

# Communications Law BULLETIN

Communications & Media Law Association Incorporated

Print Post Approved PP 234093/00011

## Radio's Digital Future

The Federal Government recently announced its policy framework for digital radio. Carolyn Lidgerwood sums it up.

On 14 October 2005, the policy framework for the introduction of digital radio was announced by Senator the Hon Helen Coonan, the Minister for Communications, Information Technology and the Arts (Minister). To say that this policy framework has been a long time in the making is an understatement. Long-time readers of Communications Law Bulletin will recall the Digital Radio Advisory Committee (DRAC) (chaired by CAMLA's own Victoria Hubensohn) as suggesting that Eureka 147 was the right technology for digital radio over nine years ago<sup>1</sup>.

In announcing the Government's digital radio policy framework, the Minister observed that radio is "the only significant broadcasting platform that remains analogue only" and that accordingly, the radio industry has "limited capacity to respond to the challenges and opportunities posed by new digital technologies"<sup>2</sup>. When combined with the radio industry's clear support for the introduction of digital radio (as illustrated in submissions to the Department's Digital Radio Issues Paper, dated December 2004)<sup>3</sup>, this provides the foundation for the announced framework.

Significantly, the Minister has acknowledged that "the radio industry's desire to be treated in an equivalent manner to television" is an appropriate objective, and that radio will be offered "equivalence of treatment" with the television industry where appropriate.

However, in doing so the Minister also acknowledged that a lesson from the digital television experience was that a regulatory model that does not "at least encourage" new digital-only services will be a "significant factor that inhibits consumer interest in the new platform".

This view reflects various submissions to the recent consultation process on digi-

tal radio policy that has been conducted by the Department of Communications, Information Technology and the Arts (as referred to above). For example, the ABC noted that:

*"Better technical quality alone will never be a compelling reason for consumers to move to digital. It is instead one of a number of likely drivers of consumer take-up of the technology. Other important drivers include new or enhanced content, including program-associated data (text information and multimedia content); ease of tuning; the possibility of "rewind" or audio recording; and the availability of affordable receivers"*<sup>4</sup>

Overall, there appears to be much in the digital radio policy framework for the radio industry (particularly commercial radio broadcasters) to be pleased with. Having said that, there are some mixed views about some of the details of the announced policy framework, particularly in relation to the amount of spectrum that will be made available to each commercial radio broadcaster and national broadcaster for digital broadcasting.

This article summarises the key components of the digital radio policy framework, and identifies some issues that remain outstanding (at the date of writing).

### Access to digital spectrum

As outlined in the Minister's media release:

*"planning for the introduction of terrestrial digital radio will initially focus on providing the spectrum to enable existing licence area planned state capital commercial, national and wide coverage community broadcasters to commence digital radio services"*<sup>5</sup>

Clayton Utz

21 DEC 2005

Sydney Library

Volume 24 N° 3  
December 2005

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Communications Law Bulletin

Editors: Sharon Barber & Page Henry

Printing & Distribution: BEE Printmail

Website:

CLAYTON UTZ



S0062280

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Prepared by William Atkins of the Communications, Media & Technology Practice Group, Allens Arthur Robinson, Sydney

Digital radio spectrum in VHF Band III will be made available for a "small administrative charge" to:

- existing commercial radio broadcasters in the broadcasting services bands;
- existing high powered community broadcasters in the broadcasting services bands who wish to broadcast in digital mode; and
- the ABC and the SBS.

This can be compared with the "loan" of digital spectrum to the free to air television broadcasters, as contained in Schedule 4 of the *Broadcasting Services Act 1992*.

L-Band spectrum may also be used for localised services and in areas where VHF Band III spectrum is in short supply.

### Commercial radio broadcasters

As announced, the digital radio policy framework would grant existing commercial radio broadcasters in the broadcasting services bands the right to access one-fifth of a multiplex (ie around 256kbps of data capacity) - subject to the very important qualification of "spectrum availability", as discussed below.

Those commercial radio broadcasters will also have "first right of refusal" to manage the relevant multiplex and to hold the licences that are required (under the *Radiocommunications Act 1992*) to operate that multiplex. However, there are practical issues that need to be addressed in the "crowded" spectrum markets of Sydney and Melbourne in particular.

The VHF Band III spectrum that is available in Sydney and Melbourne for digital radio is limited to channel 9A, which the Minister has stated will hold three digital multiplexes. The Minister has indicated that this spectrum is unlikely to be enough to allow all the relevant radio broadcasters in those markets to have access to a full one-fifth of a multiplex. For this reason, the announcement of the policy framework indicated that the relevant radio broadcasters will have guaranteed minimum rights to 128kbps per service, with the ability to be allocated additional capacity of "up to" a maximum of 256kbps on the condition that the additional capacity is used to provide new services.

At the time the policy was announced, the Minister considered that 128kbps will be adequate to provide "FM standard" digital broadcasts. However, vari-

ous members of the commercial radio industry hold contrary views. The Minister's media release<sup>6</sup> refers to newer versions of Eureka 147 technology (having more advanced compression standards) as being a possible solution to this issue, but this remains unclear. It is understood that further discussions about these issues are ongoing.

Commercial Radio Australia's response to the digital radio policy framework was positive, but it included the following qualification:

*"There are some elements of this policy that need a lot more discussion. We want to ensure the amount of spectrum allocated to commercial radio allows us to provide the additional services and features that are necessary to take full advantage of the technology and drive consumer uptake. Under the current compression technology, 128 kb is not enough to do this, we need 256kb"*

If broadcasters do not wish to operate the multiplex themselves, then the Australian Communications and Media Authority (ACMA) may allocate licences to third party multiplex operators. However, as noted in the Minister's speech, Commer-

Digital Radio Australia has previously stated that its members are keen to manage the operation of digital infrastructure themselves.

Nevertheless, if third party multiplex operators do emerge in some markets, they will be required to offer access to commercial radio broadcasters (and wide coverage community broadcasters) on published and non-discriminatory terms, and subject to the oversight of the Australian Competition and Consumer Commission<sup>8</sup>.

#### National broadcasters

As noted, digital spectrum is also to be made available to the national broadcasters, the ABC and the SBS. The Minister's media release indicated that the timing of this is to be considered further in the context of the budget process for the national broadcasters.

However, and by contrast with the commercial radio broadcasters, the Minister stated that she expects that the ABC and the SBS will use third party multiplex operators (consistent with the outsourcing of their existing analogue transmission services to Broadcast Australia). The Minister has stated that spectrum will be reserved for the ABC and the SBS to jointly manage a single multiplex in each relevant market. Again, this appears to raise the issue whether this will be "adequate" spectrum for the five ABC radio networks and for the SBS radio services that operate in capital cities and major regional centres.

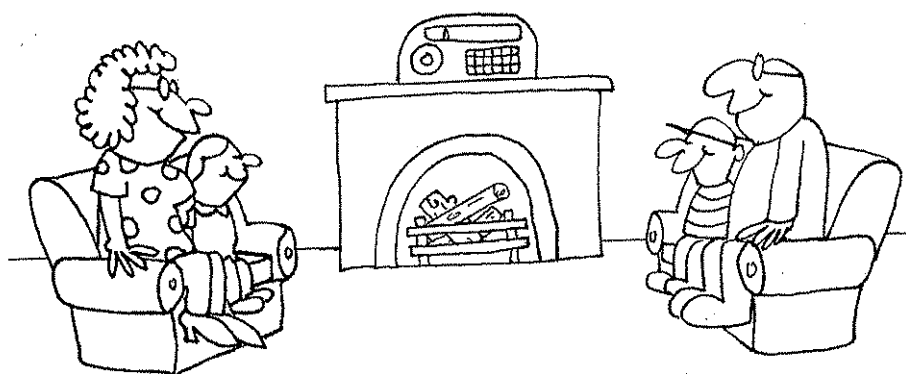
#### Community broadcasters

"Wide coverage" community broadcasters are also to have a right to access digital spectrum. The digital radio policy envisages "joint access rights" to a minimum 128kbps per analogue service, up to a possible maximum of 256kbps per available multiplex. It will be a matter for the community broadcasters to decide between themselves how this spectrum is to be shared.

#### Other services

Low powered community broadcasters, and open narrowcasters, will not be included within the initial planning of digital radio (which will first focus on capital city commercial, national and high powered community services, as discussed in more detail below). However, these categories of broadcasters are to be considered at a later time.

## A family eagerly huddles around their new radio set



## to hear the magic of digital radio

*Flame*

Further, services that are currently provided outside the broadcasting services bands will not be allocated digital spectrum in the broadcasting services bands. This includes those services which operate under licences issued under section 40 of the BSA. Such licences are not "planned" under the licence area planning process, and instead are made available "over the counter" and for a minimal fee, reflecting that the spectrum they use is not in the broadcasting services bands.

The Minister has stated that the provision of digital services by operators outside the broadcasting services bands will continue to be a commercial decision for them. As an example, Austar has provided digital subscription audio services by satellite for some years. However, press reports have reported protests by World Audio, a section 40 operator, about this aspect of the policy framework<sup>9</sup>.

#### Big cities first

The planning of digital radio services by the ACMA will be staged, commencing in the state capital cities, and expanding to regional areas at a later time.

The digital radio policy framework envisages that there will be "start dates" contained in legislation, as well as dates by which "equivalent coverage" should be achieved (ie as between existing analogue services and new digital services). It is envisaged that Eureka 147 will be the relevant technology platform in the capital cities.

Regional areas will be planned on the basis of broadcaster interest in delivering digital radio, and following the completion of technical trials. Given that Eureka 147 may not be suitable for coverage across regional and remote markets, the Minister has indicated that trials of alternative technologies such as Digital Radio Mondiale (DRM) need to be pursued. Submissions to the digital radio inquiry have suggested that a "hybrid" Eureka 147 and DRM solution may be appropriate, so it is expected that this will be tested.

While there was some criticism of the "staged" approach from some quarters (notably from World Audio), it was applauded as a "smart" decision from others, with the Chairman of Macquarie



Regional Radioworks being reported as stating that it was preferable for digital radio to be launched in the country after it was "tried and tested in metro areas first"<sup>10</sup>.

Importantly, the Minister's media release also indicated that "capped" financial assistance for regional broadcasters will be considered when technical issues are resolved, subject to the success of the rollout in state capitals.

## No simulcasting required

There will be no obligation for radio broadcasters to use digital spectrum to simulcast their analogue services – it will be a matter for the broadcasters to decide whether they wish to do so, or whether they wish to offer new types of content or data services.

This is a key difference from the digital television policy in Schedule 4 of the BSA. On one level, it reflects the very different structure of the commercial radio industry. On another, it may also reflect an acknowledgement that improved technical quality will not be enough to encourage mass adoption of digital radio.

## No analogue switchoff

The Minister has stated that digital radio may never be a complete replacement for analogue radio. This is a key area of difference between the digital television policy (in Schedule 4 of the Broadcasting Services Act) and the digital radio policy framework.

This view appears to have been based on the sheer number of radio services that are currently on air, as well as the number of analogue receivers in the community (estimated by the Minister as at least 35 million).

The commercial radio industry had proposed a different approach, with digital services completely replacing analogue services over time. However, a key feature of the announced policy framework is flexibility, as well as an assumption that not all radio broadcasters may wish to convert to digital.

## Moratorium

The commercial radio industry had lobbied for a ten year moratorium on the issue of new commercial radio licences in the digital spectrum. The Minister has agreed to a shorter moratorium, subject to a couple of important conditions.

At the end of 2004, the Minister announced that there would be a moratorium on new "Licence Area Planned (LAP) commercial digital radio licences for an initial period of five years" to commence "once technology and spectrum issues are resolved and a timetable for roll out of digital services determined"<sup>11</sup>. This period has now been extended, in that the announced moratorium related to a period of six years (instead of five years), and commencing from the start of the first digital broadcasts, rather than from the date when that a rollout timetable is settled.

The length of this moratorium could be compared with that for commercial television (ie digital television commenced in 2000, and the section 28 prohibition on new licences technically falls away on 31 December 2006). However, the commercial radio industry's key argument in support of a moratorium was a point of contrast rather than similarity – ie the commercial radio industry has absorbed a significant amount of additional competition in recent years as a result of the former Australian Broadcasting Authority's licence area planning process<sup>12</sup>.

For instance, at the conclusion of the former ABA's radio licence planning process at the end of 2001, the ABA announced that its planning "has resulted in nearly one thousand new national, commercial community and narrowcast services becoming available around Australia"<sup>13</sup>.

As noted, the announced moratorium is subject to two important conditions. The first of these requires compliance with the direction made by the ABA in 2003 in relation to the maintenance of the number of radio services of "general appeal" in licence areas<sup>14</sup>.

The second condition requires commercial radio broadcasters to comply with digital implementation frameworks (including coverage and rollout requirements). For example, for commercial radio broadcasters in state capital cities, this will involve the commencement of digital broadcasts by dates determined in legislation, and the provision of coverage that is equivalent to their analogue coverage by the end of the moratorium period (as noted at section 2 above). These requirements may be more tailored in regional markets.

It is not yet clear who will develop these frameworks – but if the digital television scheme is used as a guide, this could involve

the broadcasters developing these frameworks and lodging them with the Minister or the ACMA for approval.

## The Way Ahead

It expected that "permanent" digital radio services will commence in state capital cities in around two to three years, following the completion of existing trials and planning of digital spectrum by the ACMA. Importantly, on 9 November 2005, the ACMA announced that it had adopted a general policy that gives consideration to restricting the availability of remaining broadcasting services bands spectrum that may be needed for digital radio<sup>15</sup>.

The significance of the digital radio policy is well summarised by Commercial Radio Australia:

*"We acknowledge it is going to take a significant investment over a number of years to get digital radio up and running and to drive consumer uptake, but this is a strategic and necessary move for the industry to ensure that radio remains relevant to our listeners into the future"*<sup>16</sup>

Commercial Radio Australia has also announced that its members would invest an estimated \$400 million in rolling out digital radio services across Australia.

There are likely to be some very interesting regulatory issues that will need to be addressed before "permanent" digital radio services commence, particularly in relation to the categorisation and licensing of the new "services". This would be consistent with the "blurring" of the old distinctions that have arisen with the commencement of other kinds of digital broadcasting and content services on other platforms. Interestingly, the emergence of these issues was also predicted by the DRAC, and they have become no less complicated over time.

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*Carolyn is an external legal adviser to Commercial Radio Australia and some of its members, and has also advised community radio broadcasters.*

1. Digital Radio Advisory Committee, A discussion paper on Digital Radio Broadcasting in Australia (September 1996)

2. The Minister's announcement was made at Commercial Radio Australia's annual conference

see at [http://www.minister.dcita.gov.au/media/speeches/digital\\_radio\\_-\\_commercial\\_radio\\_australia\\_conference](http://www.minister.dcita.gov.au/media/speeches/digital_radio_-_commercial_radio_australia_conference)

3. Department of Communications, Information Technology and the Arts, Introduction of Digital Radio: Issues Paper (December 2004).

4. [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/25532/ABC\\_-\\_submission.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/25532/ABC_-_submission.pdf). Similar observations about the "drivers" of digital radio were also made by Broadcast Australia in its submission – see at [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/26075/Broadcast\\_Australia\\_public\\_submission.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/26075/Broadcast_Australia_public_submission.pdf)

5. [http://www.minister.dcita.gov.au/media/media\\_releases/framework\\_for\\_the\\_introduction\\_of\\_digital\\_radio](http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio)

6. [http://www.minister.dcita.gov.au/media/media\\_releases/framework\\_for\\_the\\_introduction\\_of\\_digital\\_radio](http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio)

7. See news release dated 14 October 2005,

"Industry welcomes digital announcement", at <http://www.commercialradio.com.au> or <http://www.commercialradio.com.au/pdf/Industry%20welcomes%20digital%20announcement%202005.pdf>

8. [http://www.minister.dcita.gov.au/media/media\\_releases/framework\\_for\\_the\\_introduction\\_of\\_digital\\_radio](http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio)

9. See Porter, J: "World Audio's digital hopes off-air for now" in The Sydney Morning Herald, 15 October 2005 at <http://www.smh.com.au/news/national/world-audios-digital-hopes-off-air-for-now/2005/10/14/1128796712358.html?from=moreStories>

10. See MacLean, S, "Audio angry at being tuned out", in The Australian, 15 October 2005, at <http://finance.news.com.au/story/print/0,10119,16922583,00.html>

11. [http://www.minister.dcita.gov.au/media/media\\_releases/introducing\\_digital\\_radio\\_to\\_australia](http://www.minister.dcita.gov.au/media/media_releases/introducing_digital_radio_to_australia)

12. [http://www.dcita.gov.au/\\_data/assets/pdf\\_file/25583/Commercial\\_Radio\\_Australia\\_-\\_submission.pdf](http://www.dcita.gov.au/_data/assets/pdf_file/25583/Commercial_Radio_Australia_-_submission.pdf)

13. See news release dated 21 December 2001, "ABA Completes Radio Licence Area Plans", at [http://www.acma.gov.au/ACMAINTER.65674:STANDARD:1674406071:pc=PC\\_91126](http://www.acma.gov.au/ACMAINTER.65674:STANDARD:1674406071:pc=PC_91126)

14. Australian Broadcasting Authority (Revisiting Radio LAPs) Direction No 1 of 2003. This direction was made to address concerns about formats of existing commercial radio services in regional areas being changed to formats of more "narrow" appeal – eg racing radio.

15. [http://www.acma.gov.au/ACMAINTER.65674:STANDARD:649793122:pc=PC\\_100296](http://www.acma.gov.au/ACMAINTER.65674:STANDARD:649793122:pc=PC_100296)

16. See news release dated 14 October 2005, "Industry welcomes digital announcement", at <http://www.commercialradio.com.au>

# Measuring Media Diversity - Recent Developments in the US

An important factor in promoting media diversity is how to measure it. Luke Waterson looks at what they're doing in the United States

## Introduction

One of the key principles underlying the proposed reform of Australian media ownership laws is the need to preserve media diversity. This principle is common to many countries, including the United States.

In *Prometheus Radio Project v Federal Communications Commission*, United States of America, 373 F 3d 372 (3rd Cir, 2004)<sup>1</sup> (**Prometheus**), the United States Court of Appeal for the Third Circuit considered various mechanisms proposed by the Federal Communications Commission (FCC) to measure and protect media diversity in the context of cross-media mergers in the United States<sup>2</sup>.

This article outlines some implications of the *Prometheus* decision for the development of media diversity regulation in Australia.

## The Australian regulatory regime

The effect of section 60 of the *Broadcasting Services Act 1992* (Cth) is to prohibit a person from controlling more than one of the following types of media businesses operating in the same coverage area: a free-to-air television station, a commercial radio station and a newspaper (**cross media rule**).

Changes to the cross media rule were proposed in the Broadcasting Services Amendment (Media Ownership) Bill 2002 (**Bill**)<sup>3</sup>.

A key condition in the Bill relating to the preservation of media diversity was the "5/4 voices test". In essence, the Bill required at least five separately owned and controlled "voices" (or four in regional areas) to remain after a cross-media merger (with each separately owned entity constituting a single "voice").

The Bill also contained a number of other mechanisms intended to preserve diversity - for example, a requirement for editorial independence between the merged businesses and a restriction on owning more than two types of media operation in the same area. However, the Minister for Communications, Information, Technology and the Arts has recently announced a proposal to remove these other mechanisms and focus on the "5/4 voices test":

*"The simplest way to protect diversity is to place a floor under the number of media groups permitted in a market to preclude undue concentration of ownership. If we do this in an environment that allows us to balance any greater concentration of ownership amongst existing players with opportunities for new services, I think we will have a more attractive approach than the regime proposed last time"*<sup>4</sup>

## The proposed FCC rules

In July 2003, the FCC announced a new set of rules (**Order**) regulating media ownership in the United States, including cross media ownership<sup>5</sup>.

The Order established a single set of cross media rules based on a Diversity Index. The Diversity Index was a modified version of the Herfindahl-Hirschmann Index (HHI) which is used to analyse mergers from an anti-trust perspective.

The HHI measures concentration in a market by using a formula that sums the square of the market shares for that market. By squaring the market shares, the HHI reflects a greater sensitivity for market concentration than a simple firm count.

In devising the Diversity Index, the FCC used the basic methodology underlying the HHI but with specific modifications. The key modifications for present purposes were:

- **Weightings.** The FCC assigned weightings to each relevant media type based on the results of a national survey of consumer preferences for local news and information. A summary of the weightings is as follows:
  - free to air television = 33.8%
  - newspapers = 28.8%
  - radio = 24.9%
  - Internet = 12.5%
- **Calculation of market share.** This was simply done by assigning each outlet in a particular media category an equal "market share". So, if there were ten free-to-air television stations in a particular area, each one was given a "market share" of 10%. Where one person owned more than one of the same type of outlet in a market, the "market shares" were added together - for example, two commonly owned television stations would produce a "market share" of 20%. The "market share" was then multiplied by the weighting for that category (in the above example giving a weighted market share of 6.7% (20% x 33.8%)). Once all the weighted market shares for each category were calculated, they were squared and summed (in the same way as for the HHI) to produce a Diversity Index score for that market.
- **Derivation of cross media rules.** The FCC then calculated the average Diversity Index scores for each market and the increases in the score that would result if various cross

media mergers occurred<sup>6</sup>. From these results, the FCC derived various cross-media rules - for example, an outright prohibition on cross-media mergers in markets with three or fewer television stations.

## Prometheus

The cross-media rules in the Order were challenged on a number of grounds. The main grounds were based on the general judicial review provisions in the Administrative Procedures Act and the obligation of the FCC under section 202(h) of the Telecommunications Act 7. The applicable standards of review were summarised as follows:

*"...In a periodic review under [section] 202(h), the [FCC] is required to determine whether its then extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified. Yet no matter what the [FCC] decides to do to any particular rule - retain, repeal, or modify (whether to make more or less stringent) - it must do so in the public interest and support its decision with a reasoned analysis"*<sup>8</sup>

In summary, the majority<sup>9</sup> remanded certain aspects of the Order relating to cross-media rules for further consideration by the FCC. This article focuses on the challenges based on:

- the weight given to the Internet/cable television as a media outlet;
- the equal market shares given to media outlets of the same type<sup>10</sup>.

### **The role of the Internet/cable television**

Despite the results of the national survey showing it was a source of local news and information, the FCC excluded cable television from the Diversity Index because it was doubtful whether it played a significant role in providing independent local news. The main reasons for the exclusion were the small number (and poor ratings) of local cable news channels (only 22 in the entire US and 5 of these in New York). The results of the survey were explained by suggesting that respondents were counting free-to-air services retransmitted on cable systems as cable television stations.

While agreeing with the exclusion of cable from the Diversity Index for these

reasons, the majority concluded that similar reasoning applied to the Internet and so therefore the inclusion of the Internet in the Diversity Index (given the exclusion of cable television) was not rational<sup>11</sup>.

The key reasoning underlying this conclusion was as follows:

- **Independent websites.** The majority drew a distinction between websites that provided independent sources of news and information and those associated with the local free-to-air television stations and newspapers. Websites in the latter category would need to be discounted (to be consistent with the FCC's analysis in relation to retransmitted free-to-air television channels on cable television). The majority could not find persuasive evidence for the significant presence of local news sites on the Internet.
- **Local news is the key indicator of viewpoint diversity.** The FCC had emphasised the "virtual universe of information sources" available on the Internet to support the role of the Internet as a source of viewpoint diversity. The majority, however, drew a distinction between the "aggregator" function of a media outlet (getting the news to one place) and its "distillation" function (making an editorial judgment on what to publish). The majority characterised many websites (for example, websites of individuals or local governments/community organisations) as having the first characteristic but not the second. They concluded that those entities and individuals who just happened to use the Internet to disseminate general information, even with a local flavour, were not significant for diversity purposes.

### **Equal market shares**

As outlined above, the methodology underlying the Diversity Index assigns equal market shares to outlets of a particular media type. The majority upheld a challenge to this aspect of the methodology. The main reasons were as follows:

- **Irreconcilable with weighted aspects of Diversity Index.** The assignment of equal market shares to media outlets of a particular type was held to be inconsistent with the weighting of each media type. The latter weighting was done on the

assumption that all types of media were not of equal importance for diversity purposes. The use of equal market shares was also inconsistent with the HHI. The main reason the HHI (and not a simple "number of voices" test) was chosen by the FCC as the basis for the Diversity Index was that it was more sensitive to the concentration of market shares.

*Treating each outlet as equal leads to irrational results.* The majority gave the example that the market share of a New York community college television station was the same as that of a local television station owned by the national ABC network. It was also pointed out that the share of the community station was greater than the combined market share attributable to the New York Times organisation (which owned both newspapers and radio stations). The inference from the lack of individual weighting for each outlet was that they were all of equal importance for diversity purposes. The majority concluded that:

*"A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third largest newspaper in America also requires us to abandon both logic and reality"<sup>12</sup>*

## Implications for Australia

While it is prudent to take a cautious view when considering the domestic implications of a foreign decision, the issue of media diversity appears to be fundamentally the same in both Australia and the United States. Accordingly, and in light of the relatively general nature of the criteria for legal review in Prometheus, it is possible to draw some relevant comparisons with the Australian regulatory position.

The main points are as follows:

### **Role of the Internet as a source of media diversity**

The reasoning of the majority in Prometheus effectively concluded that, while the Internet may be an effective medium for the dissemination of information, caution is required

in assessing whether it currently provides independent sources of news necessary to significantly contribute to media diversity.

Turning to the Australian position, the Bill provided no direct role for the Internet as a potential source of media diversity. For example, the 5/4 voices test did not count Internet services. However, the Internet may have played some role in the development of the overall regulatory scheme. For example, in outlining the Government's latest proposals, the Minister recently stated:

*The cross media rules would not include the national broadcasters, pay television, the Internet or out of area newspapers and other potential new services over other platforms which provide increasing and important additional sources of news and opinion.<sup>13</sup>*

The decision in Prometheus warns against any significant weight being given to the Internet as a source of media diversity. On balance, the Government's intended regime appears consistent with this approach.

### **Adequacy of 5/4 voices test**

The 5/4 voices test is a simple "number of voices" or "firm count" test. This type of test was not preferred by the FCC because it did not have sufficient sensitivity for concentration compared to the Diversity Index. As set out in the minority judgment in Prometheus, a "firm count system" has the potential to both overstate and understate the level of market concentration compared to a system, like the Diversity Index, based on the HHI:

*"... a market shared equally among ten firms ("Market A") would have an HHI of 1000 (10 times 10 squared). A firm count system would treat Market A as evenly concentrated*



## Prometheus

*Flame*

with a ten-market firm having a market share breakdown of 30-30-5-5-5-5-5-5-5-5 ("Market B") because each market contains 10 firms. In contrast, the HHI supports the intuition that Market B is actually more concentrated, with an HHI of 2000. Furthermore, unlike the firm count system, the HHI recognises that a merger between two large firms creates a more concentrated market than a merger between two small firms. If the two 30% firms merged in Market B, its HHI would rise to 3800, while a merger of two 5% firms would increase the HHI to 2050. The firm count system would undiscerningly treat both mergers the same, however, by noting that both markets would now have 9 firms instead of 10<sup>14</sup>

This raises the issue of whether a similar regulatory tool should be used in Australia - for example, to replace the 5/4 voices test. For the reasons set out above, in principle, a Diversity Index (or similar methodology) may be a better reflection of the true level of diversity in a market than a simple "firm count" test.

While a useful tool, the Diversity Index need not be the sole determinant of whether a cross media merger is allowed to proceed. It could, for example, form the basis of guidelines that would inform a final decision made against more general criteria - for example, in the same way as anti-trust merger guidelines. This system would give some objectivity and certainty for industry (through the application of the Diversity Index) while still retaining some overall discretion.

### **Weighting of media types and outlets**

The Diversity Index is based on weightings for each media type based on a survey of consumer preferences. The majority in Prometheus were critical of the assignment of equal market shares to outlets of the same media type. On the other hand, the 5/4 voices test does not contain any weightings at all - each outlet is weighted equally regardless

of media type or popularity. There is an argument that this approach has the general effect of overstating the level of diversity in a market by giving each "voice" an equal weight regardless of consumer preference. This effect may be magnified if no other "diversity protection measures" (such as editorial separation of the merged operations) are in place.

### **Conclusion**

A key dilemma for policy makers and regulatory agencies is how to measure media diversity and devise legal mechanisms to preserve and protect it. The Productivity Commission has stated:

*"...measuring market shares and relative influence across media is fraught with problems. But this should not discourage policy makers from seeking a better approach to regulating cross-media controls than we now have. As problematic as they may be, different measures of market share across different media (such as audience share and advertising revenue) would help establish whether a prima facie case existed that warranted more detailed examination of the public interest"<sup>5</sup>*

The Diversity Index is a laudable attempt by the FCC to develop a tool to measure media diversity in a precise and objective manner. The decision in Prometheus shows that there may be pitfalls in the development and application of such a tool. However, these pitfalls do not detract from the underlying utility of the Diversity Index and it should be considered as part of any media diversity test for the Australian cross media regulatory regime.

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<sup>1</sup> Scirria, Chief Judge, Ambro and Fuentes, Circuit Judges

<sup>2</sup> On 13 June 2005, the Supreme Court of the United States refused to reconsider Prometheus.

<sup>3</sup> The Bill lapsed prior to the 2004 Federal election.

<sup>4</sup> Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'The New Multimedia World', address to the National Press Club, Canberra, 31 August 2005

<sup>5</sup> Report and Order and Notice of Proposed Rulemaking 18 FCCR 13,620

<sup>6</sup> Prometheus op. cit., p. 409-411. In determining what was an acceptable/unacceptable score (or increase in score), the FCC had regard to the HHI thresholds used by the US Department of Justice and Federal Trade Commission ie an increase of 400 points is considered unacceptable, but the FCC adopted more conservative thresholds than those used in an anti-trust context.

<sup>7</sup> 5 USC 551; Pub. L. No 104-104, 110 Stat. 56 (1996)

<sup>8</sup> Prometheus op. cit., p. 395

<sup>9</sup> Ambro and Fuentes, Circuit Judges

<sup>10</sup> One of the other successful grounds for challenge was that the FCC did not consistently apply the Diversity Index scores in deriving the cross-media rules - for example, the rules would have permitted cross-media mergers which resulted in a higher increase in the Diversity Index score than mergers that would have been prohibited - see Prometheus op. cit., p. 409-411.

<sup>11</sup> Prometheus op. cit., p. 405

<sup>12</sup> Prometheus op. cit., p. 408. The majority did not accept the FCC's argument that the actual market share of outlets within a media type was not relevant because outlets freely changed the level of their news content therefore rendering consumer preferences too fluid.

<sup>13</sup> Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'The New Multimedia World', op. cit.

<sup>14</sup> ibid., p. 452. The Productivity Commission has recognised similar drawbacks of the existing cross-media rules in Australia: Productivity Commission 2000, *Broadcasting*, Report no. 11 AusInfo, Canberra at p 353.

<sup>15</sup> Productivity Commission op. cit., p. 364.



# Convergent Regulation - Ofcom's First Two Years

Ofcom was established under the UK Office of Communications Act 2002 as a fully converged regulator for the UK communications industries. It is equivalent, in Australian terms, to the ACMA plus the telecoms regulation team inside the ACCC.

In a speech to the 2005 ACMA Annual Broadcasting Conference on 10 November, Richard Hooper, the outgoing Deputy Chairman of Ofcom and Chairman of its Content Board, identified what he believes to be Ofcom's key success factors and challenges faced by the two-year-old super-regulator.

It is my view that Ofcom has been a distinctive innovation in convergent regulation. Normally it is not Ofcom's style to assert its own success, but this piece is a retrospective so some indulgence is surely allowed and some rules can be broken.

The retrospective is in three parts. First I am going to try and answer the question – how would you know if a regulator like Ofcom was successful? I will then go on to set out what have been, in my personal view, the key success factors for Ofcom. These may or may not be relevant to other countries like Australia which are converging their regulators as well. I will conclude with identifying the challenges and problems that lie ahead.

Regulation is very culturally embedded and country-specific so we all learn from each other at conferences like this in different and subtle ways. I first came to Australia on regulatory business in the early 1990's having just been appointed to the Radio Authority, one of the five regulators which ending up being converged into Ofcom. I have a clear memory of being taught by my host in a Sydney restaurant that content regulation was actually best thought of as context regulation – a wisdom that has stayed with me and has informed my judgements at the Radio Authority and at Ofcom ever since.

## What does success look like for a regulator such as Ofcom?

There are a number of ways of measuring a regulator's success. The vast majority of Ofcom's stakeholders including the UK Government itself have stated that they think Ofcom has got off to a good start and indeed our own continuous research indicates our approach to regulation is to date generally well received. But those are subjective judgements – let me try out a few more quantifiable assessments.

### Price reductions

From a consumer point of view (we are statutorily required to further the interests of citizens and consumers) I can point quantifiably to significant price reductions for example in mobile call termination and access to broadband. During our watch broadband penetration has accelerated rapidly, driven by lower prices and increased competition.

### Public service broadcasting

From a citizen point of view, our major report on public service television broadcasting (**PSB Review**) published last year very strongly endorsed the importance of state-funded public service broadcasting in the digital age, especially after full

digital switchover, now 2012 in the UK. There was a view among some people when Ofcom was being set up that it would just be an economic regulator and that citizen's interests "beyond the market" would be neglected. This has absolutely not happened.

### Investment and innovation

From an industry point of view, how have we done against the wording set out in 3(4)(d) of the *Communications Act 2003* (UK): "have regard....to...the desirability of encouraging investment and innovation in relevant markets".

The conclusion of the Telecoms Strategic Review (**Telecoms Review**) earlier this year has led to greater investment confidence in British Telecom (**BT**), the incumbent, and in both types of BT competitors – infrastructure competitors like Cable & Wireless, and service competitors like Carphone Warehouse – a win, win, win situation I believe. However time will be the proper judge of the review's conclusions. The Telecoms Review began from the frustrating position that, after 20 years of sectoral regulation, BT still had some 70 per cent of the fixed line market in the UK.

In the wake of the Telecoms Review, the pace of consolidation in the industry has clearly picked up with Cable & Wireless proposing to buy the altnet Energis, and the two "triple play" cable operators NTL and Telewest proposing to merge to form a strong intermodal competitor to BT in telephony and to Murdoch's BSkyB in pay television. And BSkyB has just announced its plan to move into telecommunications and buy the broadband and local loop unbundler Easynet. These transactions are currently awaiting competition clearance. In general Ofcom encourages where appropriate greater consolidation.

In broadcasting, institutional investment has picked up substantially in independent television production companies as a result of a new code of practice introduced by Ofcom which shares the spoils from primary and secondary/tertiary rights more evenly between commissioning broadcasters and commissioned production companies.

## Ofcom's Statutory Duties

Under the Communications Act 2003 (UK)

"3(1) It shall be the principal duty of Ofcom, in carrying out their functions;

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition"

## Ofcom's specific duties fall into six areas:

1. Ensuring optimal use of the electro-magnetic spectrum
2. Ensuring that a wide range of electronic communications services – including high speed data services, is available throughout the UK
3. Ensuring a wide range of TV and radio service of high quality and wide appeal
4. Maintaining plurality in the provision of broadcasting
5. Applying adequate protection for audiences against offensive or harmful material
6. Applying adequate protection for audiences against unfairness or the infringement of privacy

We hope to have encouraged not just investment but also "innovation". Innovation was a keynote of the PSB Review, with our recommendation for a Public Service Publisher to increase competition in public service broadcasting – competition for quality. And innovation is at the heart of our philosophical approach to spectrum allocation, which moves away from the traditional command and control (governments and regulators deciding who has what spectrum for what uses) towards a trading approach (where the market decides who uses what spectrum for what at what price). I will come back to this under Headaches/Challenges in part three.

## Rolling back regulation

Another criterion for success stems from one of our key regulatory principles – bias against intervention. We have taken this very seriously and during our first two years some real rolling back of regulation has happened. For example we have moved the regulation of broadcast advertising from Ofcom to the Advertising Standards Authority under a co-regulatory arrangement. We have also pioneered new ways of policing specific industry concerns, for example BT's conduct and performance in local loop unbundling, by appointing independent adjudicators. Our latest Annual Report sets out the examples of deregulation or forbearance such as Voice over IP.

Bias against intervention should not be misunderstood however as a bias against enforcement. We can be light touch in our approach to market interventions but very heavy touch when it comes to enforcement.

## Cutting costs

There is a very quantifiable way of measuring regulatory roll-back – the costs of regulators. Under the leadership of a private sector-experienced chief executive (more of him later), we are proud of the way in which for three years running we have cut costs. How many regulators can claim that? Ofcom is currently in the midst of what is delightfully termed "restacking". The chief executive decided recently to lose a floor of our building and once sublet it to an outside tenant. That will save us half a million pounds a year or so. At a recent board meeting to discuss next year's annual plan, the chief executive talked of "the natural tendency of bureaucracies to find stuff to do" – it is a tendency we actively fight against.

Incidentally, one of the drivers of convergent regulation is reducing costs. Ofcom today has 32 per cent fewer "staff" than the five previous regulators, and running costs are some 10 per cent below the previous system on a like for like basis, and still going down. We envisage further savings of some £10million per annum on IT in the next planning period. We quite specifically made a decision to have a smaller number of better paid colleagues rather than a larger number of less well paid colleagues. We believe that has turned out to be the right decision for us in our circumstances.

## Content regulation issues not swamping the Ofcom agenda

The final evidence of some success for Ofcom in its early years moves closer to my own responsibilities as Chairman of the Content Board. When David Currie, the Chairman of Ofcom, and I were appointed back in 2002, many people said that Ofcom as a converged regulator would be swamped by content issues. Nudity, sex, violence, and four letter anglo-saxon words (unknown of course in Australia) – these make the newspaper headlines in a way that the finer points of equivalence of input in BT regulation probably don't.

The main Board of Ofcom sensibly delegated what we call Tier One content regulation (accuracy and impartiality, harm and offence, fairness and privacy) to the Content Board, a committee of the main Board. This, allied to the professional way that the work has been done by a strong team of executive colleagues, has meant that the Ofcom agenda has not once been swamped (touch wood). The recently introduced Ofcom Broadcasting Code is a significant improvement on the previous codes of the three broadcast regulators – much shorter, much clearer and more principles-based and less rules-based.

In the USA, by contrast to UK's handling of these content regulation issues, I sense that the FCC has got unduly caught up in the tsunami of social conservatism stemming from the famous wardrobe malfunction on primetime television of Janet Jackson. Meanwhile, according to the UK's Internet Watch Foundation, the USA still hosts something like 40 per cent of the world's child abuse/paedophilia websites – of far greater concern I would have thought than an errant nipple during family viewing.

## Success factors

Let me identify what I believe to be the key success factors in the creation of a fully convergent regulator for the UK communications industries with particular responsibilities for competition policy, for telecommunications, broadcasting and wireless frequencies/spectrum.

## Taking convergence seriously

Ofcom has taken convergence seriously. There are three dimensions to it. First of all, and most obviously, at the heart of our work is a recognition of the grow-

ing importance, despite some false starts during the dotcom boom, of network, device and corporate convergence stemming from the convergent nature of digital technology. The modern IP network carries everything from voice to moving pictures. Spectrum is the glue of a convergent communications industry. TCP/IP is the language.

The second dimension of convergence is rather different. It is the one that, speaking for myself, has been especially interesting. Ofcom's statutory duties focus on the interests of both consumers and of citizens as I have already mentioned. Thus Ofcom is a convergent regulator in the sense that it brings together in one place both economic regulation (the encouragement of competitive markets that benefit consumers alongside sensible concern for the financial health of the industry) with cultural regulation (the interests of citizens "beyond the market", the interests of society as a whole in communications matters).

There was widespread concern, as I have already alluded to, when Ofcom began that it would be a hard-nosed, quantitative economic regulator with only passing interest in the "fluffier" aspects of culture and the qualitative judgements that concern for the citizen demands. I am told this fear of domination by economic regulation is why in France the broadcast regulator does not wish to be converged with the telecoms and posts regulator.

I believe that Ofcom has demonstrated that it is possible within one organisation to have due regard to the interests of citizens and consumers, but it is never a simple problem. This links to the third dimension of convergence – we did not put together the five legacy regulators and leave them as five departments or siloes under a unified board. We set out from the start to converge the organisation from top to bottom as appropriate, a rather different approach from that taken by the ACMA in Australia and the FCC and the CRTC in North America.

### Start-up not a merger

The Board in one of its earliest decisions (late 2002) agreed to move into a new building on the south bank of the Thames, rather than occupy an existing building of one of the previous regulators. As a result, culturally, we like to think of ourselves being involved in a start-up not a merger. I believe that has been one of the key factors central to its success.

25 per cent of the Ofcom senior management team came from the staff of the five previous regulators and 75 per cent from other worlds. Only three out of the nine members of the Ofcom Board formed in late 2002 came from the previous regulators (Of tel and the Radio Authority).

This start-up mentality connects to the principle embedded in Ofcom of "constructive disruption", where positive change from the past ways of doing things is possible and is actively sought after. The internal culture of Ofcom encourages challenging and open debate. Few conventional wisdoms are allowed to go unchallenged for long.

The new building reminds visitors more of a professional services firm than a government department. It is open and airy and transparent and modern. All of which helps to attract talent in a competitive labour market like London. And we have one single main building, with all our headquarters and quite a lot of operations people all in one place. For us, an effective model. For federal countries like Australia, this might not be appropriate of course.

### Inclusive, non-hierarchical culture

The Ofcom main Board is always an inclusive, non-hierarchical affair. At the Board meeting held in May, for example, 32 executive colleagues (part of the culture change is to stop using the word "staff") – senior and junior – presented their papers to the Board and debated with Board members. That is normal practice. The Ofcom Board does not meet in some ivory tower although the 11th floor boardroom has stunning views across the river from Wren's great masterpiece, St Paul's, to the Tower of London and Tower Bridge to the east.

Ofcom engages with its stakeholders not via remote control but with the emphasis on face to face meetings, presentations and seminars, not just in London but also around the devolved nations and regions.

### The commission model

The UK has with Ofcom moved decisively away from first person singular regulation, as in the model of the Director General of Of tel. Ofcom has moved decisively towards the commission model. But the commission model with a difference. When I chaired the Radio Authority, the chief executive was not a member of the Board – it was made up purely of part-

## Ofcom's Regulatory Principles

- Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives
- Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve
- Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required
- Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome
- Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives
- Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding
- Ofcom will consult widely with relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market<sup>2</sup>

time non-executives. Ofcom has done away with this. We have six non-executives and three executives including the chief executive on the Board – and it works. The combination of a non-executive chairman in Lord Currie and a chief executive in Stephen Carter, which is now the model of corporate governance in the UK for all listed companies, also works. The new converged ACMA here, by contrast, has decided to combine chief executive and chairman roles.

### Team working

One other thing to note about the Board which is another success factor, in my view. Under David Currie's leadership, the Board of Ofcom operates as a team, as a collegiate entity. There is much open and robust debate in the boardroom but all members, without exception, support

the decisions taken when the boardroom door opens. To date there has been no single leak from either the main Board or the Content Board (touch wood again) thus collegiality is combined properly with, and reinforces, corporate discipline. How the senior people in any organisation behave (what they do as distinct from what they say) affects and infects people throughout the organisation.

## People

Getting the people right and getting the right people in Ofcom have been crucial. It is a truism in all organisations whether private or public. Getting the people right starts at the point of recruitment but does not stop there – Ofcom has introduced a strong process of performance management, performance appraisal, performance-based pay which any private sector company would be proud of and many public sector organisations might be fearful of.

I believe that Ofcom, both in human resources matters and elsewhere, offers a new model for running a UK public sector body, combining the best of private and public sectors. We require, like many professional services firms, time-sheets to be filled in. These ensure that our costs are appropriately charged to the right industry sectors since they, not taxation, pay for most of Ofcom's expenditure.

Whilst in the team environment that is Ofcom it would be invidious to pick out any one person, I am going to break that rule too. This is a retrospective, as I said at the beginning! Stephen Carter, the chief executive of Ofcom, has been and is a central factor in our success. He came from the private sector, with no experience of the public sector. He has managed in my view to combine the best qualities of the private sector (hard driving, performance-focussed, cost reducing) with the best qualities of the public sector – the aspiration to deliver public value and public service to citizens and consumers in the UK. He is young – or rather he was when he joined us in February 2003!

Stephen has selected and managed to attract, Pied Piper like, a very talented senior group to work with him. He leads from the front and has a quite remarkable ability, I call it bandwidth, to operate and negotiate and communicate across the extraordinary width of Ofcom's convergent statutory responsibilities from spectrum to telecoms and broadcasting. A width that non-executive board mem-

bers like myself do on occasion struggle with. As people in this room will know well, the art of regulation is to get the right balance between strategic policy overview at thirty five thousand feet and absolute attention to detail (especially process) on the ground.

## An entrepreneurial regulator?

There is an entrepreneurial air to Ofcom's approach to regulation which might surprise people and might on occasion be more reminiscent of the private sector than the public sector. There is an element of deal-making in Ofcom's approach to some big regulatory issues, getting people around a table and hammering out an acceptable solution and way forward. Whilst there is and has to be great attention to process, process should not suck the regulator away from finding lateral, creative, innovative interventions. There needs to be a balance between speed of decision-making and care for process detail. To move regulation forward, Ofcom has to be prepared to take risks and not become risk-averse which is the natural tendency of a bureaucracy. Reducing regulation involves risks (and opposition from interested parties) whereas regulatory creep is less risky. Ofcom does not like regulatory creep – nor for that matter regulatory creeps.

## Evidence-based regulation

It is easy, especially in broadcast regulation, to lapse into anecdotal generalisations and rather ill-informed value judgements. Ofcom has allocated much resource to researching the topics thoroughly that we are required to rule on. The evidence gathering around the complex issue of food advertising to children in relation to obesity, for example, has been of a consistently high quality and has played a major role in our decisions and the Government's. In our creation of the new Ofcom Broadcasting Code (replacing the codes of the previous regulators), we relied on a combination of research and the views of stakeholders – some 900 responses to our consultations. A huge amount of evidence. Evidence-based regulation works.

## Size matters

When Ofcom was created, there was much talk that it would be too big and too powerful. There was talk of a need for a plurality of content regulators by people like Greg Dyke, the previous Director General of the BBC. But there is

no doubt in my mind that Ofcom's size has been a success factor. It has allowed us to be properly evidence-based as just discussed, to do deep level research and high quality policy. It has allowed us to hire quality people in a range of functions including for example competition law, and offer these people real career development paths. I sense that the companies we regulate, including the very big ones like the BBC, ITV, BT and BSkyB, believe that we have earned the right to be treated with respect.

## Independence

One final success factor. When talking to regulators around the world, I find they are especially interested in the extent to which Ofcom operates independently of Government. Ofcom is statutorily a creature of Parliament and not of Government. I believe that Ofcom has in its opening years successfully trodden the difficult line between keeping the Government fully informed, involving the Government in the debates, ensuring the Government makes the decisions that it is required to do (the dates of Digital Switchover for example), whilst remaining firmly independent of Government. Recently, for example, Ofcom published its response to the Green Paper on the BBC Charter Review. We did not agree with some key aspects of Government thinking. A modern regulator, to be successful, must keep its independence from all stakeholders including the Government whilst fully consulting all of them. It must also concern itself with making what it feels to be the right decisions, which are not necessarily the popular decisions or the decisions which will play well in the media on the following day. Good regulatory decisions are made for the long term and not for the flot-sam and jetsam of tomorrow morning's headlines. The Ofcom Board and Content Board do not allow the PR implications of a decision to be considered until after the decision has been made. That is the right sequence. Decide first what is the right course of action and only then consider the handling issues.

## Issues of concern

I would like to conclude by noting the five key challenges that Ofcom faces.

## Keeping young

The first is how to keep the organisation young and diverse (in terms of gender and ethnic background). For those of you



who have experienced start-ups, there is a special quality in the air, a special sense of purpose, of doing new things, of inventing the future. Ofcom does not want to lose this as it moves into its third year of regulation, and as some of the pioneers like myself move on to new lives outside Ofcom. Stephen Carter has just done a significant reorganisation of Ofcom, giving existing people new challenges and opening doors to new recruits at senior level, thus refreshing the organisation. We want to encourage more of the American-style interchange between private and public sectors – thus enriching both sides and giving really creative career paths to bright young people.

### Consumer policy

The second challenge is to get the balance of our policy towards consumers, especially in telecoms, right – not an easy thing to do for one reason. The Ofcom Board believes that its major task is to create and sustain competitive markets because those bring maximum consumer benefit. That is to say, Ofcom acts on the market and the market acts on consumers bringing them benefit. The consumer lobby often wishes Ofcom to act directly on consumer deficits, for example informing consumers directly about the complicated price structures in the five operator mobile telecoms market. That consumer lobby can also be quite antagonistic towards competition as the force that will bring consumer benefit. In the UK, but much less so from my experience in the USA or in Australia, the consumer can be heard to complain of too much choice. The political left in the UK has historically been sceptical about the power of competition and of competitive markets.

Whilst we are clear that we have a consumer protection role in telecoms (not to mention broadcasting), we are less keen to take on any major role of consumer empowerment/information, believing that is better done by the market and consumer groups themselves.

Yet, paradoxically, our work on media literacy (a statutory requirement) is spreading into so many different policy areas where we need the consumer and the citizen to be better informed, to be more media and communications literate – because we want to be lighter touch, less interventive and more deregulatory. Communications and media literacy are critical to our aspiration to roll back sec-

toral regulation and encourage more self- and co-regulation. An old Ofcom joke points out that there are two regulators in every pommy living room – Ofcom and Ofswitch.

### Spectrum liberalisation

Thirdly, our policy towards spectrum allocation already mentioned, from command and control to market liberalisation, can cut across the interests of incumbent operators in telecoms or broadcasting as a result of previous regulatory decisions. For example, UK mobile operators are not necessarily happy at the prospect of spectrum being liberalised in such a way as to introduce new mobile competitors. UK broadcasters have traditionally had rather privileged access to spectrum without debate. Moving spectrum allocation more towards market mechanisms challenges these traditional attitudes. Australia's experience of auctioning commercial radio licences is followed with interest in Ofcom. We are required by statute to use the 'beauty parade' method for *Broadcasting Act 1990* (UK) licences.

### Execution

The fourth challenge is to execute the fine detail of the conclusions of the Telecoms Review in relation to the future of BT regulation. Ofcom has developed a strong reputation for policy and strategic thinking, now its execution skills will be tested.

It may be a peculiarity of the British public sector that more status is accorded to policy-making than to service delivery and execution. We try to reward and incentivise both more equally.

The Telecoms Review requires major organisational and behavioural changes within BT. We are confident that BT's wholesale and economic bottleneck products, in the local loop but not just the local loop, can be provided to BT's retail arm on a strictly equivalent basis to the way those products are provided to BT Retail's service and infrastructure competitors such as Cable & Wireless or Carphone Warehouse.

Australia faces the classic conflict between the Government wanting to get as much dollar as possible in the sale of its final shareholding in Telstra, and the possible need to constrain Telstra to create a more effectively competitive future market.

I would urge Australian regulators to think seriously about how they regulate

those parts of Telstra which are enduring economic bottlenecks – a euphemism for the good old natural monopoly! Unlike the USA or Hong Kong, we did not feel in the UK environment that the problems would be solved readily by intermodal competition, for example competition between cable operators and BT.

### Content regulation in the digital age

The fifth and final challenge is content regulation in the multi-platform multi-channel digital age – worth a speech all on its own<sup>1</sup>.

The European Commission appears to be keen, in current discussions to update the "Television Without Frontiers" Directive, to extend the scope of regulation to non-linear audiovisual content on any platform including the Internet. This would clearly go beyond the current rules for regulating linear audiovisual content on only broadcasting platforms. Ofcom is not so keen.

Yet there are important issues here where a convergent regulator finds itself not very convergent. For example we can uphold a fairness complaint within a TV programme but not if it is on the programme-related website.

### Conclusion

I have tried in this retrospective to give a flavour of Ofcom. It has created huge interest around the world, so much so that we are having to ration visits from time to time. I have tried to pick topics that would interest Australians. But as I said in the opening words of my speech here on April 30th 2002: "A visiting Pom travels cautiously through Australian conferences. Whilst he can give plenty of needed advice and instruction to Australians on matters such as how to win at cricket or rugby union, he is wisely more humble on matters concerning public policy, broadcasting, regulatory regimes."

<sup>1</sup> A speech I gave on this subject in Hong Kong in August 2005 can be found on the Ofcom website: [www.ofcom.org.uk](http://www.ofcom.org.uk)

<sup>2</sup> Ofcom website: [www.ofcom.org.uk](http://www.ofcom.org.uk)

# Legal Issues Arising From IPTV

## Nick Abrahams and Glenda Stubbs provide an overview of the regulatory issues associated with Internet Protocol TV

### Introduction

"Good evening and welcome to television" were the immortal words of Australia's first television broadcast. Now almost 50 years on television programs are capable of being delivered by a number of different platforms including the Internet. Welcome to Internet Protocol TV (IPTV).

IPTV is a reality. In the United States one of the major telcos, SBC Communications, is spending \$4 billion on an IPTV rollout. In Hong Kong, Richard Li's PCCW operates the largest IPTV operation in the world with over 450,000 subscribers and 40 channels. The PCCW operation is close to eclipsing its cable-based pay TV competition and has exclusive rights to premium channels such as HBO, Channel V and ESPN.

In Australia, Primus has announced it is rolling out an IPTV offering in 2006 through its network of DSLAMS. According to media reports earlier this year, Telstra is seriously considering IPTV but there has been no formal announcement. It seems likely that all telcos will be considering an IPTV strategy, at least according to Gartner analyst, Andrew Chetham, who says IPTV is a "no brainer" for a telco.

As with any new technology there is bound to be diverging opinions as to how best to regulate. This article discusses the difficulties facing regulators and show that the regulatory issues likely to arise from IPTV are significantly more complicated than with other new technologies such as VoIP.

### Assumptions

There are a number of assumptions regarding broadcast television that are being eroded by emerging technologies.

The first assumption is that delivery of television content is dependent on spectrum, which is a limited resource. A second assumption is that due to the limited number of newspapers, TV and radio stations, it is essential to have the cross media ownership laws in order to ensure plurality of voice. With the proliferation

of platforms through which content can be delivered, both assumptions are being challenged. Media outlets are no longer limited to television, radio and print. Information is now also available through subscription TV, mobile phones and the Internet. The Internet, itself, provides a number of different platforms through which content can be delivered – blogs, podcasts and IPTV.

A third assumption is that devices that receive broadcast content are fixed. Following the introduction of television in Australia, the television set soon became a ubiquitous household item. Consequently supervision of children watching television was largely achievable. This assumption is being eroded by the advent of mobile devices that can deliver television content. Not only can mobile phones receive television content (via a technology known as DVB-H) but other devices such as Apple's video-capable iPods.

The fourth assumption is that, for technical reasons, content providers need to be local to their viewers. This, of course, is no longer the case where technology has advanced to enable content providers to make content available from any number of sources whether local or overseas.

The fifth assumption is that content should make a profit. However, recent examples of telcos pursuing IPTV rollouts in the US and Europe show that telcos may consider their IPTV offerings as loss leaders, to be bundled with their profitable telephony products. The selling of content is a way to increase sales of connectivity and is likely to see telcos offering bucket pricing models where for a flat monthly fee, customers can receive fixed telephony, Internet and television services.

The final assumption, and the touchstone of content regulation is that regulation should be technology neutral. However, a review of the Australian regulatory landscape indicates otherwise. In this article, we discuss the existing regulation of content in Australia. For a bird's eye view, it might be easier to look at the diagram that follows.

### The regulatory framework

Like it or not, regulation of content is dependent on the technology delivering the content.

#### BSA - broadcasting services

If content is delivered via a "broadcasting service" or as "Internet content" then it will be regulated by the *Broadcasting Services Act 1992* (Cth) (BSA).

Section 6 of the BSA defines a broadcasting service to be:

*"A service that delivers radio programs or TV programs using radio frequency spectrum, cable, fibre, satellite or any other means (or any combination) and excludes services:*

- *providing only data or only text;*
- *on demand on a point to point basis; and*
- *as determined by the Minister."*

To date there has been one Ministerial Determination. Under the Ministerial Determination dated 12 September 2000<sup>1</sup> the Minister declared that the following service was NOT a broadcasting service:

*"A service that makes available television programs or radio programs using the Internet, other than a service that delivers the television programs or radio programs using the broadcasting services bands."*

"Internet" is not defined under the BSA. Based on the above Determination, IPTV over the Internet will fall outside the definition of broadcasting services. However, IPTV via a proprietary network would be a "broadcasting service" and be regulated by the BSA.

#### BSA - Internet content

Schedule 5 of the BSA regulates Internet content. Internet content is defined to mean:

*"Information that:*

- *is kept on a data storage device; and*
- *is accessed, or available for access, using an Internet carriage service*

*but does not include:*

- *ordinary electronic mail or*

information transmitted in the form of a broadcasting service".

A data storage device is defined to be "any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device".

Despite the BSA's aim to regulate all Internet content, the effect of the definitions of "Internet Content" and "Data Storage Device" when read together, means that live content that comes through the Internet in real time may fall outside the scope of Schedule 5.

### Telecommunications Act

If content is delivered by way of a listed carriage service then content will be regulated by the *Telecommunications Act 1997* (Cth) (**Telco Act**). The Telco Act regulates content service providers. A content service provider is a person who uses or proposes to use a listed carriage service to supply a content service to the public. This is a very broad definition and is likely to

catch most IPTV models, however there is little prescriptive regulation affecting content service providers.

### Mobile Premium Services Determination

A mobile premium service is a mobile service supplied by a number with prefix 191, 193-197 or 199 including a proprietary network service.

If content is delivered by way of a mobile premium service, then it is content regulated by Ministerial determinations. Of particular note is the Determination that came into effect in June this year<sup>2</sup>. That Determination has four main aims:

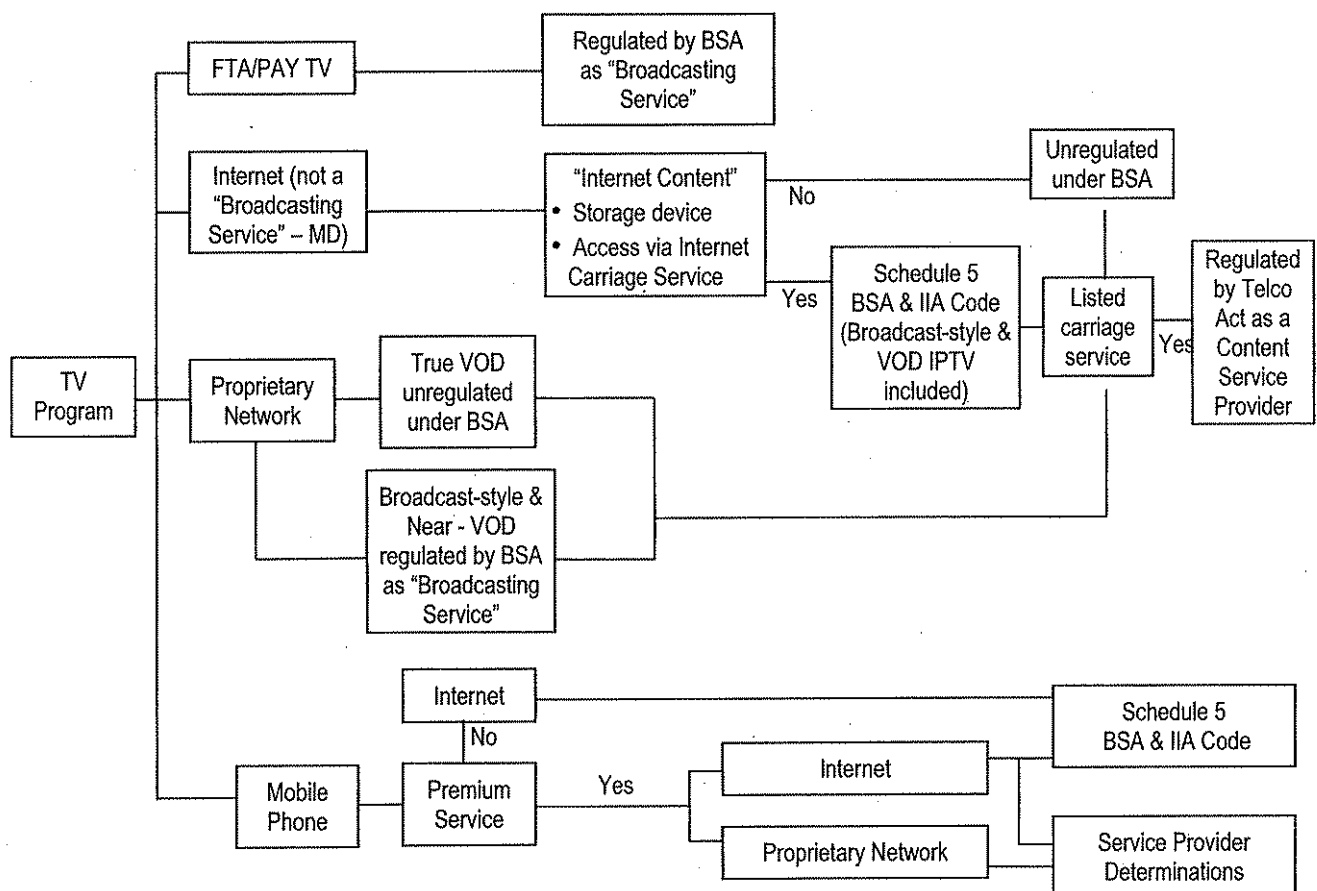
- to regulate mobile content in line with the Classification Act by requiring suppliers to implement an age verification process;
- to protect children from predatory behaviour while using chat rooms;
- to provide a measure to ensure the transparency of information on costs of the services; and

- to establish a complaints mechanism.

The first objective is intended to be achieved by requiring mobile content service providers to implement an age verification process with regards access to certain content.

Under the age verification process only persons 18 years or older can access content rated MA15+ or R18+. The classification of content is by reference to the national classification system set out in the *Classification (Publications, Films and Computer Games) Act 1995*. The age verification process means that content rated MA15+ cannot be accessed by 16 and 17 year olds using a mobile premium service. If, however, that same content were available, say through a cinema, they would be legally entitled to view that content. So even though there is a national classification system, the legislation regulating mobile content available on mobile premium services is not applying that system.

## Content Regulation in Australia



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## IPTV - licence issues

Because an IPTV service that uses the Internet is unlikely to fall within the definition of broadcasting service, this also means that IPTV suppliers will not require a licence and so even though they will be in competition with TV broadcasters they will not be subject to the same regulatory regime. That regime currently places significant burdens on licence holders, including compliance with licence conditions, industry codes and cross media ownership laws.

## Unregulated content

Viewers watching live programming via the Internet (amorous housemates anyone?), could well be able to view content which is not subject to the content classification regime.

## Anti-siphoning issues

IPTV suppliers are likely to be unaffected by the anti-siphoning provisions. Currently, only broadcasters with a subscription television broadcasting licence are prevented from acquiring the right to televise certain gazetted events unless a commercial or national broadcaster has first had the opportunity to do so. Therefore, the obligation to comply with anti-siphoning provisions would not apply to IPTV suppliers.

## What do the Regulators think?

Graeme Samuel, Chairman of the ACCC, sees the Internet as a "key driver of the next wave of competition to the current media players" and while providing a "stimulus for higher quality, lower prices and greater diversity" also sees it as posing challenges for policy makers and regulators<sup>3</sup>.

In a recent speech to the National Press Club, Senator Coonan in referring to the evolution of media had this to say:

*"For the Government's part, these new platforms are challenging the effectiveness of existing regulatory structures ... In a converged environment it will become almost impossible, and certainly counterproductive, to stop new players and new services from emerging. In my view, regulatory strategies need to move away from relying on controlling market structures in the way they have to date ..."*<sup>4</sup>

## Winners and losers

Content providers and telcos are likely to be the winners. Consumers too will benefit with the choice of platforms from which to receive content. The losers? Over time the main loser is likely to be the local video rental shop as Internet-based video-on-demand via IPTV becomes commonplace.

## Conclusion

As a result of convergence the demarcation between content accessible via the Internet and through more traditional means is gradually diminishing. Consequently traditional models of content regulation are also being challenged. The Regulators are currently struggling with the regulation of VoIP. IPTV throws up far more regulatory challenges, so it is also likely to be a significant time before we see significant regulatory change. It is easy to say "it's broke", much harder to create the solution.

**Glenda Stubbs is a Senior Associate and Nick Abrahams a Partner in the Sydney office of Deacons. Both Glenda and Nick practice in the firm's Technology, Media and Telecommunications Group**

<sup>1</sup> Determination under paragraph (c) of the definition of "broadcasting service" (No 1 of 2000), No GN38, 27 September 2000

<sup>2</sup> Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No 1)

<sup>3</sup> Henry Mayer Lecture, Media Convergence and the Changing Face of Media Regulation, 19 May 2005.

<sup>4</sup> The New Multimedia World, 31 August 2005.

# Fair Use and Other Copyright Exceptions in the Digital Age

**Raani Costelloe looks at the scope of the Federal Government's current review**

## Issues Paper

On 5 May 2005 the Federal Attorney-General's Department released an Issues Paper entitled Fair Use and Other Copyright Exceptions - An examination of fair use, fair dealing and other exceptions in the Digital Age. The Issues Paper sought submissions by 1 July 2005 and over 160 submissions were received.

## Background to the Review

The Federal Government's 2004 election policy included a plan to review the existing fair dealing provisions of the Copyright Act 1968 (Copyright Act) in

light of the recent amendments to copyright law arising from the Australia-US Free Trade Agreement (AUSFTA) which strengthen copyright owners' rights and the widespread digital copying of copyright content by Australians evidenced, for example, by:

- the widespread use of blank recordable CDs for storing unauthorised copies of commercial sound recordings;
- the substantial take up of MP3 players (such as the iPod) and unauthorised copying of sound recordings - people are copying their own (and

other people's) existing recorded music collection (CDs) into digital files for transfer onto MP3 players - known as format-shifting or space-shifting; and

- the increased popularity of digital video recorders (also known as personal video recorders (PVRs)) which allow for copying and storage of broadcast programming for watching later - PVRs have greater functionality and storage capacity than analogue VCR recorders - known as time-shifting in relation to 'recording for watching later'.

The Copyright Act contains a number of specific fair dealing exceptions/defences to copyright owners' exclusive rights in copyright subject matter which allow a



copyright user to use copyright material without the owner's permission or requirement to payment to the owner:

- research or study (ss 40 and 103C);
- criticism or review (ss 41 and 103A);
- reporting of news (ss 42 and 103B); and
- professional advice given by a legal practitioner, patent attorney or trade mark attorney (s 43(2)),

provided that it constitutes fair dealing.

Currently, the following activities are acts of infringement under Australian copyright law unless the existing exceptions apply in specific circumstances:

- making back-up copies of recorded music or films contained on CDs/DVDs; this activity may also infringe technological protection measures if content is copy-protected;
- the copying of sound recordings from a person's CD to digital files for transfer to that person's personal digital music device (eg. iPod), ie. format-shifting; and
- copying the films and other content contained in broadcasts for personal use in time-shifting broadcast programming; s111 of the Copyright Act contains an exemption from copyright infringement in a broadcast if a person copies a broadcast but does not extend the exemption to the infringement of underlying films, recordings and other copyright in the broadcast.

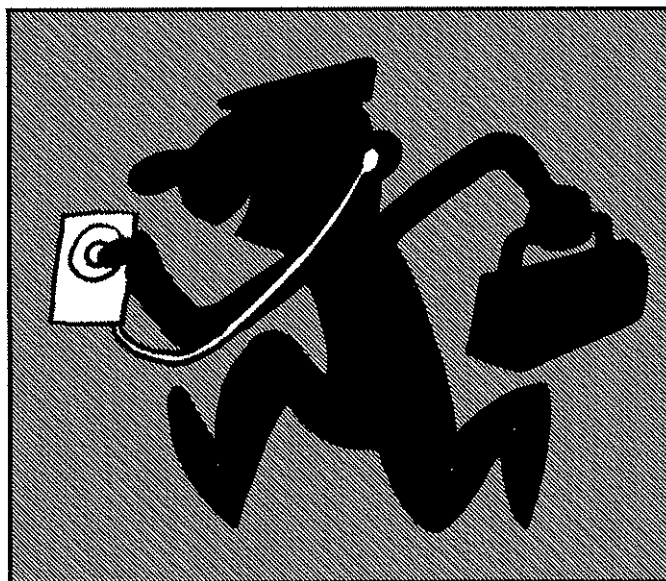
### Scope of the Review

The Federal Government's review sought submissions as to whether the types of unauthorised uses of copyright material referred to above should be made the subject of exceptions and if so, how?

The options canvassed in the Issues Paper include the creation of:

- a general 'fair use' exception similar to the US 'fair use' doctrine;
- further specific 'fair dealing' exceptions to the Copyright Act for back-up copying, format-shifting or time-shifting of copyright material; or
- some other regime, eg. immunity from infringement for private copy-

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ing combined with levies on blank CDs which are distributed to rights holders.

The review does not consider the removal of the existing fair dealing exceptions.

### Options 1 & 2 - General US type 'fair use' exception alongside existing exceptions

Exemptions of this kind would follow the US model of an open-ended fair dealing exception which provides for factors a court must take into account in determining whether something comes within the exception. This approach was recommended by the Copyright Law Review Committee (CLRC) in 1998 who put forward a model which:

- consolidated the current fair dealing exceptions into a non-exclusive list;
- created an open-ended model which provided that a court must look at a number of non-exclusive factors which are currently used in deter-

mining fair use for the purpose of research or study, including:

- *the purpose and character of the dealing;*
- *the nature of the work or adaptation;*
- *the possibility of obtaining the copyright subject matter within a reasonable time at an ordinary commercial price;*
- *the effect of the dealing upon the potential market for, or value of the copyright subject matter; and*
- *the amount and substantiality of the part of copyright material taken in relation to the whole copyright material.*

Options 1 and 2 described in the Issues Paper are variations of this model. Option 1 is essentially the same as the CLRC proposal while Option 2 involves no consolidation of the existing exceptions but the addition of an open-ended exception.

Arguments for Options 1 and 2 are that they promote flexibility for copyright users - in that they do not limit circumstances in which exceptions to infringement may apply and could therefore be expected to accommodate future technological developments.

Arguments against Options 1 and 2 are that they create uncertainty for both owners and users - which may give rise to costly litigation in order for the courts to determine whether a type of use falls within the fair dealing exception. In the US, analogue time-shifting has been held to be fair use (*Sony v Universal Studios* (1984)) but there is some uncertainty as to whether format-shifting recordings for use on MP3 players is fair use (*RIAA v Diamond Multimedia* (1999)). Amendments to the Copyright Act of the type described in Options 1 and 2 in the Issues Paper will likely involve the courts (rather than Parliament) deciding how the fair use exception to copyright infringement will apply to future technologies.

The CLRC's proposal was rejected in 1998 on the basis that it did not offer sufficient benefits to justify its costs and uncertainties.

### **Option 3 – Creation of further specific exceptions rather than an open-ended regime**

The fair dealing model described in Option 3 in the Issues Paper proposes the addition of certain specific exceptions to the existing list of exemptions to copyright infringements set out in the Copyright Act, rather than the creation of an open-ended fair dealing exception. Specific exceptions might, for example, include one or more of the following:

- a back-up copy exception for recordings and films, similar to the existing computer program exception (s 47C);
- a time-shifting exception which is broader than existing s111, so as to cover underlying content in a broadcast – both UK and New Zealand copyright law presently have such an exception; and
- a format-shifting exception which would allow a person who buys a sound recording in one format to copy that sound recording for personal use in another format (eg.

MP3 format for playing on an iPod). This exception to copyright infringement would not allow copying from another person's CD collection or unauthorised copies from a peer to peer network. Such a proposal is currently under consideration in New Zealand.

Arguments for changes to the Copyright Act that adopt the Option 3 approach are that it would give greater certainty to copyright owners and users than Options 1 and 2, and would be more reflective of Government policy rather than requiring broader judicial consideration of an open-ended exception.

Arguments against an Option 3 approach are that it is not flexible and, by removing any scope for court interpretation, will require further legislative review in the future to determine how the fair use exceptions should apply to new technological developments.

For copyright owners, Option 3 would possibly undermine the market value of copyright material and hinder new business models (eg. allowing format-shifting of music would arguably affect the sale of digital music downloads).

### **Option 4 – Retain current exceptions and add a statutory licence for private copying**

This model involves legalising the copying of copyright matter onto new media for private use (eg. sound recordings copied onto blank CD-Rs) and imposing a tax on the sales of recordable media (eg. CD-Rs) which is distributed to rights holders by a collection society. This approach is similar to the proposed blank tape levy which was held to be unconstitutional by the High Court in *Australian Tape Manufacturers v Cth* (1993). A number of European countries have similar regimes in place.

Arguments for an Option 4 approach are that it provides for some remuneration to rights holders - which does not presently occur even though copying of their material is widespread. The approach has at some times had the support of some copyright interests, particularly collecting societies (eg. APRA/AMCOS (musical works) but not the owners of sound recordings (eg. record companies as represented by ARIA).

Arguments against an Option 4 approach are that it would not provide adequate compensation to owners and that blank media are likely, in any event, to be superseded in the short to medium term by other less tangible media (eg. computer hard-drives; MP3 players and mobile phones). Option 4 also places the burden to compensate copyright owners on blank media producers. Were this approach to be adopted a likely result is that the cost of blank media would go up, including for people who do not use blank media for copying protected material (eg. personal data, photos and video).

### **The relationship between fair dealing and technological protection measures**

Copyright owners have introduced technological protection measures and digital rights management systems which attempt to prevent or limit the extent of copying of copyright material (eg. copy protection measures on music CDs, film DVDs and computer games) to prevent piracy or establish new business models.

The circumvention of these measures is prohibited under Australian copyright law and it is unlikely that fair dealing would be a defence to circumvention, unless specifically addressed in legislation.

### **The next step**

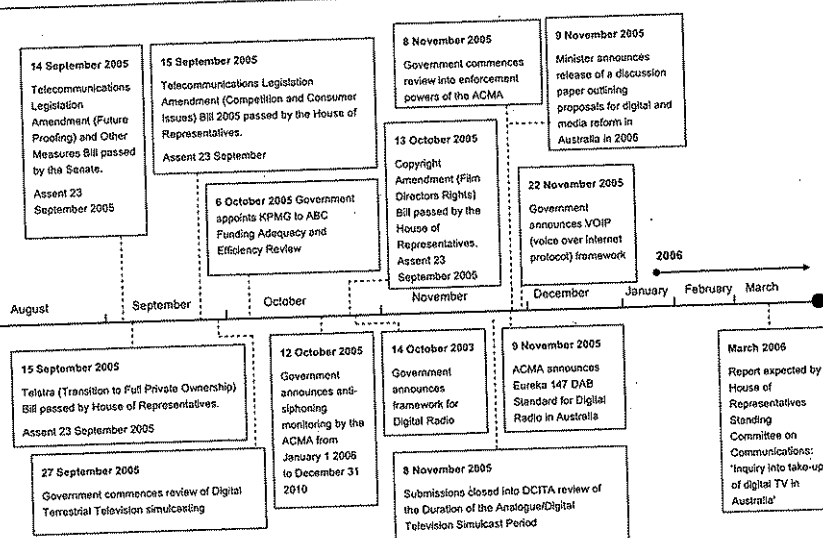
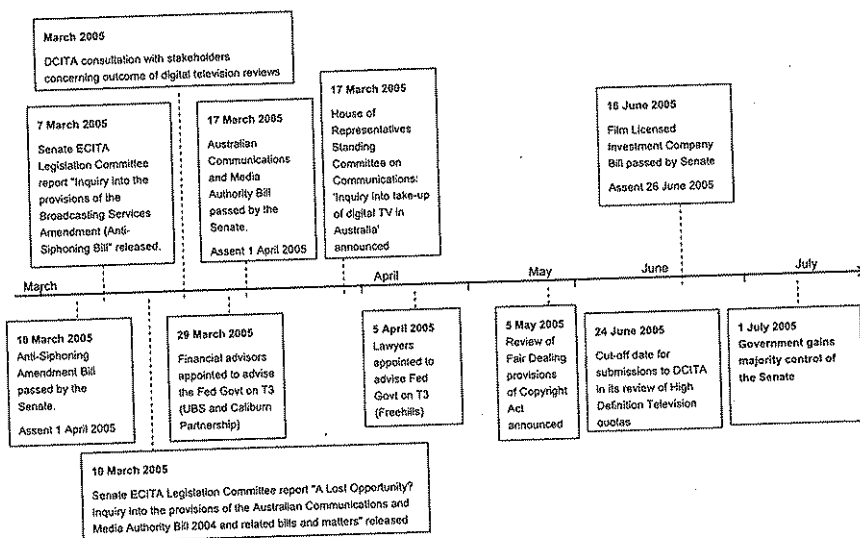
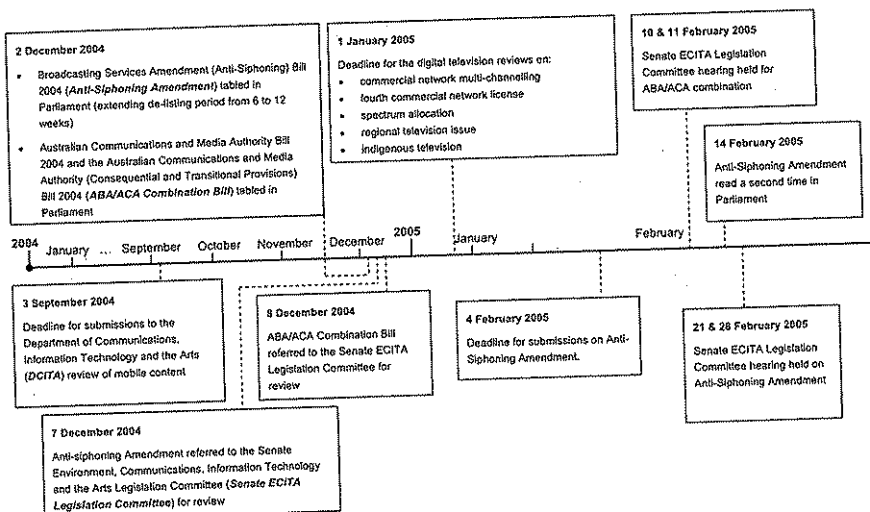
In November 2005, the Attorney-General Mr Philip Ruddock announced that his Department had completed its review of the submissions and identified the options which would be taken to Government as including:

- supplementing the exceptions with a new extended dealings exception that can apply to a wide range of permitted uses; and
- adding new exceptions to recognise some everyday forms of private copying that in the Attorney-General's view do not harm copyright owners such as time-shifting (eg. taping a TV show to watch at later time) and format-shifting (eg. putting a CD you have bought onto your iPod).

*Raani Costelloe is a Senior Associate in the Sydney office of Allens Arthur Robinson*

# Federal Media Policy Developments 2004-2005

The timeline that follows will be a regular feature in the Communications Law Bulletin. We propose to keep it updated – to track Federal legislative and policy developments in communications and media regulation.



Prepared by William Atkins of the Communications, Media & Technology Practice Group, Allens Arthur Robinson, Sydney.

## Communications & Media Law Association Incorporated

The Communications and Media Law Association (**CAMLA**) brings together a wide range of people interested in law and policy relating to communications and the media. CAMLA includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CAMLA members include:

- defamation
- contempt
- broadcasting
- privacy
- copyright
- censorship
- advertising
- film law
- information technology
- telecommunications
- freedom of information
- the Internet & on-line services

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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## Contributions & Comments

Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in hard copy and electronic format and comments should be forwarded to:

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## CAMLA Website

Visit the CAMLA website at [www.camla.org.au](http://www.camla.org.au) for information about CAMLA, CAMLA seminars and events, competitions and the Communications Law Bulletin.

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