The Forecast is for Change

Media Ownership Laws:

Communications Act, 2005 (Pakistan)

Communications Act, 2005 (Pakistan)

Proposed changes include:

- The removal of the word "national" from the title of the Act.
- The introduction of a provision for the creation of a new body, the "Communications Commission," to regulate the industry.
- Amendments to the provisions related to the regulation of media content.
- The introduction of a provision for the creation of a new body, the "Communications Commission," to regulate the industry.
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The Communications Act, 2005 (Pakistan)

Applications for Broadcasting Licences under Section 41 of the Act shall be made in accordance with the Rules framed thereunder.

Communications Act, 2005 (Pakistan)

Section 41

Applications for Broadcasting Licences under Section 41 of the Act shall be made in accordance with the Rules framed thereunder.

Communications Act, 2005 (Pakistan)

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What's Going from the BSA  
(a) BSA cross-media ownership and control restrictions

Most of the cross-media rules in Part 5 of the BSA will be removed.

Section 60 of the BSA currently provides that a person cannot be in a position to exercise control of:

- a commercial television licence and a commercial radio licence in the same broadcasting service;
- a commercial television licence and a newspaper that is "associated" with the licence area of that television licence (that is, a newspaper that is in English, published at least 4 days per week, has 50% or more of its circulation by way of sale, and 50% or more of its circulation is within the relevant licence area); or
- a commercial radio licence and a newspaper that is "associated" with the licence area of that television licence.

The BSA Amendment Act also creates "financial information offences", in Part 10.8 of the Criminal Code. These amendments criminalise dishonestly obtaining, or dealing in, personal financial information without the consent of the person to whom the information relates and also criminalises possession, control or importation of a thing with the intention that the thing be used to commit the offence of dishonestly obtaining, or dealing in, personal financial information.

The introduction of the "financial information offences" are a response to the Model Criminal Code Officers' Committee's (MCCOC's) March 2004 discussion paper on credit card skimming offences. Credit card skimming is the process by which legitimate credit card data is illicitly captured or copied, usually by electronic means.

Certain aspects of cyber crime have also been the subject of reports released by a number of Australian agencies. The Australian Institute of Criminology's (AIC) report Online Credit Card Fraud Against Small Business released in February 2004 which revealed that less than one third of incidents uncovered by the survey were reported to police. In contrast to over-the-counter credit card transactions, where businesses are generally not liable for fraudulent purchases, online traders are responsible for losses associated with online credit card fraud. This national survey of small businesses found:

- one third of online traders have been victims of online fraud;
- over half of those businesses hit became repeat targets of fraudsters;
- average losses ranged from $100 to $3,500.

On 1 September 2005, the Minister for Communications, Technology and the Arts, Senator Helen Coonan, launched Taking Care of Spyware, a guide to help Australian protect themselves against spyware on the Internet. The Minister also released submissions received in response to a recent Government review on spyware.

The Minister reported that:

"The feedback we received from members of the public and industry stakeholders highlighted a need for the public to be aware of the threat of spyware. The Taking Care of Spyware brochure tells consumers how they can identify spyware on their computers and remove it, or protect their computers against it."

The Government will now follow up on courses of action identified in the consultation process.

"This will include things like working with e-commerce companies and law enforcement agencies to target spyware," Senator Coonan said. "The Government will also continue to work with the Internet industry to ensure that consumers know what is installed on their computers and what information they are making available online to others."

Spam

Both Australia and the United States have introduced substantial legislation prohibiting or regulating the dissemination of spam. However, countries such as China and Russia risk becoming havens for creators of Spam due to an absence of legislation in those countries.

In Australia, Spam in now regulated by the Spam Act 2003 (Cth) which seeks to combat spammers and the techniques they use. The Spam Act has been examined in detail elsewhere and is beyond the scope of this article.

A public consultation version of a Draft Spam Code (Draft Code) applying to Internet and Email Service Providers was released on 26 May 2004. The Draft Code is designed to complement the Spam Act.

The Draft Code seeks to define best practice standards for ISPs and email service providers (ESPs) in their spam management, as well as assisting their customers to exercise greater control as users.

On 11 August 2004 the eMarketing Code of Practice was released by the Australian Direct and Email Association (ADEA). On 16 March 2005, the former ACA registered the code under section 117 of the Telecommunications Act 1997 with the effect that compliance with the code is mandatory and enforceable by ACMA.

The e-Marketing Code of Practice establishes comprehensive, industry-wide rules and guidelines for the sending of commercial electronic messages in compliance with the Spam Act 2003. The Code provides detailed guidance and acceptable e-marketing practice, particularly with respect to issues such as consent and viral marketing. The Code also provides a framework by which Industry can handle complaints about Spam and monitor industry compliance with code provisions.

Shane Barber is a partner, and Bridget Edgehill is a lawyer, at Truman Hoyle, Sydney.
licences (under sections 54 and 56 of the BSA),

- the “one to a market” rule that applies to commercial television licences (under sections 53 and 55 of the BSA).

Also, the “75% audience reach limits” that applies to commercial television licences under sections 53 and 55 of the BSA will be retained. This means that the development of (truly) national television networks with common ownership and control will continue to be prohibited.

The proposal to retain these limits on ownership means that there continues to be a role for the tests of control contained in Schedule 1 of the BSA. In addition, the existing control tests will also be relevant to assessing whether particular businesses form part of the same “commercial media group” (as explained below).

What’s New to the BSA

The most important new proposal for changing the cross media rules in the BSA is the proposed introduction of a “diversity test” (also called a “75% minimum number of media groups” test).

Cross media ownership acquisitions will be permitted if and only if there remain a “minimum number of commercial media groups” in the relevant licence area after the transaction is completed.

The Discussion Paper indicates that a “commercial media group” can be comprised of one or more commercial television licensees, a commercial radio licensee or associated newspaper, where these entities have “common control” (under the BSA control tests).

In other words, the proposed definition of “commercial media groups” will be limited to those categories that are presently regulated under the cross media rules. Ownership of open narrowcasting licences or community licence will not be considered in this context.

The minimum numbers of commercial media groups that are being proposed are:

- Five (5) commercial media groups in “mainland state capital” licence areas – ie Adelaide, Brisbane, Melbourne, Perth and Sydney; and
- Four (4) commercial media groups in “regional” licence areas (which are assumed to include Hobart, Darwin and Canberra).

Since the Minister’s announcement, there has been much media commentary about what this may mean but little in the way of practical illustration. These examples are set out below to assist in a consideration of this issue.

(c) Example 1 – Small regional market

In the Wangaratta (Victoria) radio licence area, 5 North East Broadcasters Pty Limited (an independent commercial radio operator) owns two commercial radio licences, which provide the 3NE 1566 AM service, and the Edge 102.1 FM service.

The Wangaratta radio licence area is contained within the aggregated Victorian commercial television licence area (Regional Victoria TV1), so people in the Wangaratta area also also have commercial television services provided by WIN, Prime and Southern Cross.

The Wangaratta Chronicle is the local newspaper, but it is only published three days per week, so would not be an “associated newspaper” for the purposes of the existing cross media rules, or for the purposes of forming a “commercial media group”.

On this basis, in Wangaratta there are presently only four (4) “commercial media groups”. This means that no cross media acquisitions would be permitted (under the BSA) in that market.

(d) Example 2 – Larger regional market

In the Cairns (Queensland) radio licence area, there are four (4) commercial radio licences. Two of these are provided by Macquarie Regional Radioworks (HOT FM 103.5 and SEAM FM 98.9), and the other two are provided by Prime Radio (Cairns) Pty Limited (4CA FM), and the fourth is provided by Elmine Investments Pty Limited (4EEL/Easymix).

The Cairns radio licence area is contained within the aggregated regional television licence area (Regional Queensland TV1), so receives commercial television services from Southern Cross, Seven Queensland and WIN. Note that this is not a Prime television market, which explains why Prime was able to acquire the 4CA commercial radio licence.

The Cairns Post is the local newspaper, published 6 days per week by News Limited. The other local newspapers (the Cairns Sun and the Northern Times) are free newspapers, so would not be considered to be “associated newspapers”.

On this basis, in Cairns there are seven (7) “commercial media groups”. This could reduce to four (4) under the proposals, subject to compliance with relevant ownership restrictions (ie the “one to a market” television rule and the “two to a market” radio rule), and to Australian Competition and Consumer Commission (“ACCC”) approval (discussed below at section 2.4).

(e) Example 3 – Major metropolitain market

In the Sydney commercial radio licence area, there are seven (7) commercial radio opera- tors, providing commercial radio services in the broadcasting services bands. These are:

- Macquarie Radio Network (2GB, 2CH);
- Austereo (2DAY, MIXM);,
- APN News and Media (WSFM, MIX 1011);
- DMG (NOVA, VEGA);
- Southern Cross Broadcasting (2UE);
- Sky Channel (2KY);
- Broadcast Operations (2SM).

The Sydney radio licence area boundaries are within the Sydney television licence area (Sydney TV1). This means that people living in the Sydney radio licence area are also served by the Seven, Nine and Ten commercial television licence areas.

In addition, The Daily Telegraph (published by News Limited) and The Sydney Morning Herald (published by John Fairfax Holdings) are newspapers associated with the Sydney licence area.

On this basis, in Sydney there are twelve (12) “commercial media groups”. In e-commerce which may be different to the consumer’s experience face to face. It covers issues such as security of payments, privacy of personal information and access to online contracts. The Guidelines provide guidance to:

- fair business practices;
- accessibility and disability access;
- advertising and marketing;
- engaging with mirrors;
- disclosures of businesses’ identity and location;
- disclosures of contracts terms and conditions;
- implementation of mechanisms for concluding contracts;
- adopting privacy principles;
- using and disclosing information about payment, security and authentication mechanisms;
- the establishment of fair and effective procedures for handling complaints and resolving disputes; and
- law and forum for the resolution of contractual disputes.

The Guidelines, among other things, reinforce general contractual principles in relation to ensuring consumers can access a clear and complete text of a transaction’s terms and conditions both easily and in a printable forms. This is a particular reminder to legal advisors of companies undertaking online transactions given the common insistence by clients to “remove all the legal stuff” from the page set out.


Jurisdiction

The nature of the problem

It is trite to say that one of the key legal issues with which courts around the world have been grappling in recent years is the analysis of their scope and derivation of power to hear particular disputes regarding online transactions and to compel those people involved to obey its commands.

This issue is exacerbated online as participants may not even be aware of the location of the person with whom they are dealing. Much of the law regarding jurisdiction is invalid in an environment which also lacks physical boundaries and community.

Australian Case Development

(a) Macquarie Bank Limited & Anor v Bell

In this case, Macquarie Bank Limited and Mr Borg were in dispute in relation to a number of matters arising from Mr Borg’s employment (or cessation) arrangement with the bank.

During 1999, marital matters appeared on a website at www.macquar-
**Introduction**

In the field of communication, the effectiveness of a message can be significantly impacted by various factors. This document aims to explore the influence of physical environment, emotional factors, and social contexts on the success of communication. By understanding these factors, one can enhance the impact and outcomes of communication efforts.

**Physical Environment**

The physical environment in which communication takes place can greatly affect how messages are received. Factors such as noise, lighting, and temperature can alter the perception and interpretation of messages. For instance, a loud environment may make it difficult to hear and understand a speaker, while a comfortable and well-lit setting can facilitate clearer communication.

**Emotional Factors**

Emotions play a crucial role in communication. Positive emotions can enhance the effectiveness of a message, making it more persuasive and engaging. Conversely, negative emotions may lead to misunderstandings and reduced comprehension.

**Social Contexts**

The social context in which communication occurs also influences its effectiveness. Understanding cultural norms, social roles, and power dynamics can help in tailoring messages to be more effective in different social settings.

By considering these aspects, communicators can adapt their strategies to optimize the impact of their messages.
mmercial television service in the future, the BSA has previously been issued by the ACM’s predecessor (the ABA) for commercial radio services (under section 14 of the Act) but the section 28 BSA moratorium has prevented this from occurring for commercial television services (i.e. in those markets which are already served by three commercial television services). This means that persons who present radio-visual content to be categorised as a "broadcasting service" for the purposes of the BSA (in order to make sure that they only make such services available on a subscription basis, or that such services fall within the narrowcasting criteria in the BSA). Once the powers to allocate new commercial television licences are transferred to the Government (as is noted above) and the section 28 moratorium ends, the Discussion Paper indicates that the Government may consider the issue of non-commercial television licences. However, this would be subject to the application of a "public interest test" (yet to be defined with precision).

When the digital BSA spectrum was planned (for digital television conversion), in most licence areas two 7MHz channels of spectrum were set aside for digital "datacasting". Datacasting transmitter licences were originally proposed to be auctioned to the Australian Communication Authority as a prelude to the caveats, however, these auction rules may never have been adopted. Two exceptional rules have been identified under Schedule 6 of the BSA. The Government is now considering whether these channels should be allocated for other new types of services. Specifically, the Government is no longer confining consideration of this issue to "datacasting" as defined in Schedule 6 of the BSA. However, as indicated by the Discussion Paper, the Government is still drawing the line at this spectrum being used for services that look like traditional television services, and that are likely to be used to provide anything like a fourth commercial network. Services being proposed include the kinds of mobile content services currently being trialled on DVB-H services that provide short video, movies, news headlines, and other "made for mobile" content), narrowcasting services and subscription broadcast services. The Government also proposing that existing free to air television broadcasters will not be able to acquire this spectrum.

What’s Next?

After the consultation period ends, formal policies are expected to be announced. If the proposals outlined in the Discussion Paper are adopted, there will be a range of amendments required to be made to the BSA.

Also, and as noted at the outset, the Government has indicated that it will issue a Paper on "Digital Action" as part of the "Digital Action Plan" that was focussed on getting Australian television audiences converted to digital.

In the meantime, the ACCC has indicated that it will shortly issue a further discussion paper considering options for how the two "datacasting channels" should be allocated (from a technical and licence allocation perspective). The ACCC paper is expected to discuss whether the channels should be sold separately and whether they should be allocated on a licence basis by licence area basis, it is expected that there will be much demand for these channels, and the ACCC’s recommendations on this issue are awaited with interest.

Carolyn Lidgerwood is Special Counsel at Gilbert + Tobin

1 Senator the Hon Helen Coonan, Minister for Communications, Technology and the Arts: Address to CEDA - Meeting the Digital Challenge: Reforming Australia’s Media in the Digital Age, 14 March 2006.
2 Speech to CEDA, 14 March 2006, ibid.
4 The ACCC has a deployment program that is progressing quickly, but is not yet complete.
8 Speech to CEDA, 14 March 2006, ibid.
10 Freedom of Information Act 1982 (Cth).
11 Speech to CEDA, 14 March 2006, ibid. "What’s Next?"
E-commerce Development

Introduction

In the right place or 2 is other words to on the economic and the development of the e-commerce market in China, the economic development of the market is influenced by the economic and the development of the e-commerce market. The economic development of the e-commerce market is a significant factor in the economic development of the market.
"Hepburn greatly extends the range of material that can be deemed defama-
tory."

Whether or not the Court’s assessment of community attitudes to homosexuality in the United Kingdom is accurate, it is certainly the Courts’ restrictive application of the ‘ordinary person’ standard in assessing satire. Ordinary persons “are not thought to be moral or socially sensitive”\(^2\). If defamation prescribes the “rules of civility,”\(^3\) a narrow ‘ordinary, reasonable, normal person’ standard will limit the extent of open discourse in our society.

Numerous cartoons fill Australian daily newspapers depicting politicians and public figures with oxen, grotesque features and animal characteristics, where we ask audiences to criticise or question persons or their policies. Satirical comment is said to “rush boundaries” and challenge assumptions unconventionally. ‘Ridicule’ is now recognised as a fourth basis for defamation\(^4\) (for example, in Boyd v Mirror Newspapers Ltd and Ettinghausen v Australian Consolidated Press\(^5\), Brandreth v Ryier\(^6\) (‘Brandreth’)). Ridicule is often a tool of satire, encouraging challenge to assumptions and the status quo. Defamation law recognises that social and community standards change over time,\(^7\) thus should recognise ridicule as a tool of satire.

Defamation law’s assumptions regarding the ‘ordinary, reasonable person’ overlook satire’s analytical and challenging function. Satire should be positively acknowledged in an area of law whose inherent role is to establish moral and ethical boundaries in reporting by encouraging both humour and humility: “... a more relaxed self-perspec-
tive can undo much of the damage [of defamation], and even improve one’s self-image.”\(^8\)

Levine J’s common jury direction\(^9\) in the New South Wales Supreme Court was: “The ordinary reasonable reader is no-one in this courtroom, and that includes you. The ordinary reason-
able reader is a hypothetical per-
som.”\(^10\)

This approach may set up a “third-person effect” whereby ‘individuals tend to per-
form worse on the effect of a conse-
quently on themselves as less than that on others exposed to the same communica-
tion.”\(^11\) United States research supports the view that such an effect means perceived societal intolerance may become increasingly exaggerated.\(^12\) Even if left to the jury, the judge’s direction as to the imputations and their effects will be influential. Most importantly, Magnus-
son warns that courts should be careful in accepting a plaintiff’s imputations, not to permit satirical comment merely because it falls outside their own middle-
class horizon.\(^13\)

Defences

The most useful defences to satire are fair comment and the extended qualified privilege regarding political publica-
tion.

Fair Comment

This defence protects legitimate criticism and expression of diverse opinions, recog-
nising an ‘important aspect of freedom of speech.’\(^14\) A satirical publication can not personally attack individuals, it must address general public profile or policies. Furthermore, “to allow public debate to descend to the levels of the gutter is not in the public interest, however hurtful or offensive the attack,” Weekly Times v Popovich\(^15\) confirmed the objective test in assess-
ing the comment’s ‘fairness’ and more.

A plaintiff need not prove they actually held the opinion, merely that it was an opinion that an ordinary reasonable person could have held; it is “harmless;” he might be... however exaggerated or obtuse his views.\(^16\) Non-acknowled-
ment of central substantives or assessments. The Commonwealth’s pros-
pects are more limiting than current common law or code law, by protecting only comments which are “fair and rea-
tionable” and rejecting grossly exagger-
ated, biased or prejudiced opinions.\(^17\) To remain effective in protecting satire, the objective element must be retained but given wider interpretation.

Qualified Privilege

While satire may be protected if relat-
ing to government and political mat-
ters accepted as a part of political publica-
tion, the strict approach adopted by Lange v Australian Broadcasting Corpora-
tion\(^18\) may unduly constrain satire.

The Lange High Court defined “political speech” as “the ability of ‘the people’ to communicate with each other with respect to matters that affect their choice in federal elections or CAV is seeking a declaratory from VCAT that the unfair contracts are void and an injunc-
tion which prevents AAPT from using those clauses or similar ones in its customer con-
tacts. VCAT has yet to issue its decision. The action is also of interest to the consumer and interest groups as likely to provide impor-
tant guidance on the practical application of the unfair contracts provisions.

ACIF Consumer Contracts Code

The CC Code (registered under section 117 of the Telecommunications Act, 1997) in Victoria provides some industry-specific guidance on what might be considered an unfair contract term. As noted above, the current regime under the CC Code is in virtual identical terms to section 32W of the FHA and was consciously modelled on it. It is likely that decisions on the legisla-
tive reform decisions on the code and vice versa.

The action against AAPT claims that 11 clauses in AAPT’s mobile phone service statement are unfair and in breach of the clause in its pre-sold CFOA are unfair. The terms alleged to be unfair include those which:

- permit AAPT to unilaterally change the contract;
- permit AAPT to suspend services with-
out notice but later charge a reconnec-
tion fee;
- impose a confidentiality clause on the customer preventing the customer from discussing AAPT’s charges or dis-
counts;
- permit AAPT to assign the contract to another mobile phone service sup-
plier without the customer’s consent and irrespective of the quality or ade-
quately of services offered by the other supplier;
- permit AAPT to charge interest on outstanding amounts without clearly informing the customer of the interest rate that will be applied in respect of that;
- permit AAPT to refuse to give a pre-
paid mobile phone customer a refund of the call credits under any circum-
stances including even if the good or service is not fit for purpose; and
- limit AAPT’s potential liability to the customer to an unreasonably excess-
ive degree and in a way not permit-
ted by law.

Implications

Clearly, suppliers of telecommunications, media and internet services are transacting in a regulatory environment which increas-
ingly looks like the ‘old’ regimes and procedural and substantive unfairness.

The unfair contract provisions in the FHA are the current high water mark in terms of fairness in consumer contracts. The CC Code applies the same general rules and also provides greater guidance in the con-
text of telecommunications and internet services.

Evident from the APA’s case, CAV has been active in ensuring that suppliers of tele-
phony services are in compliance with the FHA. Internet service providers are one cur-
rent area of focus and compliance can be expected in that quarter as well.

Although it has been more than two years since the amendments to the FHA, there is not perhaps the degree of awareness that there is that of the provisions and their effect on contracts entered into with Victorian consumers. Companies, including ACIF, the ACCC or the ISPs, which use stan-
dard form agreements across the various States and Territories, need to be aware of this. Ensuring that their customers comply adequately. Supplies may find themselves bound to contracts which lack necessary protections if an offending term is included. This can have serious financial consequences.

Robert Neely is a Partner, and Olivia Kwok is a Lawyer, at Henry Davis York. Research assistance for the arti-
cle was undertaken by Jessica Cordell, Summer Clerk at Henry Davis York.

In April 2005, the Ministerial Council on Consumer Affairs agreed to further a matter of national regulatory responsibility, the draft unfair contract terms with its preference being a response which is consistent for each State and Territory and contains the unfair contracts provisions. See http://www.consumer.gov.au/html/consumer/cntt/consntt/index2002.htm.

\(^{11}\) Fair Trading Commission Conference ‘Changing
condusio

Condusio is a difficult concept to define. The word is derived from the Latin word "condusio," which means "conduction" or "conduction of music." It is used in music theory to describe the way in which a melody is moved or transferred from one voice to another in a polyphonic composition. Condusio is a form of counterpoint in which the line of the melody is moved to a new position, usually an octave higher or lower. This movement is done in a way that maintains the same rhythm and melody, but with the notes being distributed differently among the voices.

Properly done, condusio can add complexity and interest to a musical piece. It can also be a way of creating new melodies from existing ones. However, if not done properly, condusio can result in a piece that is difficult to understand or appreciate.

Condusio is often used in polyphonic compositions, such as those of Johannes Ockeghem, Jacob Obrecht, and Thomas Tallis. It is also found in the works of other composers from the Renaissance and Baroque periods.

condusio

condusio
Unfair Terms in Consumer Contracts - The New Benchmark

Robert Neely and Olivia Kwok take a more detailed look at new Victorian requirements

Introduction

The "unfair terms" provisions in Victoria’s Fair Trading Act 1999 (Vic) (FTA) now set the requirements for the provision of consumer friendly contracts in Australia.

The FTA provisions have particular relevance to suppliers who use standard form contracts across Australia, such as those commonly offered online by banks, telecommunications companies and internet service providers.

It is suggested that it would be pragmatic for companies supplying goods and services to consumers in Australia to adopt the FTA provisions as a standard when formulating end-user contracts and sign-up procedures.

The reasons are threefold: compliance with an industry-wide requirement; compliance with other existing regulations concerning the "fairness" of consumer contracts; and all States and Territories will follow Victoria and introduce similar legislation; and it is generally not practical to have different contracts and procedures for different Australian jurisdictions.

The good news for telecommunications and internet service providers is that compliance with the Australian Communications Industry Forum (ACIF) Consumer Contracts Code, which sets minimum standards for consumer contracts in the telecommunications industry, is likely to mean compliance with the FTA provisions.

Background

The unfair contracts provisions in the FTA are based on the Australian Consumer, Trade Practices and Unfair Terms in Consumer Contracts Regulations 1999 (Australia ‘UCTP Regulations’), which in turn are drawn from a 1993 European Union Directive. The provisions are aimed at preventing unfair, unconscionable contracts by ensuring the terms are reasonable and negotiations are fair.

The provisions have obvious application to telecommunications, pay TV and internet services. When the legislation was introduced, Consumer Affairs Victoria (CAV) identified telecommunications contracts as one of its initial targets. After significant compliance activity in 2004, in December 2004, CAV commenced proceedings against AAP in relation to AAP’s mobile and pre-paid mobile telephone contracts. A decision is yet to be made.

In that matter, the Victorian Legislative Council’s (VLC) in that matter has been rescinded (the action is discussed below). CAV recently announced that it is preparing to issue for 2005/06 will include pay TV and internet service providers’ contracts. It is notable that the 2005 CACF Consumer Contracts Code (‘CCC Code’) drew heavily from the Australian Regulations and the amendments to the FTA, its central requirement mandates that the FTA and prohibits unfair terms in consumer contracts.
Digital Dilemma

Introduction

In Australia, the Digital Television switch-on is an issue which requires urgent consideration. This paper aims to address the major dilemmas of the Digital Television switch-on.

The switch-on of Digital Television, which is scheduled for 2006, is a major undertaking with significant implications for the communications industry. The introduction of Digital Television (DTV) is expected to bring several benefits, including improved picture quality, increased channel capacity, andenhanced viewing options.

However, the roll-out of DTV is not without challenges. One of the key concerns is the transition period required for households to upgrade their existing analog televisions to DTV receivers. The cost of these upgrades, as well as the technical limitations of older television sets, presents a significant barrier for many households.

Another challenge is the infrastructure required to support DTV. The rollout of new transmission technologies and the installation of new antennas and signals will require significant investment and coordination.

In addition, the DTV switch-on raises questions about the fate of existing analog channels. Will these channels be reallocated for other purposes, or will they be continued in parallel with DTV? This question is particularly pressing in light of the potential for spectrum reallocation to support other communications technologies, such as broadband Internet services.

The Digital Dilemma: transitioning to DTV in Australia is a complex issue that requires careful consideration of the potential benefits and challenges. This paper will explore the key dilemmas surrounding the DTV switch-on and propose solutions to address the major obstacles.

Conclusion

In conclusion, the Digital Television switch-on is a significant undertaking with far-reaching implications. While the benefits of DTV are evident, the challenges associated with the transition must be carefully managed to ensure a smooth and successful rollout.

The key to a successful DTV switch-on lies in effective planning and collaboration among all stakeholders. By addressing the major dilemmas head-on, we can work towards a future where Digital Television becomes an integral part of our communications landscape.
The ACMA (Australian Communications and Media Authority) is formulating schemes for the conversion, over time, of the transmission of television broadcasting services from analog mode to digital mode.

There is to be a simulcast period throughout which broadcasters are to transmit their television programs in both analog mode and SDTV digital mode.

At the end of the simulcast period, analog transmissions are to cease.

Broadcasters must meet the standards relating to quotas for the transmission of program in HDTV digital mode.

Broadcasters must meet the standards relating to captioning of digital television programs for the deaf and hearing impaired.

Broadcasters will be allowed to use spare transmission capacity on digital transmission channels to provide datacasting services.

Owners and operators of broadcast transmission towers must give digital broadcasters and distributors access to the towers for the purposes of installing or maintaining digital transmitters.

There are to be reviews before specified dates of certain elements of the digital television regulatory regime.

The simulcast period was legislated to commence on 1 January 2001 and last for 3 years, or such longer period as prescribed. It was designed to minimise disruption to viewers and allow time for the price of digital televisions to come down. In addition to the analog and SDTV simulcast, the commercial and national broadcasters must meet the HDTV quota of 1600 hours per calendar year. The commercial broadcasters must meet this quota with material that is originally produced in high definition digital video format, but since the national broadcasters source much programming from Europe (where there is little HDTV production) they are permitted to meet the quota by ‘upconverting’ their SDTV, or other higher quality, material into HDTV.

The HDTV version of the television broadcasting service must not differ from that in the analog or SDTV analog.

To enable this ‘triplexing’, these broadcasters were allocated 7 MHz of additional spectrum and issued transmitter licences authorising the transmission in digital mode. These were issued for free as a concession to the high costs that would have to be met in relation to the digital conversion.

When the simulcast period ceased and analog transmission is switched off, each broadcaster must transmit in digital mode using the channels allocated by ACMA under the scheme or a digital channel plan, and return the additional licensed spectrum and transmitter licences. New transmitter licences will be issued for continued digital broadcasting.

The conversion schemes to be formulated by ACMA for executing this initiative must require the broadcasters to prepare implementation plans, and foriture of the digital trans- mission licences would be required under the conversion schemes if the broadcaster failed to commence digital transmission on time, ceased digital transmission during the simulcast period, or failed to comply with certain standards.

Exceptions to the simulcast rule

The ‘simulcast rule’ which requires broadcasting in both analog and digital mode during the simulcast period can be excused in certain circumstances. Advertising, program matter and television programming designated by ACMA and electronic program guides can be ignored in determining whether a broadcaster has been this simulcast broadcast.

Multi-channeling may also be a limited exception to the simulcast rule.

"Multi-channeling is the transmission of more than one discrete stream of programing over a single television channel or carrier;"

This is made possible by the compression techniques employed in digital broadcasting. The view that a particular TV program transmitted using multi-channeling transmission capacity where, for example, a designer's program (eg a live sporting event) extends beyond its scheduled finishing time into a regularly scheduled news program in circumstances beyond the control of the broadcaster or any person who supplied the program to the broadcaster. The sole purpose of permitting the use of multi-channeling transmission capacity in this context is to allow viewers of the digital version of the commercial television broadcasting service to choose between viewing the regularly scheduled news program and viewing much of the designated event as overlaps with the other television programs.

The national broadcasters are permitted to digitalize their commercial multi-channel services which are linked to the obligations of their charter. The service has to be distinguished from other broadcast services provided by the broadcaster and cannot be a subscription broadcasting or subscription narrowcasting service. The types of television programs that can be delivered by the service are strictly limited. The ABC provided two multi-channel services pursuant to this arrangement but ceased in June 2003 due to budgetary constraints.

Permitted digital program-enhancement content can also be ignored in determining commercial and national broadcasters' compliance with the simulcast rule. This can mean content in the form of text, data, speech, music, sounds, visual images or any combination of these, designed to assist the main simulcast program, which is closely and directly linked to the subject matter of the simulcast program.

These concessions at least allow broadcasters to make use of some of the innovations afforded by digital technology.

Datacasting services

Datacasting services or designated teletext services can be provided by the commercial and national broadcasters using spare transmission capacity on their digital transmission channels. The Act does not specify the types of datacasting services that can be provided, but stipulates some genre conditions with reference to category A and category B television program.

"They may include weather reports, stock prices, news and entertainment guides which would be updated throughout the day, and Internet type services."

To ensure that commercial and national broadcasters do not enjoy an unfair competitive advantage as a result of their loan of spectrum, they will be charged for their provision of datacasting services.

Other datacasting services which are datacasting licences issued under Schedule 6 of the BSA and a corresponding datacasting transmitter licence under the Radiocommunications Act 1992 (Cth).

Evaluating the legislative framework

The critical question is whether the legislative framework achieves its objectives. There is widespread opinion that the legislation has failed to realise the potential of the digital television services.

The significant failures of the scheme have been summarised as falling into two main categories:

"First, there were concerns about its effects on competition. It was argued that the model unfairly favoured incumbent free-to-air TV broadcasters, by allowing them additions to spectrum without extra charge, and prohibiting further commercial TV competition for several years. Second, the other broadcasters were not allowed to provide voice and video services using spectrum that was otherwise available."

"The Australian Law Reform Commission has held that commercial broadcasting, as opposed to public broadcasting, is in terms of substantial risk of prejudice, as opposed to mere tendency to prejudice, a lower standard of protection."

This proposal charge from tendency to substantial risk has also received support from within academia.

This consideration has led DP 43 to propose that:

PROPOSAL 3

A publication should constitute a contempt if it creates a substantial risk, according to the circumstances at the time of publication, that:

(a) members, or potential members, of a jury (other than a jury empanelled under s 7A of the Defamation Act 1974 (NSW)), or a witness or potential witness or witnesses, in legal proceedings could:
(1) encounter the publication;
and
(2) recall the contents of the publication at the material time; and
by virtue of those facts, the fairness of the proceedings would be prejudiced.

I believe this proposal would be a valid one, as the very question of whether juries actually and are influenced by media information, has been seriously questioned in many quarters, but this questioning has been dismissed by Australian courts. This consideration, however, is beyond the scope of this paper.

DP 43 goes further and offers a non-exhaustive list of statements that may have the capacity to offend the sub judice rule.

PROPOSAL 4

Legislation should set out the following exhaustive list of statements that may constitute sub judice contempt if they also comply with the requirements set out in Proposal 3:

A statement that suggests, or from which it could reasonably be inferred, that the accused has been acquitted or, that the accused has been found guilty or, that the accused has been convicted or acquitted the accused.

A statement that could reasonably be regarded as inciting sympathy or antipathy for the accused and/or to disable the prosecution, or to make favourable or unfavourable reference to the character or culpability of the accused or a witness; or
A statement that may have the capacity to offend the sub judice rule.

The legislation should make it clear that this list is not exhaustive and that a statement charged for committing an offence and/or previously acquitted, or been otherwise involved in other criminal activity.

Fault liability for sub judice contempt, and defences to sub judice contempt. Another major shortcoming of the Australian law of sub judice contempt is that it is cast in terms of absolute, rather than strict liability. Although this may be found in contempt even if they had no intention to prejudice the proceedings at hand. DP 43 notes that since sub judice contempt imposes criminal sanctions, the strict liability approach, rather than the current absolute/liability approach, should apply. When present situation of absolute liability is considered alongside the current, highly generalised "tendency to prejudice" test, secondly, the lack of guidance on what constitutes a matter of "significant public interest", the shortcomings of the nephazard Australian law of sub judice contempt become all the more apparent.

Walker proposes that: "A more satisfactory way of balancing the relevant public interests will be to alter the law so that a publisher
establishing a testing and conformance centre for digital television technology; and

considering whether measures for particular groups such as people with disabilities, older or socially isolated people are necessary."

Others have expressed that there may be cheaper access to digital television for consumers if the commitment to HDTV was relaxed. Those who wanted the benefits of HDTV could still buy the appropriate equipment.

The Productivity Commission concurred that "to facilitate consumers' adoption of digital television, a new regulatory framework should permit but no longer mandate HDTV. It also recommends multi-channel reception and the provision of interactive services by commercial and national broadcasters should be permitted." Dr Siewickiowski, former Telstra chief, "radar-detection technique" applied to Canberra, including some form of subsidy for set-top boxes, to ensure the deadline was met. This could cost the budget about $400 million, he estimated. But to recoup this outlay, the Government could auction off broadcasting spectrum, raising "additional" of this amount. He said the "free-to-air" national public service channels should be free to "multicast" new channels, allowing them to supplement traditional advertising revenues with "pay as you go" channels."

Conclusion

The concerns expressed as to the short-coming of the legislative plan for implementing DTB are valid. The scheme has so far not been able to achieve its objectives. However, the stated objectives indicate that the Government did not take advantage of the DTB and intended to implement this technology in pursuit of its benefits. Having traced the progress of implementation to date, however, it is clear that the legislation has not zealously encouraged the market players to prepare for the switch off of analog transmission. DCTIA's recent ‘Driving Digital' issues Paper has fortunately acknowledged that there may be shortcomings in the scheme due to the slow take-up, and is thoughtful of ways to improve the situation. This conviction to everything is possible and willingness to rectify the weaknesses in the initial framework afford confidence in the expectation that digital benefits of digital technology in Australia will ultimately be realised.

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The conflict between freedom of speech and the proper administration of justice is most likely to arise when a media organisation publishes material which may interfere with the course of justice or the conduct of proceedings. Typically, those responsible will not intend to prejudice the proceedings. They may have been motivated solely by a desire to bring to the attention of the public matters of public interest and concern. Nonetheless, in doing so they may be guilty of a criminal offence under that branch of civil in Australia known as sub judice contempt." Examples of publications that might offend the sub judice rule include asser- tions that a person facing legal proceedings will face substantial hardship or difficulties at court. (Walker v Whan (1986) 7 NSWLR 616, or that he/she was guilty. Hinch v Attorney-General (Vic) (1974) 170 CLR 774. However, as this paper will show, the question of what publications will offend the sub judice rule is far from certain.

The "Public Interest" Defence

In light of the common laws recognition that freedom of speech is a highly valued principle, the public interest defence has developed. Walker explains that the "public interest" defence is used by the Australian courts to make a finding that a media publication contains information that has a "substantial" and substantial of court proceedings, and so doing, would cause real or serious prejudice to the public conduct of those proceedings."

The "substantial" test is the preferable test to be applied if the interests of the public are considered. It is not always clear that the substantial public interest would be served by allowing publication of a communication. The law requires that an action is justified if it is in the public interest. In order to establish the public interest, the public benefit must be greater than the private interest. The expression public interest must be given a broad interpretation in order to protect freedom of expression.

Contempt and Public Interest

Robin Bowley, in this paper which received an honourable mention in the 2005 CAMLA Essay Prize, advocates clearer rules regarding sub judice contempt.

Introduction

The law of sub judice contempt strives to balance the right to freedom of speech and the right to a fair trial. The likely occurrence of sub judice contempt proceedings will have a fair trial, unprejudiced by media comment. Striking a balance between these two interests is a difficult task, which in Australia, has been addressed by the common law over time. While a number of decisions have considered how the balance should be maintained, no authoritative guidance has yet been developed in Australia, with considerable uncertainty still surrounding the questions of when a publication will offend the sub judice rule and when the "public interest" defence will be available. The present law of sub judice contempt raises more questions than answers.

In order to provide better guidance to the courts, as well as to avoid costly and time-consuming litigation, and at the same time, allow the media to publish and broadcast with greater confidence and without fear of being found to be in contempt of court, greater certainty must be provided. Judges that prevent better than clear, and that such publication can only be achieved through making the rules on sub judice contempt clear and readily understood by the media, courts and the community alike.

Sub Judice Contempt: An overview of its development

The Sub Judice Rule

Essentially, the law of sub judice contempt aims to safeguard the public interest in the proper administration of justice through ensuring a fair trial. The rule prohibits the publication of prejudicial information about those that are charged with a crime or is pending hearing in Court. The principal source of sub judice contempt law in Australia is contained in the "s 39. Commentator Sally Walker explains the operation of the sub judice rule:"

"I am a reasonable and not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant ... It is well settled that the accused may generally be prevented by process of contempt from continuing to discuss publicly matters of personal interest which may fairly be regarded as one of public interest, by reason of the fact that the matter in question has become the subject of litigation." Walker explains that until the High Court's decision in Hinch, there was considerable uncertainty regarding the practical application of the "public interest" defence, with some courts viewing the principle as an infeasible rule.6 In Hinch it was held that councils must engage in a "balancing exercise" between the two competing interests to satisfy themselves beyond reasonable doubt that the public interest in freedom of speech outweighs the public interest in the administration of justice. However, courts are left with little (if any) guidance on how this balancing exercise should be undertaken. The test formulated by the majority of the High Court to determine if a publication is prejudicial is that the publication must: 1. "have a... real and definite ten- dency, in whatever form, as a 'matter of practical reality' to 'preclude or prejudice the fair and effective administration of justice in the relevant trial.'"

In the Hinch decision, Mason CJ differed from the majority in his preference that: 1. "there was a substantial risk that the published material would come to the attention of one or more members of the jury in the event proceedings, and through so doing, would cause real or serious prejudice to the fair conduct of these proceedings."7

The "substantial" test is the preferable test to be applied if the interests of the public are considered. It is not always clear that the substantial public interest would be served by allowing publication of a communication. The law requires that an action is justified if it is in the public interest. In order to establish the public interest, the public benefit must be greater than the private interest. The expression public interest must be given a broad interpretation in order to protect freedom of expression.