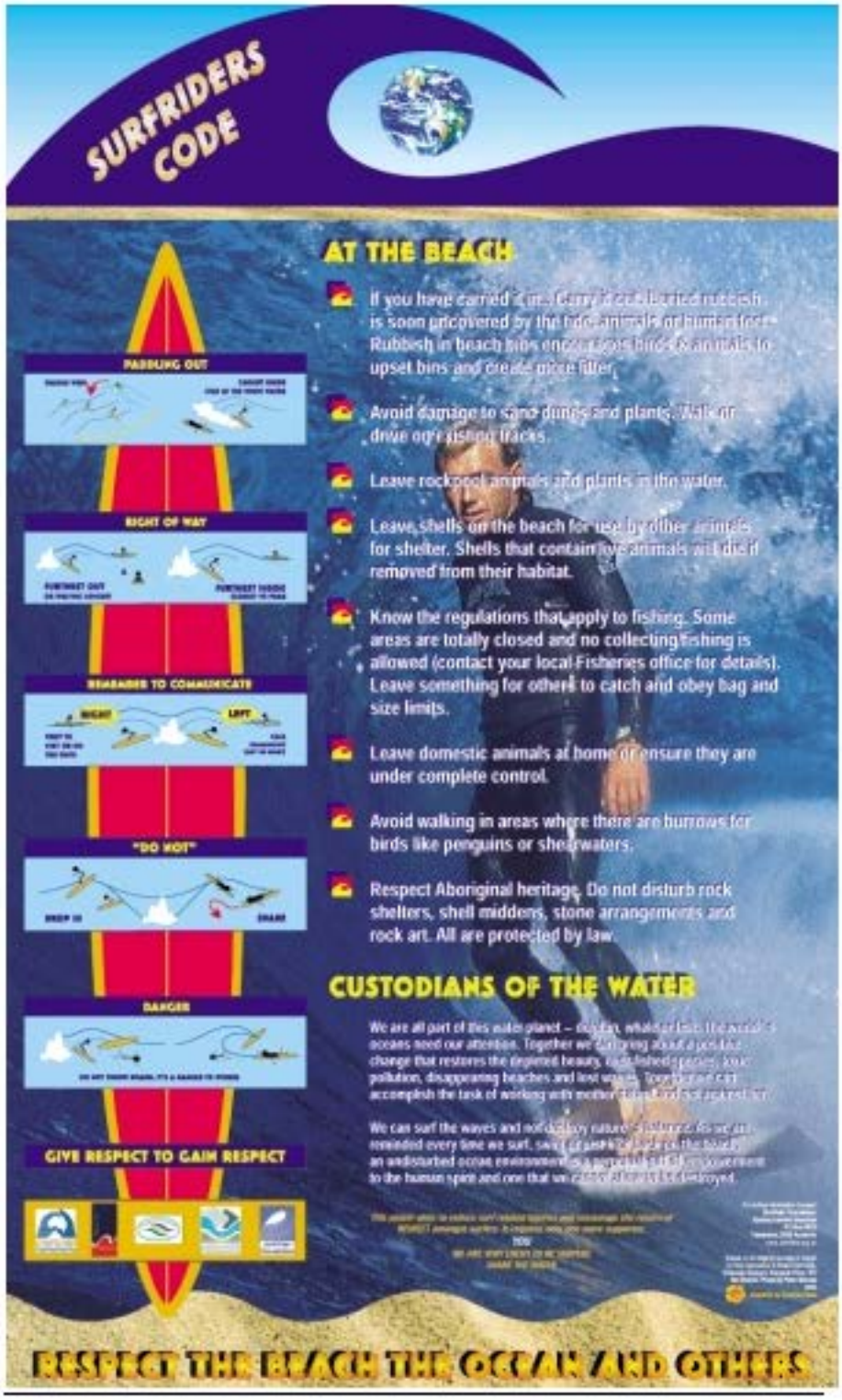
I want to talk about two things tonight. Firstly the code and secondly the Spirit of Surfing Movement, which some of you may have heard a little bit about.

Why did we develop the poster in the first place? The sport of surfing has grown immeasurably in the last ten years, it is a billion-dollar plus industry in Australia each year and I think it is safe to say that the bush has been overtaken by the beach as Australia's national icon. We really are a beach culture and as Ian mentioned 86% plus of Australia's population live within 80km of the coast. You get kids in country towns wearing surf clothing and some of them have never even seen the ocean. The surfing image is very powerful.

What is happening is everyday more and more people are being attracted towards surfing but what we are dealing with is a limited resource. There are only a certain number of beaches and there are only a certain number of surf breaks but they are becoming more and more populated every day. There is a little bit of a conspiracy feel here. If you speak to some of the coastal geophysicists, they will tell you that over the last couple of decades, due to sea level rise and global warming, that the actual currents have not been in our favour and the weather patterns have led to a decrease in the surf quality. Some of you who are a little older and slower may remember the old days as being really good. You may be right; the waves may have been better 20 years ago then they are now.

What generally happens when an increasing number of people or mammals compete for limited amounts of resource, which is the surf break, is that those with the biggest bark or the biggest bite win the battle. Apparently, we have evolved as humans and we deal with each other in a civil manner. One of the key issues that Surfrider Foundation has been working on over the past few years is the law of the surf. We talk about the law of the surf but imagine talking about

the law of the surf and saying “lore” so talking about the lore as in the story of surfing, rather the law of surfing. For me the story of surfing is wrapped up in three separate issues and we have tried to identify them in the poster.


SURFRIDERS CODE
PADDLING OUT
RIGHT OF WAY
REMEMBER TO COMMUNICATE
"DO NOT"
DANGER
GIVE RESPECT TO GAIN RESPECT
AT THE BEACH
If you have carried it in... Carry it out. Litter is soon discovered by the tide, animals or human feet. Rubbish in beach bins encourages birds & animals to upset bins and create more litter.
Avoid damage to sand dunes and plants. Walk or drive on existing tracks.
Leave rockpool animals and plants in the water.
Leave shells on the beach for use by other animals for shelter. Shells that contain live animals will die if removed from their habitat.
Know the regulations that apply to fishing. Some areas are totally closed and no collecting/fishing is allowed (contact your local Fisheries office for details). Leave something for others to catch and obey bag and size limits.
Leave domestic animals at home or ensure they are under complete control.
Avoid walking in areas where there are burrows for birds like penguins or shearwaters.
Respect Aboriginal heritage. Do not disturb rock shelters, shell middens, stone arrangements and rock art. All are protected by law.
CUSTODIANS OF THE WATER
RESPECT THE BEACH THE OCEAN AND OTHERS

To my knowledge, four posters have been produced. The original one was in 1996-97 in Margaret River, Western Australia, and that has been fixed on a plaque as well. Surfrider has been involved in all four of them. The second one was Surf Coast Branch, Bells Beach and the third at the Mornington Peninsula in Victoria.

This is the fourth poster. This one is a little bit different because it talks about three distinct messages. Its got the tribal law message - the road rules such as paddle wide, do not drop in etc, and it really spells it out for beginner surfers; an environmental message; and a message of custodianship.

Many people say "look the environment is stuffed", or "she'll be alright", or "everything's turning to shit". With the second message, we have described a series of proactive and positive environmental messages - can do things - like "if you have taken it onto the beach carry it out"; "leave Aboriginal shell middens alone, they are a part of our cultural heritage"; and "do not trash sand dunes". Little things like that that anyone can do at the beach, you do not have to be an environmental professor or know heaps about the environment.

The third thing that we have tried to do is talk about surfers as custodians of the water. The Surfrider Foundation is trying to get people to realise that we are all custodians of the ocean, and we are all part of the stewardship ethic. Therefore, when you go to the beach or when you surf or when you use the ocean, do not just think about it at the beach, think about it when you are at home. Do not flush paint down the sink, if your car leaks the oil it is going to run off into the ocean eventually, so fix it.

The lore of surfing, the story of surfing, is wrapped up in a signage for me, and I guess for Surfrider Foundation, in three important messages - cultural rules or ethics, an environmental message and it is a custodianship message.

Who is the poster for? Well the poster is for three distinct groups:

The first group is locals, people who have been surfing for a long time, you would call local "yocals", people that know the rules but may have forgotten them. People that think it is my beach, no one else is allowed to be here, I have right of way, I can do whatever I like. What we are trying to do is remind people that surfing has grown in popularity, you do need to share the waves, it is a fact of life especially if you live in an urban environment.

The second group of people are locals that have taken up surfing - the Australian population that are new to surfing but may be unfamiliar with the fact that there is some

sort of structure out in the waves, that it is not necessarily a free for all. What we are doing is saying to them, "it may look like everyone is doing their own thing but there is some sort of code out there".

The third group that we are targeting is tourists, people who come into our environment from another place. They may be new surfers completely unaware that there is some sort of structure or code of rules with regards to surfing. What we are saying to them is just have a look at this code before you go out.

The way we are trying to do that is by distributing the poster to different places: they are going into schools with environmental programs; they are going into surf shops; and they are going into board hire places. We are actually putting the poster out in a postcard format that is going to be translated into three different languages. Originally when we developed the poster it was for the Sydney Eastern Beaches, and the main tourist surfers we have there are Japanese, Israeli and Brazilian. So we are getting the poster put into a postcard format in Hebrew, Japanese and Portuguese as a form of education for dealing with getting the message out to those people.

The Surfrider Foundation had a number of problems putting the poster together. There are things that come out, which in terms of regulation and in terms of law, need to be considered:

The first is the issue of "tribal law". I have had a lot communication with indigenous elders, especially in my area. The fact that we are using the word tribal, well its not an indictment, we are not trying to cash in on any sort of indigenous custodianship, but it is an issue that has come up - and the issue is if you want to use the words 'tribal law', well you need to take Indigenous Australians into account and show your respect for them. They are the custodians of the land, the first inhabitants and that is something that you need to be aware of.

The second issue that came up is that the front of the surfboard on the poster is pointed. We have spoken before that surfboards have been used in stickups. It is true, it happened and one of the things that Surfrider Foundation in Byron Bay is doing, is promoting the dolphin nose on a board which is a rounded nose, about 1.2 x 7.5 cm. It is friendlier to other people. Having been impaled on a board and run over a number of times, the issue of board design for safety must be strongly considered.

The third issue is language. One of the things we said in the original poster was "when you are paddling out, paddle wide using the rip", and every surfer knows that you take the rip because you do not have to paddle as hard to get out. But if we put that in the poster and someone gets in the rip and goes out to sea, well who is responsible?

Ultimately, Surfrider Foundation or someone could be sued for negligence. It was something that we had to take into account and when redesigning the poster we said "paddle wide", we did not say, paddle wide using the rip.

The fourth issue is access. It is a big issue up here, especially at The Pass where you have a number of competing ocean users. There are boats going in and out, and I think that currently its set for 2500 per year and it is set to go up to 5000 per year next year, if it is not stopped. It is one example with the boats but often surfers think that we are the only ones in the water but the reality is that there are a lot of other ocean users. When this poster gets distributed with the title "Surfriders Code" does it imply that it is only for standup surfing? Does it take into account boogie boarding, lilo riding, surf skis etc. Who is the surfer? Is it anyone who uses the ocean? Is it anyone who rides a wave?

The fifth issue is "rights". What sort of rights do you have as a surfer when you go out into the water? You are aware that you are going out into a potentially dangerous situation. Do you waive all your rights to redress? So, for example, if you get held under are you going to blame the local council because they managed the beach and it is a much steeper beach with bigger waves?

The sixth issue that came up when we were putting the poster together was who was going to be involved in doing it. There is an extensive list of little logos down the bottom [*Editorial note – Major sponsors of the Surfrider Foundation Poster*]. But it is a real issue, who does Surfrider Foundation represent? Is ASP (Association of Professional Surfers) represented? Do pro surfers come in? Do board riding clubs come in? Its all very well developing a poster and then going 'here guys have a look', but its important to get as much grass roots support for it as possible. The thing that we are trying to do with the poster is have it as an educational tool, rather than a regulatory means. To develop any sort of environmental or community education program you need to get as much support as possible. When we started out - we have been working on that poster over eighteen months - we tried to canvass as much support as possible. I cannot tell you how many drafts its been through to get to where it is and still people are saying 'just change this, do this, do that'.

Another environmental issue that Ian talked about briefly was artificial reefs. I talked before about the fact that surf breaks are a finite resource and there are a certain number of breaks and there are more and more surfers. On the face of it, artificial reefs could seem like the perfect solution. There are a number of issues that come into play. Firstly, you can build an artificial reef to enhance a surfing break or you build it to protect a beach from erosion, not both. There are a

number of artificial reefs. There is Cottesloe in Western Australia, there is Narrow Neck on the Gold Coast, with the possibility of one at Noosa, as well as Caloundra and there is talk of putting one at Byron Bay and also at Cronulla. One of the things we need to consider is that artificial reefs are good if you are a human, and its only been looked at from that anthropocentric point of view, but if you put an artificial reef in it may encourage a new habitat altogether. Imagine if the Grey Nurses from Julian Rocks moved to the artificial reefs of Byron Bay. It is just something that needs to be taken into account because if you put a series of reefs in what is going to happen to the local environment? What is going to happen to the creatures in the water? It is important to have an eco-system based point of view when you talk about messing with the natural environment. Reefs need to be considered on a case-by-case situation rather than a "reefs are good attitude".

The last thing I want to talk about is the Spirit of Surfing movement. Surfrider Foundation, at its core is four pillars: conservation, activism, research and education. We are a marine conservation movement. Surfers started us and our core business is marine conservation. In 1995/96 the Spirit of Surfing Movement first emerged in Western Australia, and it was there that the first "Tribal Law" poster was developed by Rob Conneeley, Rosco Kermode and Peter Cuming. About six months ago the first Spirit of Surfing Gathering took place in Byron Bay. It was a combination of surfers and other ocean lovers whose backgrounds range from surfboard designers, doctors, psychologists. Surfrider Foundation, SANE, (Surfers Appreciating Natural Environment) from Victoria, teachers, ASP and ASLA (Australian Surf Life Association), and the local Indigenous community were represented. We did not know how it was going to turn out. It could have been a complete flop, it could have been something really good, and it has turned out to be something that is quite impressive. One of the things that the Spirit of Surfing Gathering did was act as a forum to direct discussion about how to educate and inform surfers of all ages. One of the key recommendations that came out of this gathering was the promotion of an education package to help surfers deal with and resolve conflict. There is a mediator from Victoria by the name of Gordon Stammers who has a section in the book "*Surf Rage*" on dealing with anger and behaviour management specifically for surfers. The Gathering called on surf elders to be more responsible as role models, it looked at the role of minority groups, indigenous and women in surfing, environmental protection, and it encouraged the surf industry to review their ethics about manufacturing and production. It asked the surf industry to look inwards and say 'well are we doing the right thing for

surfing, maybe we have some sort of responsibility to put something back into surfing'.

Professor William (Terry) Fisher

Harvard University Law School, USA

Professor William (Terry) W. Fisher III received his undergraduate degree (in American Studies) from Amherst College and his graduate degrees (J.D. and Ph.D. in the History of American Civilisation) from Harvard University. Between 1982 and 1984, he served as a law clerk to Judge Harry T. Edwards of the United States Court of Appeals for the D.C. Circuit and then to Justice Thurgood Marshall of the United States Supreme Court. Since 1984, he has taught at Harvard Law School, where he is currently Professor of Law, Director of the Harvard Program on Legal History, and Co-Director of the Berkman Centre for Internet and Society. His academic honours include a Danforth Postbaccalaureate Fellowship (1978-1982) and a Postdoctoral Fellowship at the Centre for Advanced Study in the Behavioural Sciences at Stanford, California (1992-1993). His academic interests pertain to four related topics: American Legal History; Property Law; Intellectual-Property Law and the Law of the Internet.

Discussion

I undoubtedly know less about the practice and the culture of surfing than anyone else in the room. However, I do know a little bit about windsurfing. Therefore, I am going to speak today about the relationship between law and windsurfing, in hopes that an understanding of that relationship will cast some light on the appropriate way to resolve conflicts among real surfers.

When windsurfers sail in waves, problems arise similar to those that have been discussed thus far in this forum. However, for two reasons, the problems associated with wavesailing are more complex than those associated with surfing. First, wavesailors move faster than surfers and thus are exposed to greater risk of injury. Second, wavesailors move fast in two opposite directions; like surfers, they ride the faces of waves toward the shore, but unlike surfers they also proceed rapidly away from the shore, typically jumping the waves. As good wavesailing sites have become more crowded throughout the world, collisions and injuries have become more frequent. In response, wavesailors have developed an informal extra-legal code of conduct similar, but not identical, to the code developed by surfers.

When I first began windsurfing, I expected the sport to be governed by the official "rules of the road" that govern sailing. There are many such rules, but the two most important are: a boat on port tack must give way to a boat on starboard tack; and as between two boats on the same tack, the one to windward must give way to the one to leeward. Windsurfers are, after all, sailboats. Shouldn't they abide by the same norms? It turns out that, when windsurfers sail on flat water, they often (though not always) do so. When they sail in the waves, however, neither of the cardinal "rules of the road" are observed. Instead, a completely different, customary code of conduct applies.

So what are the wavesailing rules? There are four of them:

- Do not sail over the back of a wave on your way toward the shore. This practice is said to be dangerous for two reasons: you could land on top of someone riding the face of the wave, or you could collide head-on with a jumper on his or her way out. Notice that this primary rule parallels the "do not-drop-in" rule of surfing.
- Sailors going out have right of way over sailors coming in. This is the most surprising rule because it is the opposite of the norm observed by surfers. The usual explanation for this rule is that sailors coming in have more manoeuvrability than sailors going out.
- The first sailor to jibe on a wave (i.e., the first sailor to turn to come back in) has right of way over other potential riders.
- Finally, as between two sailors who take a wave at the same time, the one closest to the shoulder has right of way.

This set of customary norms seems to be widely accepted by wavesailors throughout the world. For example, Olivier Matt, the 1997 Canadian wavesailing champion, has an article entitled, "Wave Sailing 101," in which he describes the code in more-or-less the same terms. The website for Windsurfing in Western Australia contains a very similar set of "wavesailing rules".

Almost all observers, however, recognise that these rules are not always obeyed. They are tempered in practice with many exceptions and limitations - some of which seem eminently sensible, others much less so. The first of the limitations on the customary rules is the general principle of courtesy. It is often said that, if the customary norms give you "right of way" in a particular situation, but insisting upon your rights under the circumstances would be rude or inconsiderate, you have an obligation to give way. This principle is most often invoked when an outgoing sailor (who, as I have indicated,

has right of way) meets an incoming sailor who is enjoying a great ride. It is fairly common in such situations for the outbound sailor to alter course or even deliberately to fall in order not to block the path of the incoming sailor. A second, related exception is that women more often give way to men than vice versa - in part because they are more likely to apply the courtesy principle. A third exception is that local sailors sometimes think they have priority over visitors, even when the four customary norms would indicate they are supposed to defer.

That, in short, is the extra-legal customary code of wave sailing. Against that backdrop, what is the appropriate role for law? There are good reasons to think that the answer is: nothing. Formal legal norms and the associated enforcement apparatus should have no role in the regulation of wavesailing. Why not? Most obviously, because there already exists a functioning extra-legal code known to, and generally observed by, wavesailors. Many sociologists and economists tell us that informal customary norms of this sort are likely to be better - i.e., more economically efficient and more fair - than anything a legislature or court could come up with. Bottom line: the law has no place here.

Unfortunately, there are two problems with that response. The first is that not everyone abides by the code. Some people refuse to do so on principle. For example, in Internet chat rooms where these issues are debated (believe it or not), some wavesailors openly reject the basic rule that people going out have right of way. Other people violate the customary code, not because they are opposed to it in principle, but because they are impatient or greedy or tired of beginners messing up the waves. When people refuse or fail to obey the customary code, the informal sanctions available on the beach are not very effective. Fistfights are a poor, dangerous, and often unfair system for penalising violators. Other social sanctions highlighted by sociologists - criticism, ostracism, and so forth - do not seem to be working very well either.

So incomplete observance, related to ineffective enforcement, is the first reason why the customary code may not be altogether satisfactory. The second reason is that, in practice, the customary code is biased. It privileges locals over visitors and it privileges men over women. It may be possible to defend the first of these biases (although the argument in its favour is not obvious), but it is hard to imagine a plausible defence of the second.

Those are the circumstances that create the possibility of legal intervention. What would legal intervention look like? One possibility is that a legislature or court could adopt a formal set of rules, backed by a schedule of penalties, that paid no attention to the customary code. For example, windsurfers could be declared to be “vessels”, fully subject to the international anti-collision rules and the associated

norms of Admiralty Law. George Greenough told me that Australian Admiralty Courts actually took this position in a case in which a windsurfer ran over a swimmer. A case in which two wavesailors collided could be treated similarly. Thus, for example, the sailor who was on starboard tack at the time of the accident could collect damages from the sailor who was on port tack, regardless of who was coming in and who was going out, or who had greater manoeuvrability. Virtually all sailors think that such a context-insensitive approach would be disastrous.

Another possibility, suggested by Stanley Yeo at the beginning of this forum, is that courts could apply to wavesailing collisions the standard criteria of tort law, under which a sailor would be liable when his or her failure to behave like a hypothetical "reasonable person" under the circumstances caused injury to others. Although this suggestion is perhaps more plausible than the first alternative, few observers regard it as satisfactory.

The only way for enlisting the formal legal system that seems to merit serious consideration would involve employing lawyers and courts to reinforce, rather than displace, the customary norms. How might that work? In extreme cases, criminal law could be brought to bear on persons who violated the customary code. Recently, the Supreme Court of Colorado upheld a manslaughter indictment against a skier who went down a slope at a reckless speed, hit another skier, and killed him. On rare occasions, criminal sanctions might be applied in an analogous fashion to wavesailing accidents. A sailor who, in violation of the customary norms, sailed over the back of a wave, collided with a jumper and killed him could be prosecuted for some form of homicide - perhaps manslaughter or even second-degree murder.

In more routine cases, tort law could be harnessed. Courts could find sailors liable, not when they violated a general norm of "reasonable care" (of the sort I just mentioned), but when they violated the customary code and injuries resulted. There is precedent for such a strategy: Admiralty Courts in the United States and elsewhere sometimes deviate from the international anti-collision rules when those rules are incompatible with local custom. For example, the customs that govern traffic on the Mississippi River do not follow either the international or the inland-waterway rules. When two boats collide on the river, the courts sometimes respect local custom, not the international regulations. So the proposal that tort law should incorporate, by reference, the existing customary code is not ludicrous.

Should it do so? My tentative view is yes - but only as a last resort. For several reasons, this strategy should be avoided if possible. First, it would be costly. Attorneys' fees and court costs are expensive.

Second, it would foster litigiousness. The possibility, even remote, that the courts would police misbehaviour on the water would likely foster among wavesailors a regrettable attitude of "rights consciousness". The last reason is the most subtle but may be the most important. Sociologists tell us that it is very difficult for a legal system to capture the nuances of an informal code. That generalisation seems plausible in this context. It is fairly easy to see how tort law could incorporate, by reference, the four customary "rules" I described a minute ago. It is much harder to see, however, how tort law could effectively incorporate the more general principle of courtesy and consideration. Increased reliance upon formal legal sanctions would thus almost certainly reduce the influence of the latter principle. That, in my view, would be unfortunate.

Brian Fitzgerald

One of themes we aimed to draw out in this Forum is the analogy between the use of codes of conduct as a form of regulating Internet users, and the use of codes of conduct in regulating surfers. There are some similarities besides the use of the word "surfing" in relation to both endeavours. Both activities occur in spaces that are beyond land and seen as difficult to regulate. As well, a number of us on the panel are researchers and teachers in the area of Cyberlaw/Law of the Internet. We have witnessed the development of codes of conduct as a means of Internet regulation in the last few years. Cyberspace started out as a new frontier land, a space for recreation of the mind where ethical self governance was desired, but pretty quickly electronic commerce entered the picture and has brought along a lot of pressure for there to be much heavier legal regulation. It has forced people to ask, "what sort of regulatory measures work in this kind of environment?" Peter Coroneos has been in the forefront of this debate in Australia and after you hear him speak you will see a lot of the reasons why we think there is scope for cross fertilisation of ideas and understanding.

Peter Coroneos

Executive Director of the Internet Industry Association

Peter Coroneos is executive director of the Internet Industry Association (IIA), the national industry body for the Internet in Australia. Prior to his appointment in 1997, he enjoyed a diverse professional life as a science educator, marketing consultant and senior officer with the national competition and telecommunications regulator. His multi-disciplinary education includes a first class

honours degree in Law, honours degree in Agricultural Economics, and a postgraduate qualification in education. Peter is also currently coordinating the implementation of an Internet industry code of practice. The Code will provide a basis for self-regulation of the industry in Australia. In addition to his role in running the IIA, Peter sits on several national bodies dealing with a broad range of industry related issues, and regularly appears before House of Representatives and Senate inquiries to assist with the development of appropriate and workable legislation pertaining to the industry. Peter has given addresses to audiences in the US, Europe and Asia on industry related matters.

Discussion

Firstly I should quickly explain the structure of Internet Industry Association. We represent over 300 companies from some of the biggest Internet companies in Australia all the way down to start-ups as well. We exist to some extent to minimise the need for external or government regulation of the Internet in Australia. At the same time we are working on solutions to empower Internet users, because we are very concerned that the nature of Internet itself does not lend itself to legislative solutions. That really is the first parallel I can draw between the Internet and surfing. In other words, neither activity is amenable to legislative solutions and intervention.

I started surfing in 1969 in Perth and, very quickly, I guess I fell into the lifestyle and thinking that in many respects unites all surfers. Neil articulated very well that sense of freedom and the sense of getting out in the water and not worrying about legal liability.

This is also a very common experience of people who want to use the Internet. It is a very unregulated space. It started as a very anarchic medium and that, in many respects, is the thing that we want to try and preserve, while still making it a constructive and an enjoyable experience. It is the anarchy of the Internet, the fact that it is very disruptive technology, which is its real power, strength and beauty. The reason why we are seeing so much innovation and excitement, is because the Internet is not being buried by governments who really would not understand how to regulate it properly anyway.

That is not to say that IIA are anti-regulation. We are actually in favour of some forms of regulation. But only in a way that will work and will not damage the experience, either for businesses and also for the people that want to use and enjoy the Internet.

I want emphasise that I am not coming here saying that we need to regulate the surfing experience. But clearly, there are problems that are

emerging just as there are real problems emerging in Internet space. As a community of committed participants in one or either of those activities, it is incumbent on us to do what we can to try to develop the medium in a very workable kind of way, while still preserving that thing that we value most of all about either the Internet or the surfing medium.

The Internet is a global village. It is an international medium. It has that sense of unifying humanity in many respects, and again the surfing community is a similar thing. I have surfed in several countries around the world and it is an unspoken communication that arises between surfers. I know people here that have surfed in other countries will know that to - that there is almost that communication that need not be said, because everyone immerses themselves in the medium and immediately they are part of that almost collective unconscious that pervades surfing. That is one of the beautiful things about surfing. It is a spiritual experience in many ways too, and I think that I am very fearful that if we do not address some of these real issues - and we permit governments to come in and intervene - then we would lose that sense of harmony.

The IIA is working with organisations like the National Crime Authority and the Federal Police and even Australian Security Intelligence Organisations (ASIO) and some of the national security bodies who are very concerned about the anonymity of the Internet and the degree to which it permits people with bad intentions pursuing activities that are hostile to national security and also to the safety of individuals. Other Internet users, and I am thinking particularly of children who want to use the Internet, are in some respects at risk here - and again this is the reason my industry is trying to take a very pro-active stance. Because we want people to feel comfortable using the Internet and also because we do not want to see the government doing what some governments around the world have attempted to do. That is to force Internet users to become registered or at least Internet Services Providers (ISPs) to register content providers that are using the Internet. We think again that that is probably not a good way to go. We are trying to look at ways that we can address these problems constructively.

The other element of the Internet that has a parallel with surfing is, to an extent, the issue of scarcity. Now that may seem like a strange statement when you think that the Internet really appears to be a very unbounded, limitless medium. But the elements of scarcity are well known to anyone who uses a dial up connection. The issue of bandwidth scarcity is real in rural Australia particularly, in places like Byron Bay I am sure. You may not have great and affordable access capacity, and there are issues like how you get the most out the

medium. Likewise, the issue of a finite number of surf breaks is an issue of scarcity that has been articulated.

There are also activities that other people can engage in that can actually limit your enjoyment. One of those is "spam" email. If you are getting lots of spam then you are actually paying for that and they are using your resource and time, to deliver to you something that you did not want to have in the first place.

What about inappropriate regulation? I was on the Triple J forum site before I came here. I thought it would be a good idea to have a look at what the surfers are saying about this event that we are having tonight. To see what the fears are out there, and I think one of the greatest fears is that someone is going to step in here now and try and make some kind of law. One particular commentator had a fear that we are going to have the police patrolling the water in jet skis giving us defect notices if we have dings on our surfboards. People are really worried about this. What I am trying to say is that it is really up to surfers - we are the ones in control here and surfers are the ones that are going to determine the outcome.

In the Internet space we have been involved in three situations in the past 12 months where we have seen government enter the area in what we would consider a very unwelcome way and they have actually legislated solutions which we think have been potentially or actually damaging to industry. The first was the attempt by the government to regulate online content and I think that you are all aware of that debate. It is sometimes called the "Internet censorship debate".

Basically how it went was like this. In the middle of 1999, the government decided that, for political reasons, some legislation was needed to provide protection for children on the Internet from harmful or offensive material. We all agree that that is a nice objective, but the question is how do you go about that without destroying the medium itself or destroying innovation and the commercial case. The Government's original proposal was to force ISPs, under some circumstances, to block access to sites located offshore. There was the very real threat that the legislation was going to require the ISPs to be the "Internet police", as it were.

I will not go through all the gory details, but the end result was that industry intervened, and put an offer on the table to the Government. We said: "Listen we do not think the solution here is one of censorship. We think the solution is one of empowering end users so that we can give them the tools, and the information, so that they can take control of the situation". And that is exactly what we did. By the end of the year we had three Codes of Practice that we had developed and registered with the Australian Broadcasting Authority. Although

they are voluntary codes, they are actually quasi-legal codes in the sense that the Australian Broadcasting Authority can direct a non complier with the code, say an ISP for instance, to distribute filter software to end users if they are not already doing that voluntarily.

Therefore, the IIA have changed it from a censorship position to an empowerment position, where we are using the industry to help disseminate the tools to protect the end user.

Therefore, applying this model to the surfing situation, we need to find some ways to empower the surfing community to take control - and perhaps the surfing industry, which as Neil said is now a billion dollar industry, could providing some support. I believe that this is the key to the solution.

The second issue we faced in the Internet industry last year was the issue of datacasting and digital television. Again we had a situation where the government came in and legislated that some sorts of content could not be delivered through digital spectrum to "set top boxes". So the bottom line is, that if you have a television set, as 97% of the Australian population has, we could have had everyone in Australia pretty much online, if the government had made the right decision. But we say they made the wrong decision, because they actually created special privileges for the television industry to the detriment of the Internet industry. So datacasting is not really going to happen now, at least in the full form it could have. And again, who loses? The community.

The third issue we face is the one of online gambling. If you are following the media you will know that on Thursday last week, the Government passed a law to impose a moratorium on Internet gambling. The IIA is not pro-gambling, but we do understand regulation that works and regulation that will not work. We are very concerned that by shutting down Australian gambling sites that are all prepared to do the right thing, you are actually forcing users to go offshore into unregulated sites - and that is actually a bad outcome.

What I am saying is that once you get politicians moving into the area, present company excepted I am sure, that do not fully understand the medium then even with all the best intentions in the world, they often make a mess of things.

The solution is to actually develop outcomes and strategies and measures that we can put in place to head off the problem and deal with it before governments feel that *they* have to intervene. It would only take, I suggest, one politician in Australia to lose a child, heaven forbid, in the surf due to some infringement of a legitimate code and you might be facing a situation of legislation. I hope that never happens but I am telling you, looking at the Internet experience, that

some of the motivation was pretty questionable. Yet they still moved in and they passed these laws - and I would have to say Australia's reputation internationally has been damaged because they have not taken what people overseas who understand the Internet consider an enlightened approach.

I just wanted to quickly go through the question of "netiquette" because I think that a lot of the solution here is about the community regulating itself. If you are not familiar with netiquette , it refers basically to the do's and do not's of Internet behaviour. In other words, the practices that arise and have been developed by Internet users themselves. In many respects, netiquette mirrors the Surfriders code of practice that Neil referred to earlier.

The first rule of netiquette according to commentator Virginia Shea is to "remember the human at the other end of the communication". In this case, remember the human out in the water there with you and realise that they have needs, and its basically respect for others and consideration.

The second point is to "adhere to the same standards of behaviour online, as you would follow in real life". The parallel here would be if you do not settle your disputes by fisticuffs on land then you should not try to use that method of trying to solve your problems in the water.

The third one is "know where you are in cyberspace" and I guess, in this context, this would refer to having sensitivity for the locals. So if you are coming into an area, you should appreciate and respect those people that are there. I will not go through all of these principles here but one of the good ones is "share expert knowledge" and, if you are an Internet user, you know that there are news groups out there and people are very willing to help other people on the Internet. I think we see that in the surfing community by and large, but I really like the idea of this spirit concept and the fact that we have got senior members of the surfing community that are here as mentors and guides. I really think that it is incumbent on all the experienced surfers to share and infuse that sense of consideration to the new ones entering the sport.

"Be forgiving of other people's mistakes". This is another netiquette rule and it basically talks about tolerance and again I think that is really one of the primary issues here. The problem, of course, and I think that I will leave you with a conundrum because I do not think I am going to give you a solution, is that I do not think it is as easy as that. But one of the problems is that we can create a code of practice as we have done in the Internet community. The question is what do you do with the non-compliers? What do you do with the bad guys?

Codes are for good guys, codes are for people that already understand what is right and wrong and are prepared to follow it.

In the Internet space, we are most worried about the ones that are not going to abide by a code and I think the question is: "Is there a role for the law here at all to supplement and to form a safety net to sit underneath the rules that we, as a community, are creating for ourselves"? That is the thing that we are promoting in the Internet space because we know that the paramount objective is to make people feel safe using the Internet. If there are guys out there, companies and so on, that are not prepared to follow the rules, then we need to have some sanctions that are meaningful and enforceable that tell people that these codes are serious guidelines for behaviour and people are expected to follow them.

I think the challenge is really not about promoting and educating, because I think we all instinctively understand that has to happen. The real question is going to be what do we do with the people who choose voluntarily *not* to follow the codes and the rules that the surfing community decides to create for themselves? That is the real challenge.

Brian Fitzgerald invited prominent surfers and selected members of the audience to briefly address the forum on the core issue of surf rage, the role of women surfers, environmental protection and intellectual property law. Surfers have long been concerned about environmental and coastal protection while issues such as intellectual property are emerging as important issues for the future development of surfing.

Mr Nat Young, one of Australia's and the world's best known surfers, former world champion and surfing historian, thanked the learned members on the panel and expressed his concern about the ramifications of what could possibly happen if governments introduced legislation that would impinge on the freedom to surf. Mr Young saw the need to educate all surfers about the rules of surfing. Adding that "some people forget what the rules are and some people never knew what the rules were, if we do not start to make people aware, then we are going to have all sorts of problems". Mr Young reminded the forum that "anger is an incoherent emotion and it has problems with your development in a spiritual sense"

Ms Melanie Mott from the All Girls Surf Riders Club was invited to say a few words about women surfers. She explained: "The All Girls Surf Riders Club was established to allow girls and women to get into surfing in a somewhat safer and more sheltered environment with a lot of supportive people to assist their confidence. While learning to surf I was unaware of the rules of surfing however, by watching other surfers I realised that there is an unwritten law out there in the surf. In

my experience, in 99% of cases surfers do respect the rules and each other, and the isolated incidences that I have been involved with (in what you might call surf rage) have been situations where a person was going to lose their temper at anyone - and I do not think that it was just because I was a woman. More girls are getting into surfing because women have gained more confidence in all areas of their lives."

Mr Wayne Deane current Australian long board champion and long time surfer and surfboard manufacturer addressed the forum about surfers' concern with the sand bypass system on the Southern end of the Gold Coast where sand is delivered from south of the Tweed River into the Snapper Rocks/Rainbow Beach area. Their concern is that state and local governments, in making decisions as to where sand is placed, will significantly impact upon well known surfing locations. Mr Deane stated that a surfers advisory committee including Wayne Bartholomew, Bruce Lee and himself are giving advice as to where they think the sand should go, so as not to adversely affect surfing spots such as Snapper Rocks and Duranbah.

Mr Jamie Massang of Pipers Patent and Trademark Attorneys in Brisbane, and an expert in patent and trademark law relating to surfing equipment, also briefly addressed the forum on these issues. He highlighted the value of trademarks and designs in the surfing industry and also pointed out the potential application of patents of inventions in relation to unique surfing equipment.

The Summing Up

Justice Greg James

The summing up is quite short. You have got a law professor, you have got a judge, you have got a legislator, you have got a wave surfer with his experience, you have got an environmentalist, you have got the analogy of the internet coming from a surfer/lawyer, you have got a whole group of concerned people, you have got books being published, the interest of television channels, the interest of newspapers, and the development of the expression of a code of behaviour.

All of that is because of the awareness that legislation should be the last resort. That the legal sanction is one people would rather avoid. We would all rather see that heavy-handed legal regulation by the state should be the last resort. But there are times when there are individuals who insist that they will not seek to gain respect by giving respect, not seek to share the surf. There are individuals who the law can deal with by Apprehended Violence Orders (AVOs), if necessary by court

enforcement of community based banning sanctions through such remedies as injunctions for nuisance or banning people by way of Apprehended Violence Orders from particular surfing locations.

It would be a very great pity if anyone had to be the subject of such orders. It would be a great pity if, under the *Local Government Act*, beach inspectors, special constables or police, policing the legislation should have to intervene. They will not if surfers are prepared to develop a culture for ourselves and ensure that the best standard of behaviour by all of us is to be encouraged and evidenced by that culture. There is a basic rule - a very basic rule – and, at bottom, *it* can avoid the application of any further restrictions to surfing.

That politician's child that was referred to should not ever be injured, and will not be injured, if people yield the right of way, take up the courtesy Terry has referred to, follow the same code of courtesy as has been suggested, basically by everybody speaking tonight and remember that the last rule of admiralty, the last rule on the road, the basic rule is in the event there is likely to be, an accident, an injury and you can avoid it, it is up to you to do that.

Brian Fitzgerald

I would like to say a few words of thanks, first and foremost to the panellists who have done a great job this evening, thank you very much. Thank you to everyone who has turned up particularly the number of high profile surfers - especially George Greenough and Max Perrot - who have given us a great deal of help with this event. To the people at Southern Cross University (including Wendy Poole, Sam Garkawe, Julie Bull, John Miller, Jim Baker) who have helped us run the Forum, Geoff Clarke who has done a lot of the preparation and operational work, Robin Osborne from Southern Cross University who gave us the initial idea to do the Forum, and Karen Hanna and Julie Burton from Norsearch Conference Services Ltd for their logistical support. Finally, thank you to all of those people whose generous participation has helped make this a successful Forum.

Postscript

Mr Stephen Kuhn was invited to present at the forum but due to unforseen circumstances was delayed at the last minute and could not attend. He is currently employed as an academic at the University of Wollongong where he is undertaking research in the law of the surf area. He has since provided us with the following summary of the speech he intended to deliver and it seems appropriate to add it here as a postscript to the Law of the Surf Forum.

Stephen Kuhn is an Associate Lecturer in the Faculty of Law at the University of Wollongong. Stephen graduated from the University of Wollongong in 1995 and was admitted as a Legal Practitioner in 1997. He worked with the New South Wales Aboriginal Land Council as a Native Title and Land Rights Officer for 18 months before going into private practice. In 1999 Stephen started lecturing at the University of Wollongong. He is currently doing a Masters thesis on the Law of Surfing. Stephen is looking at the informal laws that have developed through the surfing community and also at reasons why possible regulation of this activity is being considered.

Discussion

The point that I wish to raise is that overcrowding and aggression in the surf are not necessarily new phenomena. The anecdotal and theoretical research I have done would suggest that "surf rage" is not a new occurrence. I would suggest it is the new form of an old demon. This does not serve to undermine the seriousness of the problem, but it does provide us with a mechanism for remedying or making sense of the problem. As Ben Harper would say, we can "look to the past and learn". I am sure that there were numerous people at the forum who can remember the good old days when there were plenty of waves for everyone. Perhaps it would be good to reflect on the *changes* that resulted in the good old days coming to an end. It is fair to say that population growth would be a common theme, also changes in surfboard design, and what about changes in rules?

The rules of surfing are evolutionary. They change with each generation. Ask yourself this: "do you remember when the rule was: the first person standing got the wave?" This is a rule that developed when long boards were the norm. Today this rule no longer applies at most breaks. It is overridden by the rule that the person on the inside has the right of way. Another example is the rule that you should not "snake". This seems to be a fairly recent rule, in name at least. In a copy of the Australian surfer's dictionary, published in 1985, the term "snaking" was not mentioned. This does not mean that snaking was not occurring, but it does suggest that the law of the surf is evolving. We now take this rule for granted, as if it had always existed. The acts we consider appropriate or inappropriate are changing and the names we give to these acts are changing.

The types and number of people surfing are changing. In his article "The Beach Boy", in the *American Heritage Journal*, July 2000 volume 51, Ian Whitcomb makes the following observation, "By 1911 the waves were getting thick with riders; sometimes a hundred of them could be seen where once had been only Freeth's silhouette." He was

referring to George Freeth who Whitcomb credits with formally introducing "surf-riding to Southern California". I would argue that a hundred people at any break would lead to it being overcrowded. To prove the point, Whitcomb goes on to reiterate the point that the "sea was becoming cluttered" in 1915. Whitcomb cites numerous examples from the last 90 years of surfing - for example Leroy Grannis upon returning to Malibu from the war (World War II) saw 15 people in the surf and exclaimed "That is it! That is the end of paradise!" In the fifties and sixties it happened again with Mickey (Da Cat) Dora being the most obvious example. Mickey "mooned" [*Editorial note – indecent gesture*] a beach and TV audience during a surf carnival at Malibu to show his dissatisfaction with recent developments in surfing. More recently (but in the same vein as Mickey Dora) is the example in the May 2000 edition of *Tracks* magazine where a surfer is putting his fingers up to the photographers wanting a part of his tube at Pipeline in Hawaii.

What I am concerned about is that if we treat the issues associated with surf rage as new or worse than they used to be and deal with them differently, then the evolutionary and fluid culture of surfing will be stymied. That is, we will determine what surfing is in the year 2001 and lay down the rules for today, thereby limiting its capacity to develop. One of the vital elements of the law of surfing is that the law is "unwritten". I would suggest that by writing down the rules, as we understand them today, we are imposing our values on surfers of the future. It might be said that we could change the rules, and there are pages of legislation and common law that prove we can do this, however I am concerned that the change from an oral to a written record of the law of the surf will change the nature of those laws.

We do not need written rules. There are numerous instances where people relate to each other and nature where the rules are not written. In our life we have relationships with family, friends and work colleagues. Written and unwritten laws govern all of these relationships. Where a variety of laws interact in this way it is known in the law as legal pluralism. This is a complicated title, yet a simple concept. It is an acknowledgment of the principle that a variety of laws operate to regulate our society. They interact with one another but are very distinct laws, some written some not, some imposed, others discretionary.

What does all this history of overcrowding and over exposure tell us? Despite these changes and events, the law of the surf has not changed. The laws may have changed but the substance has not. Until now these rules have been part of an oral tradition. I would argue a successful oral tradition.