Impacts On Media Organisations

The New Workplace Surveillance Act

Writing by David Leyonhjelm

The New Workplace Surveillance Act: Does the law bring media organisations into the cusp of the digital era? It is detailed, comprehensive and contains provisions that, as a media organisation, you need to be aware of. We bring you a straightforward guide to some of the implications of the new workplace surveillance.

Scope and Powers

This Act is applicable to media organisations to the extent that they are engaged in the trade of providing information services. It is designed to provide a framework for the protection of information services, including media organisations, from the potential abuses of surveillance.

Responsibilities

Media organisations are required to comply with the Act and its provisions. The Act requires media organisations to take all reasonable steps to ensure that the surveillance of employees is carried out in a way that is consistent with the Act.

Compliance

Media organisations must ensure that they comply with the Act and its provisions. Non-compliance can result in penalties and fines. It is important for media organisations to review their current policies and procedures to ensure that they are in compliance with the Act.

Conclusion

The New Workplace Surveillance Act is a significant step forward for media organisations. It provides a framework for the protection of information services and the rights of employees. Compliance with the Act is essential for media organisations to avoid penalties and fines.

For more information, please contact your legal advisor.
Small Noise, Big Trouble

Shane Barber examines the recent decision in City of Mitcham v Hutchison 3G Australia Pty Ltd and examines its potential impact on the government’s telecommunications network policies.

A recent decision of the Supreme Court of South Australia ("Court") in relation to the manner in which telecommunications carriers roll out their networks is, in first blush, a victory for opponents of those networks in the community, but on closer analysis is potentially a significant self-inflicted wound for those groups.

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Relevant Regulation

The Telecommunications (Law Impact Facility) Determination 1997 ("Determination") establishes the types of installations which may be considered "low impact" for the purposes of clause 6 of Schedule 3 to the Act. Item 2 of Part 2 of the Schedule to the Determination provides that, prima facie, certain facilities of a type commonly installed by mobile carriers will only be considered low impact if located on existing facilities and poles in circumstances where they are co-located on or within an "original facility" or "public utility structure", where, among other things:

1. the level of noise that is likely to result from the operation of the co-located facilities are less than or equal to the level of noise that resulted from operation of the original facility or the public utility structure.

Importantly, this noise qualification does not apply if those low impact facilities are not being co-located, but otherwise installed in residential and commercial areas.

For the purpose of the Determination, an "original facility" means an original structure that is currently used, or intended to be used, for connection to a telecommunications network where the original structure was in place on 17 August 1999, or installed after that date by means other than in accordance with the Schedule 3 to the Determination.

A "public utility structure" means a structure used, or used by a public utility for the provision to the public of:

- reticulated products or services, as electricity, gas, water, sewerage."
- carriage services (other than carriage services supplied by a carriage service provider); or
- transport services; or
- a product or service of a similar kind.

The Minister for Communications, Information Technology and the Arts ("Minister") has previously made the Telecommunications Services Code of Practice, 1997 ("Code") which provides further rights and obligations of carriers in relation to the exercise of their powers and immunities pursuant to Schedule 3 of the Act. Relatively the Minister has expressed Commonwealth Government policy at clause 4.13 of the Code as follows:

"4.13 (1) Before engaging in a low impact facility activity, a carrier in the future, they could not thereafter be increased (not even to return to current lev- els)."

Section 122 of the Broadcasting Services Act 1992 (Cth) has therefore been amended to incorporate those elements of Australian content requirements that are subject to the ratchet mechanism to ensure that they cannot be reduced in the future, except through a legislative amendment.

Conclusion

Many amendments implementing the AUS-FTA are relevant to the media. Organisations dealing with copyright works should be aware of the new form of protection. The widening civil and criminal liability relating to broadcast decoding devices and the broader standing to seek civil remedies should come as good news to broadcasters and channel providers while the changes to the Broadcasting Services Act ensure that NO changes to Australian content quota requirements will not be onerous.

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The Development of a Telecommunications Network Colocation Regime in New Zealand

Shane Barber and Bridget Edghill critique New Zealand’s developing approach to telecommunications network colocations.

Introduction

Until relatively recently, New Zealand had not adopted telecommunications specific regulatory regime, but rather relied on broader competition legislation.

The Telecommunications Act 2001 (NZ) ("Act") establishes the regulatory regime applicable specifically to telecommunications services. This includes the introduction of its industry specific regime in 2001, the New Zealand government has been slowly building its telecommunications industry arsenal of legislation, regulation and codes, with an eye on developments not only across the Tasman in Australia, but in Europe and the United States.

During the course of 2005, a number of new entrants have entered into both the new NZSM and 3G mobile networks through out New Zealand to compete with the relatively small numbers of existing networks (for example, Telecom NZ’s CDMA network, Vodafone NZ’s GSM network and the network of Telstra Clear).

These new participants are currently putting pressure on the New Zealand government and its regulatory authorities to ensure that the regulatory regime is responsive to the needs not only of these new entrants, but also the consumers they seek to serve. What has become apparent is that considerable development is still required in the fledgling telecommunications regulatory regime in order to meet these goals.

In this article, we critique just one essential element of a successful telecommunications regulatory regime, being the ability to foster the rollout of competitive networks in a manner which encourages co-location of infrastructure to avoid both the proliferation of facilities and the community backlash which sales.

The existing New Zealand regulatory framework in relation to co-location

No price regulation

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In July 2005, the High Court of Australia granted H3GA special leave to appeal the decision in the Mitcham Case. The potential for those delays to be considerable given that substantial negotiations with both local councils and landowners may be required prior to the installation, especially if the delays could be expected across all mobile networks in relation to affected sites. In addition, the cost to the industry would be considerable.

- During these periods, services for the benefit of the public generally, such as emergency services and relief co-ordination, will be directly impacted.
- Potentially a carrier’s use of its powers and immunities provided under Schedule 3 to the Act may differ in each State and Territory depending on the interpretation of the Commonwealth principles in the Mitcham Case or the diametrically opposite outcome in Houston v Australian Hotels Association (2010) VSCA 99 (“Director of Housing Case”). While the decision in the Mitcham Case is only binding on other courts in South Australia, it is currently “persuasive authority” in other jurisdictions (with the possible exception of Victoria).
- Commonwealth Government policy will not be implemented to the detriment of any carrier and consumers but the public generally.

As the rollout of radio facilities in residential and commercial areas will likely be more comprehensive, the consuming and resource-intensive, efficient and internationally competitive telecommunications industry may be undermined. In this regard, one of the main objectives of the Act is to promote the development of an autonomous telecommunications industry, with the noise from a domestic style co-locating unit is a good example of a “trivial variation”.

There will be considerable interest amongst the telecommunications industry and the general public in this decision. No doubt, community groups which take an interest in the rollout of telecommunications infrastructure will also be interested in the outcome of the case and, given the decision’s potential impact on the telecommunications infrastructure, it is likely that a provision or order requiring proceedings to be held in public will remain media access and reporting in the ordinary course.

Where proceedings are held in camera under section 291 of the Act, it may be given access to proceedings. However, it is important to note that there is no guarantee of media access as the court retains a discretion to exclude media access. New section 291(1)(c) provides that in cases where the complaint chooses to give evidence via closed circuit television and is therefore not physically present in the courtroom, the media may remain in the court room to hear the complainant’s evidence.

It is important to note that media access to court documents and reporting on them will still be subject to any suppression or non-publication orders made by the court.

In addition, any adverse effect on media access to or reporting of complaint evidence could lead to reports being skewed in favour of the accused, as the accused’s evidence is in circumstances in which complainants are already protected by legislation in each Australian jurisdiction which prevents the media from identifying them in Court reports.

The new provisions will extend to proceed- ings instituted or partly heard before commen- suration of the Amendment Act and will apply in respect of any evidence given by the complainant. The amendments (section 44). The new provisions will also apply to prescribed sexual offence proceed- ings to a child being a party (Schedule 2.1 of the Amendment Act) but will not apply to inquest proceedings, which are to be held entirely in camera (new section 291B).

Access to Court Documents

The Amendment Act will also amend exist- ing section 314 of the CPR. As section 314 currently stands, a registrar is prohibited from giving the media access to documents relating to matters held in camera. The amendments will remove this prohibition.

According to the Second Reading Speech, the intention is that, by removing the prohibition, the media will be able to access those documents to enable them to prepare a full and fair report. It is important to note that media access to court documents and reporting on them will still be subject to any suppression or non-publication orders made by the court.

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offsetting cross-media ownership and

"Canadian model".
highly detailed points systems regulating the amount (by time) and diversity (by genre) of local content shown on free-to-air television and cable and satellite networks. Overall, free-to-air commercial television stations are required to devote at least 60% of the broadcast year and at least 50% of the evening broadcast period (determined by regulations). Content regulations also apply to Canadian radio. The larger multi-station ownership groups are required to broadcast, on average over the broadcast year, at least 8 hours per week of "Canadian programs" during the 7pm to 11pm period. Broadcasters can receive a 15% time credit against their peak-time priority obligations by broadcasting free-to-run Canadian drama. BDUs are required to ensure that a majority of the video and audio channels received by the subscriber are devoted to the distribution of Canadian programming. With the exception of explicit controls on foreign ownership, regulation of media concentration and cross-media ownership is left largely to the discretion of the CRTC, acting within the policy framework of the Canadian Act. There are no comparable provisions in Canadian broadcasting legislation to the cross-media or media concentration provisions of the U.S. Communications Act. The CRTC has, however, developed general polices in relation to concentrated ownership in television and radio, while the ownership of no more than one commercial television broadcasting licence in one language is in a given market. In respect of radio, the CRTC permits ownership or control of as many as three stations operating in a given language (including up to two in any one frequency band) in markets with less than eight commercial radio stations. In larger radio markets, a person may be permitted to own or control as many as two AM and two FM commercial stations in a given language, while having no specific policy in relation to concentration. The CRTC attempts to take into account cross-media implications when investigating an application for transfer or renewal of a broadcasting licence.

The Canadian model has obvious attraction for an Australian production sector that tends to lurch from project to project on intermittent and unreliable funding streams. The CRTC’s broadcast policy statement in 1999-2000, the CRTC approved a number of significant mergers and acquisitions which radically altered the media ownership landscape in Canada, particularly in relation to cross-media. As a result of these transactions, two media conglomerates, BCE/CTV and CanWest/Global, collectively now control over half of Canada’s commercial television stations and while 60 per cent of all stations get their local daily newspaper from the same company that owns one or more of their local television stations. CanWest has a potential audience reach of 97.6% of the English television market. In the province of British Columbia (which includes Vancouver, CanWest operates two television stations as well as three daily newspapers). In both Montreal and Quebec City, the francophone-based company Quebecor now owns the most popular daily newspaper and the most viewed television station.

As one commentator observed, an acceptance of increased media concentration is a trade-off between diversity of voice within Canada versus diversity of voice in a North American context. The CRTC has established an interdepartmental committee on Broadcast and Communications, the CRTC Chairperson Charles Dalfen argued that, while issues of cross-ownership and concentration of property, in some cases these issues may be outweighed by the “offsetting advantages” of larger broadcasting companies as a means for greater Canadian content production. The CRTC has attempted to alleviate concerns regarding media concentration by imposing licence conditions designed to maintain an adequate competitive separation between television stations and affiliated newspapers, and commitments to maintain local and regional news and information programs across television and radio. In any event, even the CRTC’s own media concentration rules and media companies argue that the diversity created through Canada’s long history of ownership of independent television networks, as well as the internet, lessens the need for more stringent ownership regulation. Anecdotal evidence suggests, however, that consolidation of media outlets has, at least in some instances, led to a streamlining of newsgathering and editorial content across the different media platforms within the one media company, as well as a dilution of editorial control at the local level.

Application in Australia

The Canadian model has obvious attraction for an Australian production sector that tends to lurch from project to project on intermittent and unreliable funding streams. Any scheme that promises to increase funding and provide greater financial certainty for Australian production is therefore worth examining carefully. One analyst has estimated that a Canadian-style “transaction fee” could generate up to $1.2 billion in funding for Australian programs if Canadian media ownership laws were relaxed.

Purely in terms of production investment and outputs, the Canadian system must be considered highly successful. However, more local content does not necessarily mean that more locals will watch. Canadian films have even less success at Canadian box offices than Australian films in the Australian market. In relation to television, the Canadian Committee on Cultural Heritage, in its 2003 review of the Canadian broadcast industry, found that the format of Canadian drama was drawn from “anglophone” dramas on Canavan (26% for francophones) with 34% of overall viewing by anglophones being Canadian program (60% for francophones). Even after subsidies and advertising revenue were taken into consideration, the review found that the English-language Canadian television broadcasters averaged a net loss of about C$125,000 per hour of Canadian drama, making their shows largely from US programmes. Despite a wealth of investment and output, content regulation still appears to be the most effective mechanism to ensure Canadian content is adequately represented in Canadian television and radio programming.