THE LEGAL BASIS FOR THE AUTHORITY OF PRIVATE POLICE AND AN EXAMINATION OF THEIR RELATIONSHIP WITH THE "PUBLIC" POLICE

Rick Sarre

While most of us presume to know something about the existence and role of modern private security personnel or "private" police, it is important that we ask some more fundamental questions about the legal basis of their authority. On many occasions each day, shoppers, travellers, students, tenants and workers are confronted by these "private" individuals, and requests may be made for searches and questioning. These interactions may occur on private property or in more "public" areas. From time to time individuals refuse to comply, and the question arises: what authority do security agents have? In what circumstances can force accompany non-compliance with a request? In what circumstances can an arrest occur? Accurate legal answers to each of these questions are elusive. The implications for civil liberties are significant.

This paper is designed to explore some of these issues. It is clear, from a cursory glance, that the position in 1977, as reported by Canadian researchers, is not much different today:

At the very least it is necessary to clarify the powers presently held by private citizens, a matter which, because of the relatively recent upsurge in the size of the private security industry, and the tendency of the legal superstructure to lag behind social reality, has only received very limited consideration, either in the legislature or in the courts (Freedman & Stenning 1977, p. 66).
For a start, it is not difficult to imagine that there will be perennial confusion among the general public in distinguishing between the two forces, private and public, given the similarities in dress, and the merging boundaries between private and public areas.

Despite the fact that private agents . . . do not possess police powers, it is probably true that most individuals when confronted by a uniformed guard or a man stating that he is a "detective" or "investigator" naturally assume he has some kind of legal authority. Public misunderstanding of the law undoubtedly gives private agents an additional advantage (Scott & McPherson 1971, p. 272).

In many cases, the situation is not only unclear but poorly represented. Scott and McPherson cite an example of a training manual for security officers that claims no difference in powers between public and private police (1971, p. 271). While in some jurisdictions there may be some prohibition of any conduct where persons may hold themselves out as having more legal authority than they actually possess. For example:

- The South Australian Commercial and Private Agents Act 1986, (proclaimed February 1989) section 19(1) and (2) creates the following offence:
  
  (1) A licence [under the Act] does not confer upon an agent any power or authority to act in contravention of, or in disregard of, any law or any rights or privileges guaranteed or arising under, or protected by, any law.

  (2) A person licensed as an agent who claims or purports to have by virtue of the licence any power or authority that is not in fact conferred by the licence shall be guilty of an offence against this Act and liable to a penalty not exceeding $2,000.

Yet these legislative prohibitions are hardly likely to resolve the difficulties.

It is not possible for this paper to attempt to be an inventory of the various approaches of each of the common law jurisdictions to this set of problematic questions. Therefore these will be covered in broad terms only.

Tracing the legal authority of private policing and indeed the legal liability of private security personnel is no easy task. The phenomenon cannot be examined using traditional tools commonly employed for the study of the "public" police, since private security personnel are neither enforcing public law privately, nor are they public police merely acting privately. In the midst of this, there has been a shift in our understanding of the nature of public and private property. Our cities have typically moved towards converting formerly open and "public" areas (like shopping streets and housing estates) into closed "private" property (like indoor shopping malls and monitored and patrolled living areas). As a result there has been:
... renewed pressure to re-model our policing arrangements so that they are once more compatible with the social structures that define the character of present day society (Shearing et al. 1980, p. 273).

Others may determine whether this re-modelling is necessary, and, if so, what form it should take and whether it is a replacement of, or an add-on to, public policing. Moreover, this paper does not examine whether the private sector is more efficient or competitive in undertaking the role of policing, nor does it address the method of evaluation of the various options, other than to consider later some of the explanations that have been proffered to explain the relationship between public and private police. However, the paper does begin with the premise that the primary (although certainly not sole) motivation for handing over segments of the policing task to private enterprise is an economic one (Stenning & Shearing 1991, p. 131). That being the case, and given the corollary that private security has not evolved from any careful consideration of the choices (public or private) of policing policy (McCarthy 1992, p. 113; Heald 1985, p. 10), it is fair to say that the question of the legal authority of those to whom we have entrusted much of our day-to-day policing responsibilities is determined more by a piecemeal array of legal rights, privileges and assumptions than by some system of settled law. Indeed, it is surprising, then, that more political and academic attention is not paid to this important aspect of public policy.

The Legal Authority

Unlike the public police, whose power is found generally in the various law enforcement statutes, the power of private security personnel derives principally from their being legal "agents" of those who control and own private property.

True, there has been legislation passed in a number of jurisdictions concerning the registration, employment and training of private legal personnel, but it is unlikely to delineate legal powers. Thus the legal fiat of such personnel is not statutory, nor does any (Australian, at least) law confer any additional powers upon them beyond the powers of the ordinary citizen. Indeed the criminal law seems

... to have been drafted in complete ignorance of the existence of the huge army of specialised private security officers... because these laws... were devised long before the phenomenon of private security as we know it today came into existence (Shearing & Stenning 1982, p. 3).

Private property owners and their legal security agents are able to draw, arguably, upon three fundamental areas of the common law to enhance their position vis-à-vis the rest of the world: the law of contract, the law of property and industrial law (Shearing & Stenning 1982, p. 6). These will be examined in turn. Following this examination, this paper will address the likely legal outcomes in a variety of settings.
The Law of Contract

From the law of contract private security personnel derive their right to contract as agents for their principals, and thus to act upon their instructions within the scope of their authority. The "agent" status of private security personnel allows them access to, and control over, places where the public police may not routinely go. By virtue of their being contractual agents, they are able to exercise, in so far as they remain within their scope of authority, the powers possessed by the owner of the property.

Putting to one side employment contracts (discussed below), the contractual power of owners or managers of private land (and their legal agents) over visitors is extremely problematic. Those who challenge shoppers and request a search of their belongings, for example, may find it difficult to locate the "consideration" required for there to be a contract between manager and shopper. Visitors who pay for the privilege of residence (tenants, for example, by the payment of rent) or entertainment (by the purchase of a ticket) may, however, find that a contract does now exist. Visitors may therefore be subjected to express and implied, written and verbal contractual terms upon the payment of rent or the purchase of a ticket. They will, at law, be deemed to have consented to these terms in so far as the terms (at a concert, for example, the requirement of a search of a bag which may contain recording equipment) have been clearly determined and incorporated into the contract.

Such tenants or visitors enter the premises or entertainment venue on the basis of a contract with the following implied terms—that in return for the abode or entertainment, and the provision of a safe environment in which to live or be entertained, the visitor agrees (impliedly) not to behave in such a way as to threaten or disrupt the condition or integrity of the apartment or presentation, and to obey any directions of the managers or promoters or their legally appointed agents. The person who is in charge of premises has the capacity, and thus is under a legal duty, to make those premises safe. In return, the visitor agrees to abide by the rules.

Thus the provision of security includes a right, under contract, to search people and their belongings. But to what extent can force be used to ensure compliance by those who refuse? Does the existence of implied consent extend to the use of force, and if so, to what degree? What about situations where the consent which may have been present when the person entered the private property was revoked upon exit? In the case of Robinson v. Balmain Ferry [1910] A.C. 295 this exact situation arose. Robinson missed his ferry and attempted to go back through the turnstiles. Unfortunately, his retreat required the payment of another fare, since passengers alighting from the return trip were not charged at the dock where they boarded. Robinson refused, and was "held" (albeit passively) by the ferry agents against his will. He sued in the tort of false imprisonment. He failed. The court said, however, in passing, that the non-payment of the fare would not have justified the use of force to restrain Robinson. The common law protected the ferry company from civil suit only in so far as they legitimately blocked Robinson's exit.
without the use of force. There is no common law power to justify force to ensure the payment of any debt (Sunbolf v. Alford (1838) 150 E.R. 1135).

So while there are rights under contract for property owners to enforce compliance under contract law, they are seriously circumscribed in certain situations, for example, where no contract exists or where force is contemplated to enforce the contract.

**The Law of Property**

From the law of property, private property owners and their agents receive great protection. The influence of capitalist economics upon the notion of private property has entrenched the concept that each person's home is his or her castle (Stenning & Shearing 1979-80, p. 233 quoting the famous dictum of the judges in Semayne's Case (1604) 77 E.R. 194, see also Lippl v. Haines and Ors (1989) Aust Torts Reports ¶80-302). Putting to one side the difficult legal questions surrounding the common law right of a person (including a police officer) to go on to private property with or without force for the purpose of arresting someone on a criminal charge (Halliday v. Nevill (1984) Aust Torts Reports ¶80-315), or intervening in a personal dispute (Panos v. Hayes (1987) 44 SASR 148; McConnell v. Chief Constable of Greater Manchester (Court of Appeal 1988 reported in Johnston 1992, p. 206), it is clear that the law grants to the owner (or legally appointed agent of the owner) of the "castle" some power to eject strangers or to subject invitees and visitors to stipulations prescribed by the property owner. An invitee on to property (who has been granted a "licence" to enter) will have to follow the directions of those charged with the responsibility of "security", particularly if there are clear directions (to which notice has been drawn) of the terms of that licence.

Like the situation in the law of contract, fundamental to this area of law is the issue of informed consent. Where there is consent by the invitee to the terms of the licence, there is no problem. Anyone who dissents, however, before entry or during the visit is in a different and more contentious position. These persons are unlikely to be invited or, if they are already present, will be ordered off the property with the (arguable) legal authority of the owner to use whatever force is necessary and reasonable in the circumstances, and furthermore to be subjected to any requirements of entry (for example a search) that were drawn to their attention upon entry. Such a statement, of course, still leaves open the question of the "reasonableness" of the force used.

In South Australia the power of property owners has been reinforced by statute. An Act to amend the Criminal Law Consolidation Act 1935 was passed into law in December 1991. It was introduced by the Opposition spokesperson on Legal Affairs in order to allow persons to defend themselves or their property "from unjustifiable interference from another" by the use of "such force as is reasonable in the circumstances as they actually exist, or as the person believes them to be" (emphasis added). The Act is, therefore, adding, for better or for worse, a subjective component (in the determination of the availability of a defence to a criminal charge) to the current common law test of "reasonable" force. Whether it applies, of course, beyond the home-owner
to encompass corporate law security officers is another question. How such legislation will affect one's common law liability in *tort* is another interesting question. To what extent may a person who fires a weapon to protect property be liable in the tort of assault? In *Hackshaw v. Shaw* (1984) 155 CLR 614 a property owner injured a thief when he fired wildly at a car. The High Court found that the injured person (in the car) should be compensated for her injuries because it was reasonably foreseeable that an injury was likely to result. In the words of Justice Lionel Murphy, to fire bullets at a car in this way "is not merely extra-hazardous, it is ultra-hazardous".

Putting aside those finer points of legal interpretation, it is important to reiterate that private security personnel possess no greater powers than those of the property owner. Like any citizen, property owners or their agents have limited rights to make a "citizen's arrest" in circumstances where they perceive that a crime (such as larceny in a shopping centre, for example) has been committed (discussed below). The only limitation is that the citizen has to be right about his or her suspicions or face a civil suit of false imprisonment or assault. Off private property, the right of the property owner or agent to enforce the criminal law becomes even more delicate.

The presence of security agents' uniforms, their badges and weapons is, then, little more than a facade of power. The "special" power which is exercised emanates from little more than a combination of property law (and in some cases contract law) and intimidation by appearance. It does not derive from any unique authority granted by law to private security personnel, but rather it is found in the perception of power by those at whom it is directed.

In other words, if one adds to the general power of property owners to control conduct on their property a right to allow their agents to wear uniforms, the ability to engage in legal "control" activities on a paid full-time basis, the ability to require searches (with implied consent) of those who enter that property, the availability of sophisticated surveillance equipment and the privilege of carrying weapons, it is not surprising that there is a perception by the general public that "private" police have the same powers as public police. The argument is simply that this power is found more in fact than it is in law.

**Industrial Law**

The law of contract would appear to have more "bite" in the field of industrial law and industrial relations. Employees may be required to agree to undergo searches and credit reference checks in order to remain employed, since that may be a part of their employment contract. While formal negotiation regulates and justifies the bargains struck between employers and employees, it is often doubted that the final workplace agreement is, in all respects, fair. In theory, it can only operate with the consent of both of the parties, but, in reality, consent is usually deemed to have been given or put in the form of an offer that cannot be refused, particularly in times of high unemployment, and (on some views), under what is known as "enterprise bargaining". Infused in this relationship is the fundamental "master and servant" doctrine. In that environment, workers have little choice but to comply with requests by
private security to submit to searches and to answer (subject to equal opportunity laws) certain questions if they wish to remain employed.

For example, there is an implied term in the employment contract that one should be honest. With that in place, then, there is a "right" granted to employers ("masters") to ensure honesty (of "servants"). If the request for a search is reasonable in the circumstances, then a search of a person's belongings while they are on the property of the employer (or leaving it) would be entirely appropriate. In *Latter v. Braddell* (1881) 50 LJQB 448 (C.A.) it was held that no assault was committed when a mistress required her maid to be medically examined to see whether she was pregnant. Although under protest, the maid complied, and it was held that her consent negatived any action in the tort of "battery".

Nevertheless, there are good public policy reasons why consent should be regarded as nullified in certain circumstances (Williams 1962, p. 75ff), for example, in relation to hazardous conditions of work. In other words, it should not be possible to allow a person to consent to being injured. The object of industrial legislation is to reduce these hazards to a minimum and to ensure that a person is protected even if it appears, prima facie, that consent was present.

In all of this, however, the difficulty arises in relation to the ability of the security personnel to use force to ensure compliance. The political dimensions of this situation cannot be understated. Industrial conflicts which question the right of management to use force to ensure compliance by workers raise an entirely new set of questions, outside the terms of this paper.

**The Legal Framework: Examples**

With the above guidelines in place, it is possible to imagine several settings in which the legal principles may be tested. A discussion of each of them in actual settings may assist our understanding of the legal issues, or, at the very least, raise our awareness of the uncertainties and vagaries that exist.

*To what extent is a person in a retail store, or leaving a business as an employee, or in, say, a library, liable to submit to a request for a search of their person by a private security officer?*

Fundamental to this question is the issue of consent. If the person gives a valid and informed consent, then there is no problem. Consent can be express ("Yes, I will do as you ask") or implied ("Yes, I saw the sign when I entered and agreed to be bound by it"). But if there is no consent, the issue becomes clouded. It is clear that there is no common law right to use force to secure a contract (if one exists), and if force may be used in order to preserve the integrity of a proprietary right, then it becomes a question of reasonableness. Perhaps the courts could distinguish a cursory bag inspection to be a reasonable condition of exit from a store, but a personal search to be an unreasonable condition. Perhaps a cursory search upon exit from a department store could be distinguished from a more invasive search required upon exit from a prison visitors centre where questions of public safety and security are more acute.
In the final analysis then, the private security guard or store detective who does not obtain express and informed consent and who cannot imply consent, cannot detain any person against their will or use force to ensure their compliance without running a risk of being sued for false imprisonment or (civil) assault, which risk may still persist (depending upon the force used in the circumstances) even if it turns out that their suspicions (that an offence has been committed) are confirmed. The public police, by contrast, can detain any person upon suspicion of an offence by virtue of the criminal codes. Private police, unless there is a statutory grant of power, have no other legal fiat than that possessed by the private citizen.

To what extent can private security personnel eject a person from private premises, and use force in so doing?

Again, the issue is one of consent, and the private security officer who has not received express consent, or in circumstances where consent cannot be implied, remains constantly at risk of being sued in the tort of assault if the circumstances are such that the force used was objectively unreasonable.

What is the position of the security officer who embarks upon a citizen's arrest?

This is another large and difficult issue, and a full discussion of the contingencies of it are not possible in a paper such as this, given the variations on the laws of arrest which change from jurisdiction to jurisdiction. For example, in all States of Australia the common law rights of private arrest have been supplemented and even expanded by statute (NSW and South Australia allow arrest in circumstances where there is a mere "reasonable cause" to suspect the commission of an offence), yet in one State they have been abrogated. The Victorian government passed the Crimes (Powers of Arrest) Act in 1972 to limit the availability of a "citizens arrest" to situations beyond suspicion. The difficulty in this area is to balance the citizen's or private security person's right to enforce the law with the danger that officious intermeddlers might abuse others' rights. The conflict is, presumably, resolved by judicial limitations on the privilege, assuming, of course, that matters such as these ever get to court.

In the United States, the law concerning citizen's arrest "privileges" (US National Advisory Committee 1976, pp. 392-3) have been specifically enacted in over half of the states of the Union. Like the situation in the English common law tradition, the difficulty remains in determining the reasonableness of the suspicion that an offence has been committed. Recent legislation may have assisted in this respect. The Police and Criminal Evidence Act 1984 section 24 allows a citizen to arrest without a warrant "anyone whom he has reasonable grounds for suspecting to be committing [an arrestable] offence". The case of Graham Self (1992) 95 Cr App R 42 illustrates the complexities of the legislation. The "shoplifter" was acquitted on the charge of theft, and thus the court held that since the commission of an arrestable offence was a pre-condition to a valid arrest, then the arrest was not warranted and the charges of assault (an attack by the accused upon the store detective while being arrested) could not stand.
Suffice to say for our purposes that under normal circumstances the powers of the private citizen (and consequently private security) to arrest someone without a warrant are more limited than the public police who have the right in most cases to arrest on suspicion of the likely commission of an offence which may be about to occur. For example, in some jurisdictions the right of a private person to make such an arrest is limited to felonies and not misdemeanours or summary matters, assuming that the person understands the distinction! Private security personnel remain, therefore, constantly at risk (in the absence of consent) of being sued for false imprisonment (Freedman & Stenning 1977, p. 79) either for their initial action, or in circumstances where they do not hand that person over to a member of the police as soon as is practicable after apprehension.

Where deadly force is used in order to effect an arrest, the problem is compounded (Elliot 1979, pp. 72ff). The case of Hackshaw v. Shaw (supra) makes it clear that there may be tortious (as well as criminal liability) in the event of injury to any person involved, or indeed a bystander. The danger is not only to citizens but also to the security officers and public police. In many jurisdictions security personnel and police officers have the privilege of carrying firearms, the former regulated by licensing requirements and the latter by police regulation, (in South Australia by Police Issue 3375). Further debate concerning the use of deadly force by public and private police is required, given that some evidence points to the greater likelihood that police or security officers will be at risk if wearing a firearm (McCulloch 1992, p. 136, Boyanosky & Griffiths 1982, p. 406).

The Changing Nature of "Property"

In the circumstances, one can see that one of the principal keys to the legal authority of private security is the notion of private property. Generally speaking, the right of the private police agent is enhanced where private property is involved, and may dissolve where private property is not involved.

But determining the description of the property does not solve the problem, especially with the advent of what Shearing and Stenning describe as "mass private property" (1981, p. 229). How do we delineate where private property ends and public property begins? This gives rise to unfortunate difficulties for the law, since the dividing lines are not evenly drawn nor clearly visible, for example, where an arrest for a "public" offence takes place on ostensibly private property (see, for example, Semple v. Howes (1985) 38 SASR 34).

Notwithstanding that it is possible to conclude that the legal authority of private security is not as firmly based as one may have believed, the facade of power spoken of earlier is even more enhanced by the power wielded by the property owner over the disposition of the matter. An essential ingredient in loss prevention (typical of the function of private security) is lack of publicity. Investigations and security checks will proceed as quietly as possible if wrongdoing is suspected. If a culprit is apprehended, private security will first enquire into the possible ramifications for business interests prior to
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contacting the public police. Arguably, only if there is no risk of civil damages, bad publicity or loss of company secrets, or if a scapegoat is needed, are the public police considered.

Hence the great importance . . . of the "unique access to private places" which private security personnel enjoy. On the one hand they are in a unique position to observe and detect criminal activity on private property. On the other hand, the rights of private property ownership, which they enjoy by virtue of the fact that they act as agents of the owner, leave them with a virtually unfettered discretion as to whether they will invoke the criminal justice process in dealing with such activity, or attempt to deal with it in some more private fashion (Stenning & Shearing 1979-80, p. 235).

It would not be too difficult to conclude that the common law, in circumstances where private property is involved, favours the privacy of the property owner above the privacy of the individual. There is a paradox here, since the very agents responsible for the protection of privacy must invade other's privacy in order to complete their task (Reiss 1987, p. 20). What objections are raised are quietly discussed elsewhere and compromises are encouraged, for it appears that private property owners are anxious to avoid any test case which may threaten this interpretation of their rights as owners.

Accountability

Although it is clear that the extent of the proper accountability of public police is far from unequivocal (Hogg & Harker 1983, Sarre 1989), it is strongly arguable that the formal accountability mechanisms that exist within that sphere outstrip the accountability of private security. The private sector is not dependent upon the state for its authority and the state has little power to control or require accountability, having merely granted contractual and proprietary rights and then left them alone.

The accountability of the state through the ballot box is more achievable than the accountability of corporations which, although theoretically accountable to the state, are beyond the reach of the public (McCarthy 1992, p. 113).

There has been a suggestion that the market forces which drive the private sector act as a mechanism of accountability, that is, the poor performer will not survive in business. Indeed, there is some suggestion that private security firms in the United States owe a duty of care to their clients for acts of criminals whose conduct they ought to have foreseen! (Schiller & Harris 1988). But despite the growing number of cases which are finding firms liable for their breach of tortious or contractual duty (Reg. Glass Pty Ltd v. Rivers Locking Systems Pty Ltd (1968) 120 CLR 516; Williams v. Peters and Peters No. A562/77 of 1982 in the High Court of New Zealand; cf Photo Production v. Securicor [1978] 3 All ER 146, Chanel v. Remath No. 050153 of 1989 Supreme Court of New South Wales) these cases do little to provide systematic mechanisms of accountability. They merely indicate that the
private security firm has to undertake its private responsibilities well, or risk being sued by those with whom it has contracted. Indeed, market forces and the risks of civil suit are poor forms of accountability where a non-contractual party or bystander is involved.

Assume for the moment that a confrontation between a trespasser and a private security officer occurs in which the trespasser is shot. The only accountability mechanisms which may be called upon to examine the event are civil proceedings brought by the trespasser, or criminal proceedings involving the public police. *Hackshaw and Shaw (supra)* aside, it is unlikely that a trespasser will bring an action (assuming he or she is still alive) given the fact that they were trespassing, even though there may be evidence that the security officer used more force than was necessary in attempting apprehension. Criminal proceedings against the security officer are equally unlikely in the absence of strong evidence of criminal conduct. In circumstances where the trespasser was entirely innocent, or where a bystander was injured, once again, the only form of accountability is quite *ad hoc*, relying upon the injured person undertaking expensive civil litigation, or the public police initiating criminal proceedings against a member of a security force, an unlikely event given its political ramifications. Comparisons with the North American situation (the availability of protections under a Bill of Rights or a Charter of Rights and Freedoms, and the greater accessibility to the courts by potential litigants in the North American tradition) are not particularly useful in the Australian and New Zealand context.

Thus it is somewhat anomalous that the general public pays greater attention to the lack of accountability of the public police than it does to accountability questions affecting the private police. Armed with different, less overt power, private security personnel use broad coercive powers and in some cases physical force in the absence of any forum of accountability with barely a whimper from commentators.

**The Relationship Between the Two**

Policing has not undergone radical change without some strain on existing arrangements. How has the rise of private security affected the public police? In many respects, in attempting to answer this question there may be some difficulty separating the theory from the practice (Shearing & Stenning 1981, pp. 229 ff; 1983, p. 502; Johnston 1992, pp. 191 ff). What may present as clear differences *de jure* may not exist *de facto*. Conversely, where it appears that the two sectors are compatible in law, it may well be the case that there exist fundamental differences in fact.

How does this different structure of authority possessed by private security affect its relationship with the public police? The following conceptual models have been suggested.

*The partnership model*

This model assumes that the two sectors, both being concerned with the common objective of crime control, work within a compatible system with a clear division of roles: the public police investigating, and the private police
preventing and detecting. Essentially their objectives and character are the same. One works on private property, the other on public property. One is the junior and the other (public) the senior partner in this alliance. But the difficulties of delineation and the adaptability of each to conform to roles, especially junior and senior partners, makes this model unworkable in practice.

*The "Unholy Alliance" model*

Despite the differences in their spheres of influence, their character and objectives are the same under this model. But if this were the master plan, neither force sees it as such, nor does the model explain satisfactorily to the outside observer the mutual antagonism and suspicion which from time to time surfaces.

*The competing forces model*

This model has the two sectors similar in character but totally at odds with one another. However, the model cannot fit the facts, especially those which point to a network of mutual services being provided from time to time. For example, the government itself utilises private police services for economic reasons if the public police are short of manpower, or if the private industry can provide greater technology resources.

*The quiet revolution model*

This model challenges for the first time the notion that the character of these two sectors is the same. This model states that they are completely different entities, one well-established, and a new one entering the field and remaining quite aloof from it. So long as the private security personnel stay within the confines of the law as it relates to private property, they will not be challenged by the public police. Evidence suggests, however, that there exists a covert dialogue seeking information to allow the right questions to be asked through the appropriate channels if and when the need arises. There are many ex-public police employed by private security firms to facilitate this process for both sides (Marx 1987), and in some cases off-duty police. The strength of this alliance is linked to the need each has for the other; the public police have no unequivocal access to the private purview and vice versa.

Although no one model is entirely explanatory per se, the evidence points to the last model as being the most appropriate, if for no other reason than that it highlights the unusual relationship between the two sectors. Each of the other models seems to assume that there is some order in the nature of the relationship, and the evidence points otherwise. At one moment the two are aloof, the next, highly compatible. Any model that cannot accommodate inconsistencies in alliance and compatibility is necessarily inadequate.

Far from fitting into a complementary model of exclusive jurisdictions, the two sectors are constantly crossing each other's paths due to the blurring of distinctions between areas which are private and areas which are public.
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(Johnston 1992, pp. 205-6). Furthermore, the United States Private Security Advisory Council (1977) listed the following factors as barriers to compatibility and complementary relationships: a lack of mutual respect, negative stereotypes, status differential, a lack of communication, a lack of standards in the private sector and the mutually perceived corruption of both. But the critical factor was the belief of the public police that private security ought to stay well away from the realm of investigation and take a role which is purely passive and preventative.

Just how that potential conflict of interest operates in a milieu of mutual dependence and yet mutual antagonism, wrapped in a confusion about roles, tied up with questions concerning sources of power and authority and the nature of responsibility for what and to whom, is a matter which requires serious deliberation. At the very least, there is at the current time an identified "window of opportunity" for the two "sides" of the coin to see not so much a threatening situation but possibilities for greater cooperation (Walsh 1989, p. 26).

Conclusion

Private policing derives its power from an admixture of the law of agency and contract (in certain situations), the law of property and industrial law. Its de facto power (by virtue of its apparent authority) allows it to have the appearance of a force equal to public police.

The power of the public police is found in the system of rules and laws promulgated by statutes and regulations and the common law which finds its way from the courts into the law reports. Since exceptional authority was to be bestowed upon those who are to administer public justice, traditionally "... it has required legislative action and all the public debate which that engenders" (Shearing & Stenning 1983, p. 11). The rules regulating the public sector of policing are used prospectively to authorise the taking of particular action, and then retrospectively in showing to interested others, such as the courts and superiors, that the action was justified in the circumstances (Ericson 1982, p. 15). It is arguable that none of this happens with private security. Little debate has accompanied the conferring of legal and de facto powers on private security personnel. Nor are private security guidelines tested and interpreted by the courts on a regular basis if at all. Arguably, if no written law or legal interpretation grants them power, private security personnel are not constrained by that power. Test cases are avoided. Thus the legal authority is more subtle than overt, and the power is wielded quietly and without fanfare. An added complication to regulation is the fact that many private security firms are transnational corporations, and thus any national attempt to set rules which transcend international boundaries would be difficult to implement.

Each of the two sectors of policing, private and public, is premised upon different legal bases, a factor which does, to a marked degree, affect and effect the nature of the relationships between the two. But it is too simple to allege that one has authority over private land and the other authority over everything else. It is too simple to assume that one is involved purely in loss
prevention and detection and one is solely concerned with investigation and the administration of the criminal justice system. It is much too simple to adopt any model of relationships which suggests that the two sectors are either neatly compatible or overtly hostile and suspicious.

What we are left with at the end of the day is a scene of two forces; one a highly trained, directed and accountable (to the state) public force and the other a less professionalised quasi-force which, in many instances, is less trained and much less accountable to the general public. Together they move around both public and private areas, in a sea of misconceptions about their various functions, engaging in a tight-lipped dialogue which hides more than it states, and using each other only when the economic and commercial assessments have been concluded.

**Endnotes**

1. The term "invitee" is used here in its general sense. In *Australian Safeway Stores v. Zaluzna* (1987) Aust Torts Reports ¶80-073 the concept of the status of a visitor determining the extent of the occupier's liability in tort was abandoned in favour of the mere application of the ordinary principles of negligence and the question of foreseeability of risk and injury.

2. On the subject of credit references, it ought to be noted that the Australian government has passed amendments to the *Privacy Act* which impact upon the availability of certain information about individuals. The new law applies to all credit providers including banks, credit unions, building societies, finance companies, and retailers which issue credit cards. Since 24 September 1991 the *Privacy Amendment Act 1990* has been in force. It says that only the above classes of credit providers will have access to files on individuals held by "Credit Reporting Agencies". All of the other typical holders of such information, for example, insurance companies, real estate agencies and government instrumentalities, including Telecom, will be denied access. It is now illegal for a credit provider to pass information on to a non-credit provider or credit reporting agency without consent. Furthermore, a new Code of Conduct will be drafted for credit providers and credit reporting agencies in the collection, storage and use of information. It is being developed currently by the Australian Privacy Commissioner. The Commissioner can examine the files to ensure whether the information is being properly recorded and that adequate measures are being taken to prevent unlawful disclosure. The effect of such an amendment to privacy laws is yet to be tested in the realm of employment contracts.
References


Heald, D. 1985, "Will the privatization of public enterprises solve the problem of control?", Public Administration, vol. 63, no. 1, pp. 7-22.


