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Online Content Regulation – The New Regime

Adrian Lawrence and Ryan Grant outline the new Content Services regime that will apply to internet and mobile content.

On 21 June 2007, the Federal Government passed the *Communications Legislation Amendment (Content Services) Act 2007* (Cth) (**Amending Act**). The Amending Act received royal assent on 20 July 2007, but the majority of the operative parts will only commence on proclamation.

The Amending Act, which amends the *Broadcasting Services Act 1992* (Cth) (**BSA**), involved a complete redraft of the proposed *Communications Legislation Amendment (Content Services) Bill 2006* (Cth) (**2006 Bill**) which related to mobile and live internet content and was released to select industry bodies for consultation late last year. In its released form, the 2006 Bill presented some serious issues for content providers, in particular proposed criminal sanctions for contravention of the regulatory scheme.

Many of the issues of concern to the industry in the 2006 Bill have been addressed in the Amending Act.

Key changes to the BSA

1. A new Schedule 7 has been added to regulate hosts of stored content and providers of live content. Schedule 5 to the BSA, which previously regulated both hosts and Internet Service Providers (**ISPs**) in respect of stored content, now only applies to the activities of ISPs.
2. Under Schedule 7:
 - (a) Hosting service providers may be subject to ACMA take-down notices if they host prohibited (or potentially prohibited) content;

- (b) Live content service providers may be subject to ACMA service-cessation notices if they provide a live content service that contains prohibited (or potentially prohibited) content; and
- (c) Links service providers may be subject to ACMA link-deletion notices if they provide a link that links to prohibited (or potentially prohibited) content.

3. In addition, 'commercial' content service providers (service providers that supply content for a fee and as part of a profit-making enterprise) will be subject to positive obligations to ensure that risky content is assessed before it is made available. These obligations are to be imposed as part of a co-regulatory industry code scheme.

Background to the Amending Act

Big Brother

During July 2006, raw feeds from cameras located on the set used for Channel 10's Big Brother reality television programme were streamed live over the internet. In the early hours of one Saturday morning, an incident of an allegedly sexual nature occurred involving two of the male and one of the female housemates. The incident was streamed live over the internet to a small number of paid subscribers, one of whom made a recording of the foot-

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age, which was then made available on video-sharing sites. In turn, some online news sources linked to the video on the video-sharing sites.

At the time, the specific statutory powers under Schedule 5 of the BSA did not extend to live online content. Although police decided not to prosecute the housemates, and although the online news sources voluntarily removed links to the content, the former Minister for Communications, Information Technology and the Arts issued a media release stating that ACMA:

will be directed to undertake a detailed review of the free to air television code of practice and legislation will be introduced into Parliament to extend content regulation to video streamed on the Internet.

The 2006 Bill

The 2006 Bill proposed the regulation of 'content services', defined as a service that delivers content over a carriage service where a person needs special equipment to receive the service. The proposed definition of content was extremely broad, including text, data, sounds, visual images or any other form or combination of forms. There were, however, a number of

specific exceptions, including broadcasting services, certain news and current affairs services, SMS, MMS, search engines and voice and video calls. Content that was classified X18+ or RC, or content that had a substantial likelihood of being classified as such would have been prohibited. Potential or actual MA15+ or R18+ content would have been required to have an age-based access restriction system.

Under the 2006 Bill, if prohibited or potentially prohibited content was made available or delivered over a carriage service, the content provider was to be directly liable for such provision. This was a significant step away from the previous Schedule 5 regime, which was based on a notice and take-down process. Furthermore, for streamed content, the provisions of the 2006 Bill would have required every 10 minutes block of content to be pre-assessed to determine whether it was 'substantially likely' that the segment contained prohibited content.

A key concern with the 2006 Bill was the onus it placed on content providers to monitor content just in case content contained potential or actual prohibited content, given that once delivered, the content provider would have been liable for a fine of up to \$5,500 per contravention. In this regime only carriage service provid-

ers were given a 'reasonable diligence' defence. Submissions on the 2006 Bill by online publishers pointed out that the regime would have imposed direct pre-classification and censorship obligations on the online delivery of material that had not previously been the subject of any other forms of classification.

Key provisions of the Amending Act

The Amending Act steps back from some of these key areas of concern, retaining, as its primary mode of regulation, a notice and take-down process.

It regulates both stored and live content accessed by means of a carriage service. The Amending Act repeals Schedule 5 of the BSA except to the extent that Schedule 5 regulates internet service providers. It introduces a new Schedule 7 that otherwise sets out the framework for regulation of all forms of online content, including both static and live content.

What is regulated: 'content service'

The core principle of the Amending Act is the regulation of a 'content service'. 'Content' is defined to mean content whether in the form of text, data, speech, music or

other sounds, visual images (animated or otherwise), and content in any other form or in any combination of forms.

A 'content service' is a service that delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of a carriage service or a service that allows end-users to access content using a carriage service.¹ The definition has a number of exceptions, including broadcasting services, datacasting services, internet directories, internet search engines and end-to-end voice calls. In effect, a content service covers most content-related services provided over the internet and over mobile telephones.

It should also be noted that there is a specific carve-out from the scope of the content service providers definition for providers that merely supply a carriage service that enables content to be delivered or accessed, and for persons who merely provide a billing service, or a fee collection service, in relation to a content service.²

Stored and live content

Content may take the form of 'stored content' or 'live content'. Stored content means content kept on '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'. For this purpose, any storage of content on a highly transitory basis as an integral function of the technology used in its transmission is to be disregarded.

Live content is content which is not stored content.³ Accordingly, the legislative intention appears to be that 'live content' only covers content that is provided to the public at the same time that it is created (ie that is not stored in any way other than on the transitory basis referred to above).

Provided to the public

A content service is provided to the public if, and only if, the service is provided to at least one person outside the immediate circle of the person who provides the service.

What content is regulated: 'prohibited content'

Prohibited content

Prohibited content is,⁴ content where the content has in fact been classified by the Classification Board, with the result that:

- the content is RC or X18+;
- the content is R18+ and access to the content is not subject to a restricted access system;
- the content is MA15+, access to the content is not subject to a restricted access system and the content is provided as part of a commercial content service; or
- the content is MA15+, access to the content is not subject to a restricted access system, and access to the content is provided by means of a mobile premium service.

Potential prohibited content

Content is potential prohibited content if the content has not yet been classified and, if the content were to be classified, there is a substantial likelihood that the content would be prohibited content.⁵

Eligible electronic publications

In response to issues raised during the legislative process by publishers, the Amending Act introduces exceptions for material that is freely available in print version to the Australian public, defined as 'eligible electronic publications'. However, there are prohibitions on electronic editions of publications classified as RC or Restricted-Category 1 or 2.

Who is regulated: 'service providers'

The Amending Act places obligations on four major classes of service provider in relation to regulated online content, as follows at the top of page 4:

Note that these classes overlap in some cases. For example, a commercial content service provider of live content is also a live content service provider.

Australian connection

In order for ACMA to have the power to issue a take-down, service-cessation or link-deletion notice regarding a hosting service or a content service, the relevant service must have an Australian connection.¹⁰ A hosting service has an Australian connection if, and only if, any of the content hosted by the hosting service is hosted in Australia.¹¹ An Australian connection with respect to a content service (including a links service) exists when any of the content provided by the content service is hosted in Australia, or in the case

of a live content service, the live content service is provided from Australia.¹²

How are service providers regulated?

Take down notices

In order to remove access to prohibited (or potentially prohibited) content, ACMA is able to issue 'take-down' notices for stored or static content,¹³ 'service-cessation' notices for live content¹⁴ and 'link-deletion' notices for links to content (**Notices**).¹⁵

Depending on the classification or likely classification of the content, ACMA may direct the service provider to take different types of action. Notices instruct the service provider to implement either 'type A remedial situation' or a 'type B remedial situation'. A type A remedial situation is one in which the service provider no longer provides or hosts the content service. A type B remedial situation is one in which the service provider can decide either no longer to provide or host the content service, or to subject the content service to an age-restricted access system.¹⁶ Note that ACMA may, by legislative instrument, declare that a specified access-control system is a restricted access system.¹⁷

Prohibited content

Once ACMA carries out an investigation,¹⁸ a Notice can be issued on the basis that the content hosted, provided or linked to has been classified as prohibited content. In this case, ACMA must issue a *final* take-down, service-cessation or link-deletion notice.¹⁹

If the content is classified MA15+ or R18+, ACMA must, in the Notice, instruct the service provider to implement a type B remedial situation.²⁰ Likewise, if the content is classified RC or X18+, ACMA must instruct the service provider to implement a type A remedial situation.²¹

Potential prohibited content

Similar to the treatment of prohibited content, once ACMA carries out an investigation,²² a Notice can be issued on the basis that the content hosted, provided or linked to is potential prohibited content. In this case, ACMA must issue a *interim* take-down, service-cessation or link-deletion notice.²³

If ACMA is satisfied that there is a substantial likelihood that, if the content were classified, it would be classified MA15+ or

Hosting Service Provider	Is a person who hosts stored content: ⁶ <ul style="list-style-type: none"> not including voicemail messages, video mail messages, email messages, SMS messages, MMS messages or messages specified in the regulations, and where such hosted stored content is provided to the public as a content service.
Live Content Service Provider	Is a person who provides a content service that provides live content to the public. ⁷
Links service provider	Is a person who provides a content service that: <ul style="list-style-type: none"> provides one or more links to content; and is provided to the public (whether on payment of a fee or otherwise).
Commercial Content Service Provider of Live Content	Is a person: ⁸ <ul style="list-style-type: none"> who provides a content service that is operated for profit or part of a profit making enterprise; and is provided to the public but only by way of a payment or a fee; where the content provided is live content.
Commercial Content Service Provider of Stored Content	Is a person: ⁹ <ul style="list-style-type: none"> who provides a content service that is operated for profit or as part of a profit making enterprise and where such content is provided to the public as by way of a payment or a fee; where the content provided is stored content.

R18+, ACMA must, in the Notice, instruct the service provider to implement a type B remedial situation.²⁴ Similarly, if the content is like to be classified RC or X18+, ACMA must instruct the service provider to implement a type A remedial situation.²⁵

ACMA must then apply to the Classification Board to have the content that is the subject of the Notice classified. Once the content is classified, ACMA must issue appropriate Notices as for Prohibited Content.

Note that if ACMA does not have a copy of relevant live content, ACMA cannot issue an interim service-cessation notice for unclassified live content²⁶.

Enforcement

Non-compliance with a Notice by 6pm the day after it is issued constitutes a breach of a 'designated hosting/content service provider rule'.²⁷ Contravention of a designated content/hosting service provider rule can attract a criminal penalty of fines of up to \$11,000.²⁸ A civil penalty for contravention of a designated hosting/content service provider rule also exists.²⁹ Alternatively, ACMA can issue a remedial directions³⁰ or formal warnings³¹ with respect to a breach of a designated hosting/content service provider rule.

If the service provider continues to provide content that is 'substantially similar' to the content that is the subject of the Notice, ACMA can issue a special anti-avoidance notice. Non-compliance with a special anti-avoidance notice by 6pm the day after it is issued also constitutes a breach of a designated hosting/content service provider rule.

Positive obligations and industry codes

The Amending Act also introduces certain compulsory matters to be covered by industry codes, to be developed by bodies or associations that represent the sections of the content industry.³² The industry code can then be registered with ACMA.³³ If a code is not developed or ACMA refuses to register a code, ACMA may develop an industry standard.³⁴

Any industry code or standard must impose obligations on commercial content service providers in respect of the professional assessment of live and stored content to determine if there is a likelihood the content would be prohibited content.³⁵

There are also matters that the industry code may take into account,³⁶ including:

- referral of complaints to ACMA;
- advice about the reasons for content having a particular classification;

- procedures directed toward ensuring that, in the event that a commercial content service provider becomes aware of prohibited content provided by another commercial content service provider, that the other commercial content service provider is told of the content; and
- promotion of awareness of the safety issues associated with commercial content services or live content services.

The Internet Industry Association is developing such an industry code.

Once directed by ACMA to comply with an industry code,³⁷ non-compliance will constitute a breach of a designated content/hosting service provider rule. Non-compliance with an industry standard is also a breach of a designated content/hosting service provider rule.

Conclusion: summary of obligations placed on different service providers

Overall, the introduction of Schedule 7 represents a significant amendment to the landscape of online content regulation in Australia. The table at the top of page 5 is a summary of the above obligations placed on the different classes of service provider identified above:

Service Provider	Obligation
Hosting Service Provider	<ul style="list-style-type: none"> • Comply with take-down notices • Comply with compulsory industry standards/codes
Commercial Content Service Provider of live content	<ul style="list-style-type: none"> • Comply with service-cessation notices • Comply with compulsory industry standards/codes – including obligation to have a trained content assessor assess live content where there is a 'reasonable likelihood' that the live content would be classified MA15+ or above
Live Content Service Provider (non-commercial)	<ul style="list-style-type: none"> • Comply with service-cessation notices • Comply with compulsory industry standards/codes - prohibited content will not include video or audio content classified MA15+
Commercial Content Service Provider of stored content	<ul style="list-style-type: none"> • Comply with take-down notices • Comply with compulsory industry standards/codes – including obligation to have a trained content assessor assess stored content where it is 'substantially likely' that the stored content would be classified MA15+ or above
Links Service Provider	<ul style="list-style-type: none"> • Comply with links-deletion notices • Comply with compulsory industry standards/codes

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(Endnotes)

1 *Broadcasting Services Act 1992* (Cth)(BSA), Schedule 7, cl 12.

2 BSA, Schedule 7, cl 5.

3 BSA, Schedule 7, cl 2.

4 BSA, Schedule 7, cl 20.

5 BSA, Schedule 7, cl 21.

6 BSA, Schedule 7, cl 4.

7 BSA, Schedule 7, cl 2.

8 BSA, Schedule 7, cl 2.

9 BSA, Schedule 7, cl 2.

10 BSA, Schedule 7, cl 47 and 56.

11 BSA, Schedule 7, cl 3(2).

12 BSA, Schedule 7, cl 3(1).

13 BSA, Schedule 7, Part 1 Division 3.

14 BSA, Schedule 7, Part 1 Division 5.

15 BSA, Schedule 7, Part 1 Division 4.

16 BSA, Schedule 7, cl 47, 56 and 62.

17 BSA, Schedule 7, cl 14. At time of writing, ACMA was in the process of drafting on the proposed Restricted Access System Declaration: see http://www.acma.gov.au/WEB/STANDARD/pc=PC_310813.

18 An investigation could either follow a complaint under cl 43 or be commenced at ACMA's own initiative under cl 44 of BSA, Schedule 7.

19 BSA, Schedule 7, cl 47(1), 56(1) and 62(1).

20 BSA, Schedule 7, cl 47(1)(d), 56(1)(d) and 62(1)(e).

21 BSA, Schedule 7, cl 47(1)(e), 56(1)(c) and 62(1)(d).

22 An investigation could either follow a complaint under cl 43 or be commenced at ACMA's own initiative under cl 44 of BSA, Schedule 7.

23 BSA, Schedule 7, 47(2) & (3), 56(2) & (3) and 62(2) & (3).

24 BSA, Schedule 7, cl 47(3), 56(3) and 62(3).

25 BSA, Schedule 7, cl 47(2), 56(2) and 62(2).

26 BSA, Schedule 7, cl 56(2)(c) and (3)(c).

27 BSA, Schedule 7, cl 53, 60 and 68.

28 BSA, Schedule 7, cl 106.

29 BSA, Schedule 7, cl 107.

30 BSA, Schedule 7, cl 108.

31 BSA, Schedule 7, cl 109.

32 BSA, Schedule 7, cl 80(1).

33 BSA, Schedule 7, cl 85.

34 BSA, Schedule 7, cl 91.

35 BSA, Schedule 7, cl 81.

36 BSA, Schedule 7, cl 82.

37 BSA, Schedule 7, cl 89.

An Overview of the Digital Radio Legislation

Moses Kakaire reviews digital radio policy and the effect of the Broadcasting Legislation Amendment (Digital Radio) Act 2007.

Introduction

The *Broadcasting Legislation Amendment (Digital Radio) Act 2007* (the **Digital Radio Act**) commenced operation on 28 May 2007. The Digital Radio Act will facilitate the introduction of digital radio broadcasting services in Australia.¹

This paper provides an overview of some of the key features of the Digital Radio Act and their implications for radio broadcasters and consumers.

The Benefits of Digital Radio

Free to air, broadcast radio is the last of the major media/communications sectors to move to a digital transmission platform. Digital radio will be the most fundamental advance in radio broadcasting technology in Australia since FM stereo radio and will provide benefits like:

- *better quality audio* - with the potential for CD quality sound;
- *interference free reception*;
- *ease of tuning* - listeners can search for stations by name rather than by a frequency;
- *additional radio stations* - digital radio uses spectrum more efficiently and so broadcasters will be able to provide multiple audio channels at the same time;
- *multimedia capability* - digital radio allows the transmission data, text and images in addition to audio channels; and
- *the ability to pause, rewind and record live radio*.²

Policy Considerations

The Government first announced its digital radio policy in October 2005.³ That policy announcement and the Explanatory Memorandum to the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* and the *Radio Licence Fees Amendment Bill 2007* (the **EM**) suggest that the Government has had to consider and reconcile some difficult policy issues such as:

- *Which technology to adopt* - there are several competing technologies capable of delivering digital broadcast radio.⁴

- *All the technologies are new* - digital radio broadcasting technologies are still relatively new and in the process of being fine-tuned.
- *Spectrum availability is currently low* - most of the spectrum, suitable for digital radio services in Australia, is currently used for other broadcasting or communications uses.⁵
- *The incumbent sector is very large* - there are 270 commercial radio broadcasting services, over 350 community radio licences issued, 2 national radio broadcasters (ABC and SBS) with a number of services each and approximately 2000 narrowcasting radio services.
- *Will it be a 'supplementary' or 'replacement' technology* - a question that the Government has had to consider because of factors such as limited spectrum and the size of the incumbent sector.
- *How to ensure that digital radio delivers new and innovative programming* - the Government has identified this as the key driver that will lead to the consumer take up of digital radio.
- *Equity of treatment for regional areas* - ensuring that people living in rural, regional and remote areas also get access to digital radio services even though costs for deploying digital services in those areas may be disproportionately higher than in metropolitan areas.
- *Maintaining the traditional distinctions between TV and radio* - digital radio technology is capable of transmitting still and moving images and so has the potential to blur the boundaries between radio and TV.⁶

These policy considerations help to explain the way in which the Government has chosen to implement digital radio broadcasting services in Australia.

Phased Introduction

The 'digital radio start-up day' will be declared, by the Australian Communications and Media Authority (**ACMA**) on a licence-area-by-licence-area basis.

However, ACMA must ensure that the digital radio start-up day in the licence areas of Sydney, Melbourne, Brisbane, Perth, Adelaide and Hobart (each known as a **metropolitan licence area**) is **not later than 1 January 2009**.⁷

No ultimate date has been set for the other licence areas (each known as a **regional licence area**). ACMA must ensure that the digital radio start-up day for each regional licence area is the day specified for that licence area in a legislative instrument made by the Minister.⁸

ACMA will have to be satisfied that sufficient action has been undertaken in each licence area, in respect of a number of planning and licensing requirements, before making a declaration of the type referred to above.

On 27 September 2007, ACMA released, for public comment, draft digital radio channel plans and draft frequency allotment plan variations for the metropolitan licence areas. These plans contain details such as the proposed number and categories of transmitter licences for digital radio services, transmission frequencies and associated technical data for the main transmission sites.⁹

Priority for the Major Sectors

Spectrum constraints mean that it is not currently feasible for the entire incumbent radio sector to provide digital radio broadcasting services. Therefore, the Digital Radio Act only makes provision for licensees of:

- commercial radio broadcasting services;
- national radio broadcasting services; and
- services provided pursuant to a 'designated community radio broadcasting licence'.

A designated community radio broadcasting licence is a licence that is used to provide community radio broadcasting services in the broadcasting services bands and, amongst other things, has a licence area that is (or is deemed to be) the same as the licence area of a commercial radio broadcasting licence.¹⁰

The effect of this definition is that (for the foreseeable future) only those licensees who are licensed to provide 'wide coverage' community radio broadcasting services will be entitled to provide digital radio broadcasting services.

Assistance With Capital Costs

The Government has agreed to provide financial assistance to the community radio sector

(\$10.5 million over 4 years) and the national radio broadcasters to help licensees acquire infrastructure so that they can begin digital radio broadcasts by 1 January 2009.¹¹

The Government will also provide assistance for the commercial radio sector but in a different form to the other sectors.¹² For a period of 6 years from the digital radio start-up day (and provided that all commercial radio broadcasting licensees in a licence area continue to provide at least one digital radio broadcasting service) no new digital commercial radio broadcasting licences will be issued in that licence area.¹³ This 6 year moratorium is designed to ensure that commercial radio broadcasting licensees have a 'level of stability and certainty during the digital radio investment phase'.¹⁴

The Technology Platform

The Government has adopted a digital radio technology platform known as Eureka 147 or Digital Audio Broadcasting (**DAB**). DAB is the most mature and widely deployed digital radio broadcasting platform in the world. It has been adopted throughout Europe, Canada and a number of Asian countries.¹⁵ It has also been trialled since 2003 in Sydney, by Commercial Radio Australia (**CRA**),¹⁶ and in Melbourne, by a transmission services provider.

DAB uses radiofrequency spectrum more efficiently than analogue AM/FM radio. AM/FM radio requires a separate frequency channel for each radio station. With DAB, the signals of several radio stations are combined (using infrastructure known as a **multiplex**) into a single wideband channel (called a **DAB ensemble**) which is then fed through to a broadcast transmitter for broadcast.¹⁷

The audio compression standard used in the DAB platform has recently been updated through the adoption of the advanced audio codec (**AAC+**) standard. AAC+ makes it possible to fit 9 separate radio stations into one DAB ensemble. The updated version of DAB using this new compression standard has been christened DAB+.¹⁸

However, in many regional areas, DAB may not be the most cost effective digital radio platform because of extended coverage requirements. The EM suggests that other digital radio platforms such as Digital Radio Mondial (**DRM**) may be more suitable for regional licence areas.¹⁹

Before 1 January 2011, the Minister must cause a review to be conducted into, amongst other things, the 'relative merits' of using various terrestrial and satellite technologies that are capable of transmitting digital radio broadcasting services to regional licence areas.²⁰

Shared Transmission

DAB uses a shared transmission platform which removes the need for broadcasters to operate individual broadcast transmitters for their digital radio services.

Instead, broadcasters will need to get access to one of the multiplexes in their licence area. Access to, and control of, multiplexes will be one of the central features of the new digital radio regime. A new category of licence known as a '**digital radio multiplex transmitter licence**' has been created to facilitate this.²¹

The holder of a digital radio multiplex transmitter licence will be subject to several licence conditions (including those which require the recognition of certain rights of access seekers) to ensure that eligible incumbent radio broadcasters are able to access multiplexes on a fair and non-discriminatory basis. These obligations are discussed below.

Minimum Guaranteed Rights Of Access

According to the EM, there will be enough multiplexes in each licence area to accommodate the transmission needs of all eligible incumbent radio broadcasting licensees with each licensee entitled to use a minimum level of multiplex transmission capacity.

For the licensees of commercial, designated community and (in some cases) national radio broadcasting services, this entitlement is known as a '**standard access entitlement**'. In practical terms, a standard access entitlement is an entitlement to access a multiple of one-ninth of the total transmission capacity of a multiplex.

Digital radio broadcasting services will be provided initially using 3 different categories of multiplexes designed to carry different combinations of services as follows:

- Category 1 multiplexes will have capacity for up to 7 digital commercial radio broadcasting services (with each licensee having a standard access entitlement of one-ninth of the total multiplex capacity) and the remaining multiplex capacity (two-ninths) will be for sharing amongst digital community radio broadcasting services as determined by their representative company;²²
- Category 2 multiplexes will have capacity for up to 5 digital commercial radio broadcasting services (with each licensee having a standard access entitlement of one-ninth of the total multiplex capacity), 2 digital national radio broadcasting services (with each licensee having a standard access entitlement of one-ninth of total multiplex capacity) and the remaining multiplex capacity (two-ninths) will be for sharing amongst digital community radio broadcasting services as determined by their representative company;²³ and
- Category 3 multiplexes will be reserved for digital national radio broadcasting services.

A digital radio multiplex transmitter licence for a category 1 or 2 multiplex which is subject to the standard access entitlements of

eligible broadcasters will be known as 'foundation digital radio multiplex transmitter licence'.²⁴

If the transmission capacity of a foundation digital radio multiplex exceeds the aggregate needs of all eligible broadcasting licensees (i.e. it exceeds the sum of the standard access entitlements for that multiplex), there is scope for interested broadcasting licensees to acquire additional multiplex capacity (known as an 'excess-capacity access entitlement').²⁵ However, a digital commercial radio broadcasting licensee is not permitted to have more than two-ninths of multiplex capacity in a licence area.²⁶

If the total multiplex capacity of the foundation multiplexes in a licence area is enough to fulfil all the standard access entitlements of the digital commercial radio broadcasting licensees, either in existence or likely to come into existence, ACMA may issue a non-foundation digital radio multiplex transmitter licence. Such a licence will not be subject to standard access entitlements.²⁷

First Right to Control the Multiplex Transmitter Licence

Broadcasting licensees entitled to access a Category 1 or 2 foundation digital radio multiplex will also have the first right to jointly hold the licence for that multiplex.

To exercise this right, they will have to establish a separate joint venture company, in each case, to apply for and hold the relevant licence.²⁸ Designated community radio broadcasting licensees will be able to participate in the joint venture company through their representative company.

If no applications are made by an eligible joint venture company or an application of an eligible joint venture company is rejected, ACMA can allocate that digital radio multiplex transmitter licence under a price-based method.²⁹ Non-foundation digital radio multiplex transmitter licenses are to be issued under a price-based method.³⁰

The Multiplex Access Regime

Licensees of foundation and non-foundation Category 1 and 2 digital radio multiplexes will be subject to access obligations set out in Division 4B of Part 3.3 of the *Radiocommunications Act 1992* (the **Radcomms Act**). These access obligations will be regulated by the Australian Competition and Consumer Commission (ACCC).

Within 3 months of the issue of Category 1 or 2 digital radio multiplex transmitter licence, the licensee will have to submit an access undertaking to the ACCC.³¹

The access undertaking must provide, amongst other things, that the digital radio multiplex transmitter licensee or a person authorised to operate the multiplex transmitter under licence will comply with the terms and conditions contained in the undertaking relating to various access entitlements

of eligible broadcasters such as the standard access entitlements and excess-capacity access entitlements.³² Such terms and conditions may deal with subject matter such as the price of access to multiplex capacity.

The ACCC can approve or reject an access undertaking. If approved, the access undertaking remains in force for as long as the digital radio multiplex transmitter licence remains in force and continues in effect even if that licence is transferred. Compliance with an access undertaking can be enforced by the Federal Court on application by the ACCC or a party whose rights are affected by a contravention of that access undertaking.³³

If the ACCC rejects an access undertaking, it may specify alterations which, if made by the licensee, will lead to the ACCC's acceptance of the undertaking.³⁴ Alternatively, the ACCC may (by written notice to the licensee) determine that an undertaking in the terms specified in the ACCC's written determination, is the access undertaking in relation to that licence.³⁵ The decisions of the ACCC which are discussed above can be reviewed by the Australian Competition Tribunal on application by a person whose interests are affected by such decisions.³⁶

The ACCC is also required to determine criteria that it will apply in deciding whether to accept an undertaking or variations to an undertaking³⁷ and to develop procedural rules to govern the practice and procedures that it will follow in performing its functions or exercising its powers in relation to the digital access radio regime.³⁸ On 21 September 2007, the ACCC issued a discussion paper seeking views of stakeholders in relation to various aspects of the access regime described here. That discussion paper also contains the ACCC's draft decision making criteria and draft procedural rules.³⁹

Expected Programming Changes

The most important changes from the introduction of digital radio broadcasting are likely to be in the area of programming. One-ninth of the transmission capacity of a digital radio multiplex is analogous to 128 kilobits per second of data transmission capacity. This transmission capacity will allow broadcasters to broadcast more than one audio channel at the same time.

CRA reports that:

*each broadcaster will now have the ability to ... split their signal to offer two or three audio channels, or broadcast a combination of better than FM quality sound plus lots of associated data such as text or images.*⁴⁰

To that end, it will not be compulsory for radio broadcasters to simulcast their analogue radio programs in digital mode although it is reasonable to assume that most broadcasters will use some of their digital transmission capacity to simulcast their

analogue programs to ensure some continuity of services to their audiences.

However, if a commercial radio broadcasting licensee acquires more than one-ninth of multiplex capacity in any licence area (i.e. an excess-capacity access entitlement), it will not be able to use the additional capacity to simulcast more than 50% of the program content of its own analogue service or another analogue service in the licence area with the exception of certain types of programs like advertising and promotions or news and weather bulletins.⁴¹ This is designed to encourage commercial radio broadcasters with excess-capacity access entitlements to use their additional capacity to provide new digital radio programming.

Digital radio broadcasting licensees will also be permitted to broadcast non-audio content (defined as '**digital program enhancement content**') which is:

- in the form of **text**,
- in the form of '**still visual images**' (i.e. no video-type services);
- **as specified by the Minister** in a legislative instrument; or
- in any **combination of the above forms**.⁴²

CRA recently showcased a digital radio-enabled mobile phone which allows users to view, navigate and store visual images broadcast by digital radio stations using DAB+.⁴³

There are many potential applications of digital program enhancement content such as displaying news or weather updates, artist and track details and competitions. According to the EM:

*The power given to the Minister to broaden ... the forms of content that could be provided ... allows for additional types of content to be brought within the meaning of 'digital program enhancement content'. This may allow, for example, consideration to be given to specifying services such as animation to be provided as 'digital program enhancement content'.*⁴⁴

The Digital Radio Act has also amended Schedule 6 of the *Broadcasting Services Act 1992 (BSA)* to establish a new category of service to be known as a '**restricted datacasting service**'. Holders of a restricted datacasting licence will be able to use the DAB digital radio platform to provide services other than traditional radio and TV programming.

The Minister will be able to specify, in a legislative instrument, particular types of content that must not be provided by a restricted datacasting licensee. In the absence any such legislative instrument at this stage, the EM states that restricted datacasting license holders will be subject to the same genre restrictions as those that apply to licensees of datacasting services. In other words, the services that could be provided under a

restricted datacasting licence include niche services like:

- information-only programs;
- educational programs;
- interactive computer games; and
- Parliamentary broadcasts.⁴⁵

During the 6 year moratorium period, a person is prohibited from being in a position to exercise control of both a commercial radio broadcasting licence and a restricted datacasting licence.⁴⁶

Legislated reviews of the digital radio regime

Finally, the Government has not legislated for a switch-off date for analogue radio. This is consistent with its view that digital radio is likely to be a supplementary, rather than replacement technology, for analogue radio.

The author notes that this view is not likely to be popular with some licensees who have already began or are about to invest in the rollout of digital radio services. There is scope for this issue to be investigated further since, before 1 January 2014, the Minister will be required to cause reviews to be conducted in relation to:

the development of various terrestrial and satellite technologies capable of transmitting digital radio broadcasting services and restricted datacasting services in Australia, the implementation of those technologies in foreign countries and the operation of the BSA in relation to the licensing and regulation of digital radio broadcasting services and restricted datacasting services;⁴⁷ and

spectrum issues for digital radio broadcasting and restricted datacasting services, the availability of additional frequency channels for such services and the operation of the Radcomms Act in relation to the licensing and regulation of digital radio broadcasting and restricted datacasting services.⁴⁸

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(Endnotes)

1 The Digital Radio Act amends the *Broadcasting Services Act 1992 (Cth) (BSA)*, the *Radiocommunications Act 1992 (Cth)* (Radcomms Act) and the *Trade Practices Act 1974 (Cth) (TPA)*.

2 For more information, see Digital Radio Australia website at <http://www.digitalradioaustralia.com.au>.

3 http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio.

4 The different technologies are discussed in the *Report of the Digital Radio Study Group* (March 2003) at http://www.dcita.gov.au/data/assets/word_doc/23361/DSRG_report_March_2004.doc. See also http://en.wikipedia.org/wiki/Digital_radio.

5 Explanatory Memorandum accompanying the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* and the *Radio Licence Fees*

Amendment Bill 2007, p 8.

6 For example, the digital transmission platform adopted in South Korea (Digital Multimedia Broadcasting) carries a combination of digital TV, digital radio and data channels.

7 BSA ss 8AC(3)(a).

8 BSA ss 8AC(3)(b).

9 http://www.acma.gov.au/WEB/STANDARD/pc=PC_310504.

10 BSA ss 8AA and 8AD(3).

11 These funding commitments are in the Federal *Budget 2007-08* at <http://www.budget.gov.au/2007-08/bp2/html/expense-05.htm>.

12 The Government's 2003 policy announcement (see note 2) states that the Government might, in the future, provide capped financial assistance for commercial radio broadcasters in regional areas.

13 BSA ss 35C and 35D(2).

14 Explanatory Memorandum accompanying the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* and the *Radio Licence Fees Amendment Bill 2007* p. 39.

15 <http://www.wohnort.demon.co.uk/DAB/index.html>.

16 CRA is the industry body for the commercial radio sector and its trial is being conducted as a joint venture with commercial radio stations and the ABC and SBS. For more on its trials, see <http://www.commercialradio.com.au>.

17 http://en.wikipedia.org/wiki/Digital_Audio_Broadcasting.

18 CRA, "Australia to use DAB+ for Digital Radio Rollout", 14 March 2007 at http://www.digitalradioaustralia.com.au/index.cfm?page_id=1001&display_news_id_1129=1002. More information on DAB+ can be found on the website of the technical standard setting body WorldDMB at <http://www.worldddab.org>.

19 Explanatory Memorandum accompanying the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* and the *Radio Licence Fees Amendment Bill 2007* p 6. DRM is currently being trialled by Broadcast Australia in Canberra. DRM does not have all the features of DAB and is said to be a narrowband service with the audio quality of a mono FM radio service.

20 BSA s 215A.

21 Radcomms Act s 5.

22 Radcomms Act s 118NR.

23 Radcomms Act s 118NS.

24 Radcomms Act s 5.

25 Radcomms Act s 118NT.

26 Radcomms Act s 118NV.

27 Radcomms Act ss 102F and 118NU.

28 Radcomms Act ss 102C(2) and 102D(2).

29 Radcomms Act ss 102C(3) and 102D(3).

30 Radcomms Act ss 102C(4) and 102D(4).

31 Radcomms Act s 118ND.

32 Radcomms Act s 118NL and 118NM.

33 Radcomms Act ss 118NZ and 118P.

34 Radcomms Act ss 118NF(4).

35 Radcomms Act ss 118NF(5).

36 Radcomms Act s 118PE.

37 Radcomms Act s 118H.

38 Radcomms Act s 118L.

39 <http://www.accc.gov.au/content/index.phtml/itemId/798925>.

40 Above n 18.

41 BSA ss 43D(3) and 43D(4).

42 See the definition of 'digital program enhancement content' BSA s 6(1).

43 http://www.commercialradio.com.au/index.cfm?page_id=1001&display_news_id_2400=1039.

44 Explanatory Memorandum accompanying the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* and the *Radio Licence Fees Amendment Bill 2007*, pp 38-39.

45 Explanatory Memorandum accompanying the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* and the *Radio Licence Fees Amendment Bill 2007* p. 56.

46 BSA s 54B.

47 BSA s 215B.

48 BSA s 13B.

Radical Privacy Law Reforms Proposed

Dr Gordon Hughes and Tim Brookes discuss the Australian Law Reform Commissions recent discussion paper on Australian Privacy Law.

Introduction

On 12 September 2007, the Australian Law Reform Commission (ALRC) released a 2,000 page discussion paper entitled *Review of Australian Privacy Law*. The discussion paper sets out the ALRC's preliminary views on how Australia's complex privacy laws could be revamped and calls for comments from interested parties by 7 December 2007. A final report to the Attorney General is due by 31 March 2008.

Traditionally, it has been accepted that there is no right to privacy at common law in Australia although some recent decisions have introduced an element of uncertainty. There is, however, extensive privacy legislation. The legislative framework is essentially embodied in the *Privacy Act 1988* (Cth) (**Privacy Act**), complemented by the *Spam Act 2003* (Cth), the *Do Not Call Register Act 2006* (Cth), segments of the *Telecommunications Act 1997* (Cth) and *Telecommunications (Interception and Access) Act 1979* (Cth) and a range of State and Territorial laws, regulations and policies.

The Privacy Act has been amended on numerous occasions, and imposes separate regulatory regimes on the handling of personal information held by Commonwealth

government agencies and the private sector, along with specific rules regulating the handling of tax file numbers and certain credit information.

Unquestionably, the existing system has become cumbersome and confusing.

Consolidation Of Privacy Principles

Personal information held in the Commonwealth public sector is regulated by the Information Privacy Principles set out in Section 14 of the Privacy Act. Information held in the private sector is regulated by the National Privacy Principles set out in schedule 3 of the Act. There are some inconsistencies between the two sets of regulations and, in the case of Commonwealth outsourcing to the private sector, a service provider may have a statutory obligation to comply with the National Privacy Principles and a contractual obligation to comply with the Information Privacy Principles. The ALRC recommends that these two sets of privacy principles be consolidated into new 'Unified Privacy Principles'. The rationalisation of the currently inconsistent principles would result, amongst other things, in a limited right for individuals to deal with government agen-

cies anonymously, more robust rules dealing with the handling of sensitive information in the public sector and constraints on public sector agencies transmitting personal data overseas. Furthermore, the ALRC urges clarification as to what amounts to 'consent', clearer rules governing the handling of third party information, more flexibility to disclose information in urgent situations, greater restraints on the collection of irrelevant information and a more efficient process to enable the correction of inaccurate information.

Embracing New Technologies

The ALRC has recognised the need for the Privacy Act to be adaptable so as to address privacy issues posed by new technologies. It notes, in particular, challenges presented by relatively recent technology such as spyware, cookies, radio frequency identification technology and biometric information technology. To guard against any legislative reform becoming prematurely outdated, the ALRC stresses the importance of the legislation remaining technologically neutral. The report also encourages the adoption of – and public education about – privacy enhancing technologies. The ALRC further recommends that email and IP addresses be unambiguously protected by the legislation as 'personal information', and the report raises the possibility of the introduction of a 'take down notice' scheme requiring website operators to remove information which constitutes an invasion of an individual's privacy.

Removal of Exemptions

Privacy obligations currently imposed by the *Privacy Act* do not apply to organisations with an annual turnover of less than \$3 million, political parties or acts in the course of journalism of media organisations which have committed to privacy standards. In addition, employee records are exempt from the existing scheme. The ALRC proposes that exemptions applicable to small business, political parties and employee records should be removed. It is proposed, on the other hand, that the media exemption be retained on the basis that it is necessary to balance privacy protection on the one hand and the free-flow of information to the public on the other. The media exemption will be restricted, however, to news, current affairs and documentary material. In addition, the ALRC proposes that standards 'adequately' deal with privacy in a media context and proposes various measures to achieve this. It also proposes that the new cause of action discussed below would apply to acts in the course of journalism as well as to other activities. That is, the media exemption would not apply in respect of the proposed cause of action.

Telecommunications and Marketing

The ALRC proposes an amendment to the *Telecommunications Act 1997* (Cth) to prohibit carriers charging for unlisted telephone numbers.

In relation to spam and telemarketing, the report queries whether regulation imposed by the *Spam Act 2003* (Cth), currently restricted to telephone numbers and email addresses, should be expanded to cover facsimile and Bluetooth messages, and whether government agencies and political parties should be required to incorporate an unsubscribe facility into spam which is otherwise permitted under exemptions set out in schedule 1 of the Act. The ALRC further foreshadows the possible extension of the *Do Not Call Register Act 2007* (Cth), which currently regulates telemarketing calls, to incorporate the regulation of Voice Over Internet Protocol (VOIP) numbers and it queries whether the exemption for political parties and politicians set out in Schedule 1 to the Act should be removed.

The report further foreshadows the introduction of a special privacy principle to deal with direct marketing. The principle would apply regardless of the purpose for which information was collected and the report foreshadows the application of direct marketing restrictions on public sector agencies.

Regulation of Health Records

Privacy obligations in respect of health information are implemented inconsistently throughout the country. The Privacy Act provides a higher level of protection to 'sensitive information', which includes 'health information', whilst other States and Territories

(apart from Western Australia and South Australia) have adopted a range of legislative and regulatory controls. The ALRC has proposed health privacy regulations to operate in conjunction with the proposed new Unified Privacy Principles, and State and Territory health services would be 'encouraged' to develop health regulations consistent with the new Commonwealth regulations. New laws would facilitate the collection by healthcare providers of information on third parties without their consent where this was relevant and necessary for treatment, and patient access to healthcare records would be facilitated in certain circumstances. The ALRC also foreshadows the possible introduction of a shared electronic health record system which in turn would require the regulation of unique healthcare identifiers (discussed further below).

Credit Reporting and Identity Theft

The report acknowledges the benefit inherent in credit providers having access to a greater range of information whilst at the same time recognising that the collation of an expanded range of information potentially increases privacy risks. The ALRC suggests that an expanded range of information be permitted but that it be subject to review after 5 years of operation. It is further proposed that credit reporting agencies be subjected to a greater obligation to monitor the accuracy of information on individuals supplied by credit providers and that they should establish controls to ensure that information used or disclosed is accurate, complete, up-to-date and relevant. A credit provider wishing to provide information on defaults to a credit reporting agency would have to be a member of an external dispute resolution scheme, and the report proposes a time limit of 30 days in which a credit provider must respond to the notification by a consumer that a default listing is disputed. The collection of credit information from individuals known to be under the age of 18 would be prohibited, and individuals would be entitled to report that they had been the victim of identity theft so as to ensure that such information would be available to any potential credit provider.

Regulation of Identifiers

The ALRC urges the introduction of greater controls over the use of personal 'identifiers', such as customer numbers. In this regard, it recommends an expanded definition of 'identifier' to include biometric information and symbols as well as numbers, greater regulation of identifiers used by public sector agencies, expanded powers for the Privacy Commissioner in determining what constitutes an 'identifier' and the regulation of identifiers issued by State government agencies (such as driver's licence numbers). One specific form of identifier referred to in the report is a possible unique healthcare identifier which would be introduced with the advent of a shared electronic health records

system. It would be necessary to legislate specifically in relation to the permitted and prohibited uses of unique healthcare identifiers and information in electronic health records and to introduce safeguards in relation to unique healthcare identifiers, such as a guarantee that it would not be necessary to produce such an identifier in order to obtain healthcare services.

Transborder Data Flows

Existing restrictions on transborder data flows apply only to private sector organisations. The ALRC proposes that requirements protecting information sent overseas should now be extended to public sector agencies. At present, it is possible for a private sector organisation to transmit personal information overseas, if, inter alia, the organisation believes that the body receiving that data is subject to a law which imposes similar privacy requirements about the handling of information. The ALRC proposes greater guidance on what amounts to 'adequate overseas privacy laws' for these purposes. The report further proposes that the ability of an organisation to transfer personal information overseas by relying upon the existence of other conditions, such as the fulfilment of contractual obligations or the impracticality of obtaining consent of the individual, be more closely regulated.

Statutory Cause of Action

Until 2001, a decision of the High Court of Australia in 1937 was commonly understood to mean that a general right of privacy did not exist at common law. In 2001, the High Court found that the 1937 decision had a narrower significance and that a right of privacy might well exist. The majority of the Court canvassed the possibility of a tort of privacy like one that exists in the United States. Gleeson CJ found in accordance with United Kingdom case law that breach of confidence principles protect private information in particular circumstances. The 2001 High Court decision has led to subsequent awards of damages for breach of privacy in both the Queensland District Court and the Victorian County Court. There have also been findings by other Courts that no such cause of action yet exists. Thus, the common law position in Australia is highly uncertain. The ALRC has proposed a statutory cause of action for invasion of privacy in circumstances which include where there has been interference with an individual's home or family life, the individual has been subject to unauthorised surveillance or sensitive facts about an individual's private life have been disclosed. The cause of action would apply where there was a reasonable expectation of privacy and where the infringement was serious enough to cause 'substantial offence to an ordinary person'.

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Telstra v Coonan: What is it and Why?

Hamish Fraser looks at the decision of *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No2)*¹ and also discusses the Federal Government's Connect Australia program.

As if trying to come to grips with the FTTN and G9 wasn't enough, or trying to understand the difference between FTTN and Connect Australia, Telstra decided to commence an action against the then Minister Helen Coonan. This action saw the press, the Coalition Government, Telstra and even the Labor opposition circling each other like street dogs looking for a fight.

And just to add a little spice to it all (well at least for the lawyers in the room), Telstra was recently forced to hand over some documents over which it claimed Legal Professional Privilege.

This article will look at the recent brawl over privilege, look at what the documents said (at least those that were revealed in Court) and dig a little behind the Coalition Government's Connect Australia program to see if Telstra's motives can be gleaned and then consider whether that motive would amount to an abuse of process. Along the way it may reveal a little more about the very public debate around Australia's broadband future which took place against the background of a Federal election.

Telstra's Loss of Privilege

Legal Professional Privilege is one of those areas like chaos theory and fractals, where the borders can be hard to make out. If you are well inside or well outside, then it's easy, it's when you are close to the edge that it gets problematic.

In house lawyers live life on the border of Legal Professional Privilege. This case does not expressly consider the role of the in house lawyer (partly because no evidence seems to have been led). Rather, a more simple problem arose, and Graham J found that a "no sufficient claim for privilege has been made..."

Although what seems clear is that it is harder for an in house lawyer to claim Legal Professional Privilege and extra care needs to be taken.

Why Wasn't the Claim For Privilege Sufficient?

In the action commenced against the Minister in August this year, Telstra asserts that it

"has serious concerns that it was not treated in a fair and equitable manner"² with respect to the allocation of funds under its Connect Australia program to the Optus Elders Joint Venture, OPEL. It has sought an order that the Minister release the documents upon which she relied in awarding the funds to OPEL.

On 5 September, in response to a Notice to Produce filed by the Minister, Justice Graham ordered Telstra to produce certain documents by 5:00 pm on 12 September, including those surrounding Telstra's consideration of the Minister's notification to Telstra that it was unsuccessful for funding (which occurred on 18 June).

Amongst the documents to be produced, Telstra identified a number of internal emails and draft memos, created at or about 18 June. Telstra sought to claim privilege over many of these documents.

As is the way in highly contentious litigation, the parties' lawyers argued over whether that claim was properly made and the matter came back before Justice Graham on the night of September 12, after the 5:00 pm deadline. It is relevant that the hearing of Telstra's Application was listed for the next morning (13 Sept), so it was important and relevant that if the documents were to be disclosed, an order to that effect had to be made that night.

In short, Telstra's claim for privilege was largely comprised of language such as: "Communication from internal legal adviser to client [or vice versa] for the dominant purpose of claiming [receiving] legal advice." or similar formulations of words – the sort of language used by most lawyers when preparing lists for discovery.

It appears that Telstra elected not to file any affidavits to support the claim for privilege and His Honour was left to make a decision on the basis of the materials then before him.

Graham J discussed the public policy reasons behind full disclosure of documents balanced with the 'obvious tension' of the need to ensure clients are able to give their lawyer full and frank disclosure and the rationale for legal professional privilege.

His Honour set out a useful summary of the principles in claiming privilege that can be summarised as follows:

1. *It is for a party claiming privilege to show that the documents for which the claim is made are privileged.;*
2. *The relevant time at which a claim for privilege is to be determined is the time when the document came into existence;*
3. *The relevant question is whether the document came into existence for the dominant purpose of seeking legal advice; and*
4. *The authorities emphasise the need for focused and specific evidence...where possible the Court should be assisted by evidence of the thought processes behind, or the nature and purpose of advice being sought in respect of, each particular document*³ (emphasis added).

Acknowledging that the role of an in house lawyer makes the decision less clear and therefore more difficult, he referred to the Channel 7 litigation,⁴ where Tamberlin J observed:

...there is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions... [and they] will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement...

However in the absence of any particular evidence about the individual documents or the independence of the lawyers involved in the preparation of the communications, His Honour concluded that the claim for privilege was not properly made and ordered Telstra to produce the documents.

What Did Those Documents Reveal?

The documents released remain confidential, however parts of them were read into open Court the next day. Comments read into open Court reveal the following observations by Telstra:

and with an election looming if there is a change of Government it would be very surprising if this proposal proceeded

And:

Given the timing and the broader context, we are taking the view that as long as we have claims that are arguable that will not be 'laughed out of court' we should run them even if the prospects for success are not great

It is clear that at least part of Telstra's strategy in pursuing the then Minister was to buy Telstra time with a federal election looming and the consequent risk of a change of Government. Even if Telstra was even able to set the Connect Australia process back by a few months, there seemed every prospect that a Labor Government would put a halt to it.

It is suggested that this shows a clear intention by Telstra to use the Court process to achieve an ulterior objective, namely to defeat the Coalition Government's award of funds to OPEL.

What Was Connect Australia and Why Wouldn't Telstra Win It?

The Connect Australia project was one that Telstra was, it is suggested, always going to struggle to win. Telstra itself seems to acknowledge this in the documents that were released to the Court, where it says: 'we had trouble spending \$600 million' (being the original amount to be offered).

Whilst Telstra's true motives may never be known, one interpretation of this and other comments (referred to above) can be found by looking back at the original Connect Australia EOI.

In June 2006 the Coalition Government released a Request for Expressions of Interest known as 'Broadband Connect'⁵, part of their Government's 'Connect Australia' program, with the stated intention to:

...drive the extension of next generation broadband infrastructure widely across Australia...in a way that stimulates competitive outcomes and competitive access to broadband networks in regional Australia...

Telstra has made it clear that, in order to offer fibre to the node (FTTN) in Brisbane, Sydney and Melbourne, Telstra requires a regulatory holiday or reduction in competition for this new FTTN network. Against that, it is hard to see Telstra being overly excited about a competitive outcome for a broadband solution to the rest of Australia. That is, Telstra is being asked to propose a way to offer metro comparable broadband in remote and regional Australia with no regulatory holiday, whilst still seeking a regulatory holiday in metro areas. That would seem to make something of a mockery of the FTTN proposal.

Put another way, a strategy that saw Telstra submitting a bid to Connect Australia, was arguably a strategy that directly contradicted its (loudly) stated FTTN strategy.

One interpretation of the information available, is that Telstra did not want the Connect Australia program to succeed at all, certainly not in a way that the Optus Elders JV was able to.

Additionally, the Labor Opposition and Telstra seemed to have a similar view of the future of Australia's Broadband requirements⁶ which are quite different to the Connect Australia program.

If that interpretation is accepted, then Telstra's action against the then Minister seems to make sense, at least in the broader political sense, namely put the Connect Australia funding on hold at least until the federal election and hope the whole program is thrown away following a change of government.

When is an Ulterior Motive an Abuse of Process.

In *Williams v Spautz*⁷ the High Court considered that:

central to the tort of abuse of process is the requirement that the party who has instituted the proceedings has done so for a purpose or to effect an object beyond that which the legal process offers

In *White Industries v Flower and Hart*⁸ Goldberg J followed *Williams v Spautz* in making and indemnity costs order against Flower and Hart. It should be noted that there is no evidence in this case that Telstra's lawyers acted similarly to Flower and Hart, indeed the evidence led before Graham J seems to express the opinions of Telstra's employees.

Following that reasoning, and accepting the interpretation posed above, it seemed open for the Court to find that Telstra's claim against the then Minister was an abuse of process, a finding that would be likely to have consequences as to costs.

The Decision

On 10 October, Graham J dismissed Telstra's application with costs, having found:

In my opinion there does not exist reasonable cause to believe ...that Telstra may have or has the right to obtain relief in this Court from the Minister...

His Honour did not find that there had been an abuse of process, however commented that the application's "legitimacy, in terms of its necessity, is in some doubt...".

Conclusion

Legal Professional Privilege is a complicated area, particularly for in house lawyers. When claiming that privilege, it is clearly important, particularly for documents created by in-house lawyers to establish the claim for each document separately and not rely on standard wording. Equally it is important to ensure an in house lawyer is in fact independent and that if necessary, evidence is available to establish or support that.

In this case Telstra was forced to reveal documents that showed its attitude to the Federal Government's Connect Australia program. It is trite to observe that Telstra is opposed to OPEL winning the award, however at least one interpretation of Telstra's approach is that its interests are not aligned with the Connect Australia program at all, and has attempted to derail it on a number of fronts.

Whilst it is arguable that in commencing proceedings against the Minister, Telstra has engaged in an abuse of process, the Court disagreed. However the Court did cast some doubt over the application's legitimacy.

Telstra has appealed the decision. The author is not surprised.

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(Endnotes)

1 *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts* (No2) BC200707832

2 *The Australian*, Sept 19 2007

3 Graham J quoted *Barnes v Commissioner of Taxation* [2007] FCAFC 88

4 *Seven Network Ltd v News Ltd* [2005] FCA 142

5 http://www.dcita.gov.au/_data/assets/pdf_file/39763/Broadband_Connect_EOI.pdf

6 <http://www.australianit.news.com.au/story/0,24897,22530018-5013038,00.html>

7 (1992) 174 CLR509

8 (1998) 29 ACSR 21

Ambush Interviews, Off Limits Questions and Fake Personas Under Trade Practices Law

Sally McCausland discusses recent trade practices actions against the media and the free speech implications for journalists, documentary makers and comedians

Plaintiffs unhappy with their treatment by the media are increasingly bringing misleading and deceptive conduct actions under section 52 of the *Trade Practices Act 1974* (Cth)¹ and equivalent state fair trading laws² (**trade practices actions**). One reason for this may be the recent amendment of the Australian defamation laws to prevent large corporations from suing.³ In the case of individuals, misleading and deceptive conduct might be alleged where a defamation action is unavailable, or because the grievance is about the way an interview or footage was obtained.

Recent judicial and legislative developments in other areas suggest an impetus to rein in some of the more invasive contemporary methods of newsgathering.⁴ However, this article argues that there is potential for new applications of trade practices laws to chill the publication of material which is in the public interest.

Misleading and deceptive representations made to talent prior to publication

In the recent hit movie *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan* the English comedian Sacha Baron-Cohen pretends to be 'Borat Sagdiyev', a boorish, sexist and anti-Semitic Kazakh reporter making a documentary about America. Cohen is a Jewish comedian whose alter ego personas, including Borat, often lull his real life interview targets into revealing their own prejudices. Several people who appeared in the movie as themselves have attempted, so far unsuccessfully, to sue in US courts on the grounds that they were tricked into appearing and consequently suffered public ridicule or contempt.

In Australia, similar cases have now established that the media can potentially attract liability under trade practices actions in the

course of obtaining material for publication where:

- The plaintiff was misled into granting the interview or being recorded for the story under false pretences; or
- the plaintiff can prove that they were misled about the scope or purpose of the interview or appearance and what topics would be 'off limits'.

False pretences: *Craftsman Homes Pty Ltd v TCN Channel Nine* (2006)⁵

This case concerned reporters from the Channel Nine current affairs program *A Current Affair* (ACA) who masqueraded as a husband and wife in order to film a 'surprise' interview with the owner of a building company. The building company and its franchisee was the subject of several complaints from unsatisfied customers. ACA had previously attempted to interview the managing director of these companies, Mr Cox, but did not agree to his proposed conditions. One of the reporters rang Mr Cox's business premises pretending to be part of a couple interested in building work, and arranged for an appointment at the business premises. These premises were also the Coxes' residential premises.

On the day of the appointment the reporters, pretending to be the husband and wife, were invited into the premises by Mrs Cox. Once inside Mr Cox's office, the male reporter, Ben Fordham, used his mobile phone to ring a ACA film crew waiting outside, invited them in and revealed his identity. He then filmed Mr Cox's angry reactions, which were later played in Nine program promotions and during the program.

In the New South Wales Supreme Court, Smart AJ found for Mr Cox on his trade practices action. In his Honour's view, Mr Cox had been misled into granting entry to the reporters in reliance on their mislead-

ing and deceptive representations that they were a couple interested in the services of the building company:

...If the misleading and deceptive conduct had not occurred there would have been no admission to the Edmondson Park premises, no discussion with Mr Cox, no filming of Mr Cox and no opportunity for TCN Nine to enhance its program by a personal confrontation in unfair circumstances...⁶

Nine argued that its reporters' conduct was not 'in trade or commerce' and therefore the trade practices action could not succeed. However, Smart AJ disagreed, finding it sufficient that the conduct was for the purposes of making a commercial television program which used advertising to attract viewers.

His Honour found that Mr Cox had suffered detriment, as the reporters' misleading conduct had allowed ACA to expose him to 'public criticism' by showing him in an "unflattering light...⁷ stunned, distressed and seething".⁸ Channel Nine and the reporter Ben Fordham were ordered to pay \$50,000 to Mr Cox to compensate him for "the damage of his visual representation being exposed to hundreds of thousand[s] of people in adverse circumstances".⁹ He granted a further \$30,000 to Mr Cox's company, which had been mentioned by name several times in the program promo.

Implications of *Craftsman Homes*

This case fits within a larger trend of Australian courts developing new legal remedies against allegedly unethical media conduct.¹⁰ While many people may be sympathetic to plaintiffs such as Mr Cox, the extension of trade practices actions into the area of newsgathering raises concerns. These laws were not designed to address the difficult ethical questions of newsgathering, where sometimes, it may be argued, deception of some kind is justified in the pursuit of a story.

A couple of hypothetical examples show the potential detriment to freedom of expression should *Craftsman Homes* style actions be applied in different circumstances.

The first is undercover investigative journalism. The Australian Journalist's Association Code of ethics requires that journalists use 'fair, responsible and honest' means to obtain material and that they 'identify yourself and your employer' before obtaining an interview. However, this ethical rule has at times been breached in the interests of getting the truth. Internationally, undercover journalism is more widespread and has achieved famous exposés which could not otherwise have been brought to public attention.

Another potential casualty of *Craftsman Homes* style actions is satirical pranking, a tradition well known to Australian audiences. In the US, satirical pranking has received support under the First Amendment. Earlier this year a Californian court struck out a claim by two college boys who were shown in *Borat* expressing 'stereotypical' views about minorities.¹¹ They claimed that they were 'fraudulently' induced into signing a consent release after being offered alcohol and 'at the encouragement of Defendant, engaged in behaviour that they otherwise would not have engaged in'. But the court struck out the case using the Californian 'anti-SLAPP' law¹² designed to protect free speech and other public interest activities where a case discloses no probable basis for success at trial:

*...it is beyond reasonable dispute... that the topics addressed and skewered in the movie – racism, sexism, homophobia, xenophobia, anti-semitism, ethnocentrism and other societal ills – are issues of public interest, and that the movie itself has sparked significant public awareness and debate about these topics.*¹³

In doing so he distinguished between legal and ethical concerns:

*The propriety of filming individuals, often in crude contexts and with a disarming disguise, with the specific intent of later embarrassing them on a national scale – even those individuals who, on occasion, exhibit less than admirable qualities – is not before the Court.*¹⁴

There is no equivalent anti-SLAPP legislation in Australia. There is therefore little opportunity for undercover journalists or satirical pranksters to argue for the public interest in publication. If *Borat*'s 'frat boy' victims had been able to sue under Australian trade practices law, they may have succeeded.

The difficult 'fit' of trade practices law to this area is demonstrated by comparing the

position under Australian defamation laws. In the first instance defamation generally arises in relation to what is published, not the conduct involved in obtaining material for publication. Defamation laws also contain defences which go some way towards protecting free speech. For example in *Craftsman Homes*, Channel Nine was found *not* liable for defamation, as it was able to establish defences of truth and comment in relation to the defamatory material published. As noted above, large corporations can no longer sue, and interlocutory injunctions to prevent publication of defamatory material are only available 'in the clearest of cases'.¹⁵

In comparison to defamation laws, trade practices laws favour the plaintiff. Trade practices laws are generous as to who can sue. There are no defences allowing publication of material obtained through misleading representations even though the publication itself is accurate and in the public interest. And it is less than certain that an Australian court hearing arguments on a trade practices injunction application in either of the hypothetical examples given above would be swayed by arguments on the public interest in publication.¹⁶

Another area into which *Craftsman Homes* style actions could expand is misleading media conduct which does not occur in the course of a trespass. In *Craftsman Homes* the defendants were found to be additionally liable for trespass. However, the principle established in *Craftsman Homes* is not limited to media trespasses. His Honour found that the initial telephone call, in which the female reporter had pretended to be a wife interested in building work, formed part of the misleading conduct. On this basis, trade practices liability could potentially arise whenever a reporter sitting at her desk rings up a subject pretending to be a 'civilian' in order to elicit an unguarded response, or a comedian in disguise films his target's response to a prank on a public street.

What is 'off limits'? Hearn v O'Rourke (discontinued 2007)

A case which supports this further expansion of trade practices law is *Hearn v O'Rourke*, brought by two girls interviewed for Denis O'Rourke's documentary 'Cunnamulla'.

This case against O'Rourke and his production company was recently discontinued before trial. However, a prior interim judgment in the case¹⁷ has established that a filmmaker can be sued for misleading and deceptive representations made about the subject matter of an interview or areas which will be 'off-limits'.

'Cunnamulla' was a 'fly on the wall' documentary following various real people living in the central Queensland town Cunnamulla. O'Rourke approached the two girls, then aged 13 and 15, to appear in his film. He obtained the consent of their parents and had them sign releases. The dispute arose over segments in the film where the girls discuss their sex lives. The girls claimed that O'Rourke promised that he would not ask them about their sex lives. They sought damages for misleading and deceptive conduct based on reputational harm and distress they allegedly suffered after the film was shown in the town.

In her first instance judgment¹⁸ on O'Rourke's strike out application, Justice Kiefel in the Federal Court found that, while O'Rourke's production company made the film *Cunnamulla* for profit, the seeking of unpaid interviews for the film was not conduct in trade or commerce. She therefore found that section 52 could not apply and struck out the proceedings. However, in a split appeal decision,¹⁹ the majority, Finn and Jacobson JJ, reversed her decision, holding that the alleged misrepresentations, if ultimately made out, could be characterised as being in trade or commerce:

*...the conduct which [O'Rourke's company] was engaging in was the identification of prospective participants in the projected documentary who would provide the material that was likely to be used... There could be no documentary unless appropriate interviews were secured. Securing such interviews, in our view, could properly be said to be central to the trading or commercial activity in which [O'Rourke's company] was engaged in producing a film for profit.*²⁰

However, their Honours commented that the 'Trade Practices Act claim pleaded faces formidable obstacles for reasons we have not had to consider.'²¹

This was a prescient remark. The trial was eventually set down for 2007. Before it went on, however, a separate trial was heard in ACT defamation proceedings brought by O'Rourke in relation to newspaper articles about the case.²² These proceedings related to imputations in the articles alleging that, among other things O'Rourke had misled the girls into discussing sexual matters and was unscrupulous. At this defamation trial O'Rourke, the girls and their parents gave evidence. Again the central issue was whether O'Rourke had promised not to interview the girls about sexual matters during the weeks of filming his documentary. On this issue the court

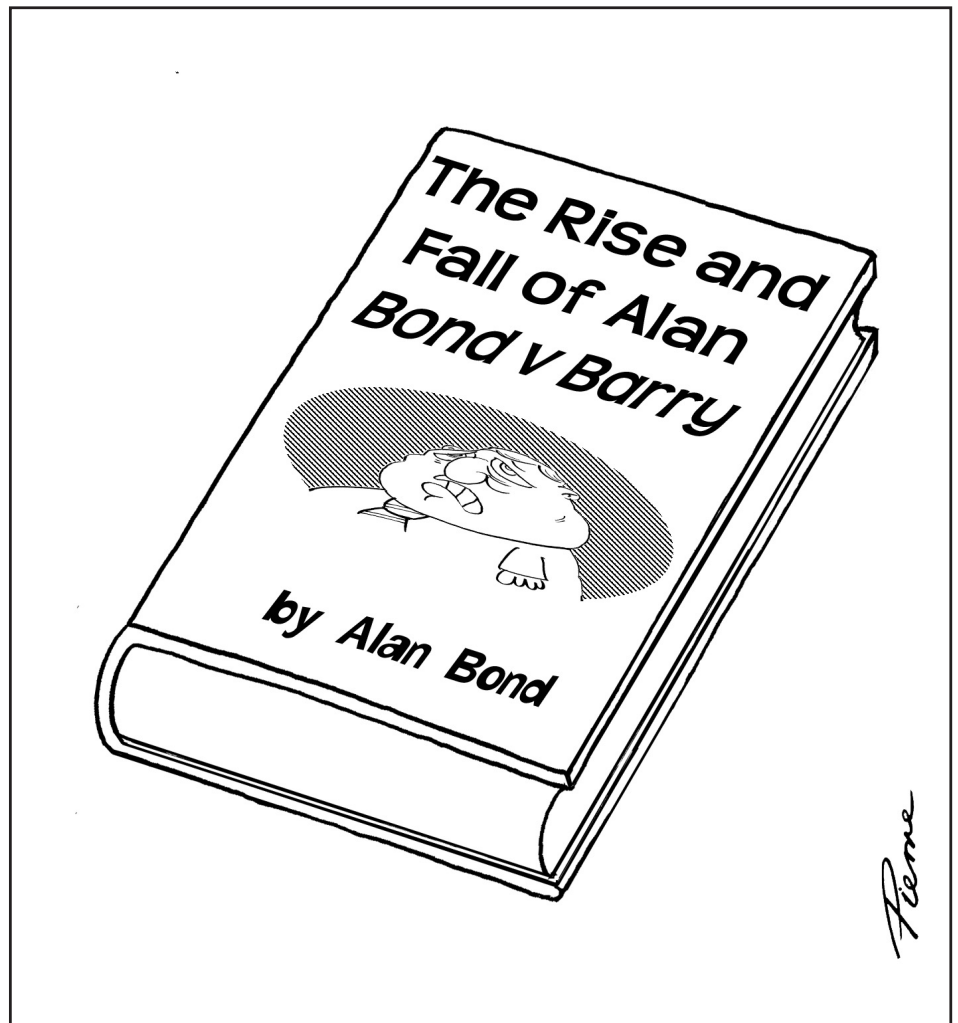
preferred O'Rourke's evidence that he used an open-ended approach to documentary making and did not promise to limit what was discussed. The trade practices action has now been discontinued.

The outcome of this trade practices action demonstrates that an interviewee will often have difficulty in proving express or implied oral representations made by an interviewer about what would or would not be discussed. This suggests that, at least where false pretences are not involved, trade practices actions will not unduly constrain ordinary news reporting and documentary making. The usual journalistic practice of keeping matters as open ended as possible when setting up interviews will usually avoid potential liability for misleading conduct in relation to what was or wasn't 'off limits'.

However, trade practices laws may have a real impact where sophisticated and well advised plaintiffs, such as celebrities and public figures, are concerned. It is not uncommon for those advising such persons to demand that interviews be limited to certain approved topics or to request that questions be submitted in advance. As these tactical manoeuvres are now underpinned by potential legal liability, journalists will need to be cautious when entering into written correspondence with prospective interviewees. In addition to facing a walk out in response to an 'off limits' question, journalists may now also find themselves receiving a letter of demand citing the prior correspondence and threatening legal action should they publish the client's response to an 'ambush' question. Based on the decision in *Craftsman Homes*, the likelihood of an interlocutory injunction would be higher in the audiovisual medium, where the client may object to being shown responding angrily to such a question.

Such a scenario would once again raise the free speech concerns outlined above. Some of the most famous media interviews in history arose out of questions the interviewee was not expecting or was trying to avoid discussing.

A carefully drafted interview release may assist in defending an interviewee's claim that they were misled about the nature of the program or the subject of their interview. However, whether or not such a release will assist will depend on factors such as the nature of the alleged representations and the damage suffered. In any event such releases are not commonly used in news reporting, and some interviewees refuse to sign them.



Challenges to the 'Publishers Defence'

Broadcasters and other publishers generally enjoy the 'publishers defence' in relation to publication of information.²³ This defence provides that a news provider cannot be sued under trade practices law for inaccurate statements in a publication except in limited circumstances not generally applicable.

However, this defence appears to be shrinking relative to the expanding scope of media liability under trade practices law discussed above. In both *Craftsman Homes* and *Hearn v O'Rourke* the courts accepted that section 65A does not apply to pre-publication conduct. In *Craftsman Homes* Smart AJ also found that section 65A does not apply to a 'program promotion'. And in a recent win for the ACCC, Seven's program *Today Tonight* lost the defence where it was found to have 'adopted' various misleading statements about a financial service for 'Wildly Wealthy Women' by failing to sufficiently distance itself from those statements in its reportage.²⁴

Fortunately for freelance journalists, a further attempt to limit the publishers defence was recently dismissed by French J in the Federal Court in the case of *Bond v Barry*.²⁵ In this case Alan Bond and a company called Lesotho Diamond Corporation attempted to bring a trade practices action against the freelance journalist Paul Barry and the publishers of the Sunday Telegraph and the website News.com over an article the Telegraph's editor had commissioned from Barry. The plaintiffs alleged that misleading and deceptive representations were made in the article. They argued that the publishers defence did not apply to Barry as he was a freelance journalist.

The court dismissed the action, holding that Barry was entitled to the publishers defence as he had been commissioned to write the article as a 'freelance journalist.' He was therefore a 'proscribed information provider' and could use the defence. The publishers were also entitled to the defence.

It is less clear whether the producers of *Borat* could claim the publishers defence, as they may not be determined to be providing 'information.' The publishers defence may

also prove elusive for bloggers and other freelancers now joining traditional media outlets in increasing numbers, if their publications are not primarily about the supply of 'information'.²⁶

Conclusion

Trade practices actions are not an appropriate vehicle to address disputes which commonly involve difficult questions of media ethics and the balancing of public and private interests. The publishers defence was introduced in 1984 to ensure

a vigorous, free press' and to 'exempt the media...from the operation of [section 52 and related provisions] which could inhibit activities relating to the provision of news and other information'.²⁷

The subsequent creep of trade practices actions back into this area suggests that it now may be necessary to extend the publishers defence to pre-publication media conduct and possibly to a broader range of publications. Alternatively there may be a case for inserting new defences where material obtained through deception is nevertheless in the public interest. It would also be useful to have some form of anti-SLAPP laws or an express requirement to consider free speech issues on injunction applications where a public interest may weigh in favour of publication.

These suggestions do not deny the ethical difficulties that can arise when material for publication is obtained by deception. Particular concerns arise where vulnerable groups such as children are concerned, and there may be a case for reviewing codes of conduct or strengthening other laws in some instances. Rather, it is to suggest that trade practices laws are, quite naturally, not equipped to weigh the public interest, where it exists, in publication of such material. Trade practices laws as they now stand are potentially overbroad in application to journalism, filmmaking, comedy and other forms of communication to the public. In the absence of law reform, it must be hoped that courts keep in mind the potential results if plaintiffs shown in an 'unflattering' light are allowed to win too often.

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(Endnotes)

- 1 *Trade Practices Act 1974* (Cth) s 52 provides as follows (1) a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).
- 2 See eg *Fair Trading Act 1987* (NSW) s 42, which is in equivalent terms to section 52 of the Commonwealth Act except that it prohibits conduct by a 'person'.
- 3 *Defamation Act 2005* (NSW) (enacted by mutual agreement of each state and territory) s9. Corporations with less than 10 employees and not for profit corporations can still sue.
- 4 See eg *TCN Channel Nine v Anning* [2002] NSWCA 82; Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] 208 CLR 199; New South Wales Law Reform Commission, Consultation Paper 1, *Invasion of Privacy* (May 2007); Australian Law Reform Commission, Review of Australian Privacy Law (DP 72, September 2007).
- 5 *Craftsman Homes Pty Ltd v TCN Channel Nine* [2006] NSWSC 519 (2 June 2006).
- 6 *Id* at 1069.
- 7 *Id* at 1007.
- 8 *Id* at 1069.
- 9 *Ibid*.
- 10 See e.g. above n 4. Overseas developments, particularly in privacy law, are also becoming influential.
- 11 *John Doe v One America Productions Inc* (15 February 2007) SC California, LA, Biderman J.
- 12 "SLAPP" stands for "strategic litigation against public participation. See California Code of Civil Procedure, section 425.16.
- 13 Above n 11 at 4.
- 14 Above n 11 at 2.
- 15 Patrick George, *Defamation Law in Australia* (2006 LexisNexis – Butterworths) at 410 citing *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR at 163, 172.
- 16 See *Trade Practices Act, 1974* (Cth) s 80(1). Cf *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* (1987) 77 ALR 615.
- 17 *Hearn v O'Rourke* [2003] FCAFC 78 (2 May 2003). For a review of this case and in depth discussion of some of the issues raised in this paper see Craig Burgess, "Hearn v O'Rourke: What does it mean for journalists?" (unpublished, faculty presentation 2003, University of Southern Queensland <http://www.usq.edu.au/faculty/arts/Research/files/JEA%20Paper%202003.doc>).
- 18 *Hearn v O'Rourke* [2002] FCA 1179 (20 September 2002).
- 19 Above n 17.

20 Above n 17 per Finn and Jacobson JJ at 10.

21 Above n 17 at 14.

22 *O'Rourke v Hagan* [2007] ACTSC 61 (8 August 2007)

23 *Trade Practices Act 1974* (Cth), s 65A.

24 *ACCC v Seven Network Limited* [2007] FCA 1505 (5 October 2007) (under appeal by Seven).

25 [2007] FCA 1484 (21 September 2007).

26 French J cited the *Shorter Oxford English Dictionary* definition of 'information' as relevantly including 'knowledge or facts communicated about a particular subject, event, etc: intelligence, news': *ibid* at 33. Cf *Gianni Versace SpA v Monte* [2002] FCA 190. at 126.

27 Attorney General, second reading speech, Law (Miscellaneous Provisions) Bill, *Hansard Reports of Debates* (House of Representatives, 13 September 1984 at 1296); cited in *Advanced Hair Studios*, above n 16.

International Regulation of Access to the Geostationary Orbit: Mission Impossible?

Sara-Louise Khabazian considers the ITUs regulation of the Geostationary Orbit

The description of the geostationary orbit as a 'reservoir of wealth'¹ conveys the immense value to countries in securing access. However, scarcity problems are further compounded by the competing interests of developed and developing countries. Transnational cooperation in the regulation of access to the geostationary orbit under the auspices of the International Telecommunications Union (ITU)² therefore represents a significant development. This article however, questions the effectiveness of the ITU framework for reconciling equity and efficiency considerations, concluding with hope that transformations in the nature of modern communication will eventually compensate for the deficiencies of international regulation.

Geostationary Satellite Orbit

The 'geostationary orbit' has been defined as "[a]n orbit, any point on which has a period equal to the average rotational period of the Earth...circular and equatorial".³ Such characteristics render the geostationary orbit highly desirable for the placement of communication satellites. In addition to reducing the complexity and cost inherent in using additional satellites for tracking purposes,⁴ satellites placed in the geostationary orbit provide significant coverage in terms of line-of-sight communication with the earth.⁵ As a result, a single satellite may communicate with 'approximately one third of the planet, an entire country, or if in conjunction with a satellite network, the entire globe'.⁶ Such extensive coverage is particularly significant in light of globalisation and the importance of connecting national communication networks.⁷ The initial proposal for the placement of artificial satellites in the geostationary orbit for the purpose of communication is widely attributed to A.C. Clarke in 1945.⁸ Following the fiftieth anniversary of the launch of Sputnik I, satellites are now well renowned for their widespread uses including, television, telephony, meteorology, space research and global positioning systems.

However, the number of beneficiaries of access to the geostationary orbit is inherently restricted by the limited number of useful orbital slots.⁹ The geostationary orbit is ultimately a finite geographical resource with the capacity to contain a restricted number of satellites in order to avoid collision.¹⁰ Spectrum is similarly regarded as a scarce resource,

permitting the allocation of a limited number of frequencies so as to avoid harmful interference.¹¹ With the unprecedented rate at which developed countries are employing satellites to exploit the latest technology there has been increasing awareness of the limitations of the geostationary orbit.¹² Despite the relatively rapid development of certain developing countries in recent years, there generally remains significant disparity between the ability of developed and developing countries to utilise satellite technology. Such disparity has fuelled divergent perspectives on the appropriate regulation of access to the geostationary orbit.

Pronounced under customary international law as forming part of outer space,¹³ the geostationary orbit is subject to the principles enumerated in the Outer Space Treaty:

*[t]he exploration and use of outer space...shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.*¹⁴

Whilst beyond national appropriation,¹⁵ the proposal that there ought to be wholly equitable access to the geostationary orbit is arguably undermined by the absence in the Outer Space Treaty of a positive right for all countries to use the geostationary orbit. Uncertainty therefore remains as to the proper reconciliation of potentially competing efficiency and equity considerations, developed countries generally prioritising the former and developing countries the latter.

ITU Framework

Transnational cooperation under the auspices of the ITU represents an attempt to reconcile competing national interests. Whilst the ITU does not formally allocate spectrum or orbital slots,¹⁶ it provides international recognition of assignments that fulfil the advance publication, coordination and notification procedures,¹⁷ and a forum for dispute resolution.¹⁸ Member states must observe the ITU Constitution acknowledging that the geostationary orbit is a 'limited natural resource'¹⁹ to be used

rationally, efficiently and economically...taking into account the special needs of the developing countries

and the geographical situation of particular countries'.²⁰ In an attempt to reconcile equity and efficiency considerations so as to reflect its diverse membership, the ITU has developed its approach to regulation of access to the geostationary orbit in a somewhat incremental fashion.

Whilst ITU member states continue to retain sovereignty in relation to the use of spectrum in the absence of a global regulator,²¹ orbital slots have traditionally been allocated via an *a posteriori*²² registration system.²³ However, with a continual increase in the number of countries seeking to establish satellite systems a strict *a posteriori* approach has been perceived as increasingly inappropriate,²⁴ arguably conferring 'squatter's rights'²⁵ antithetical to both the concept of efficient and equitable access.

With respect to efficiency, whilst an *a posteriori* approach enables developed countries access to the geostationary orbit for the purpose of exploiting the latest satellite technology,²⁶ such an approach has been criticised for potentially giving rise to market failure.²⁷ 'Common pool inefficiencies'²⁸ may arise where an *a posteriori* approach "creates an incentive for both incumbent and prospective satellite operators to over-estimate their orbital slot requirements",²⁹ preventing "productive use by others with near term needs".³⁰ To the extent that this may encourage free-riding, both developed and developing countries may be reluctant to invest in technology to enhance exploitation of the geostationary orbit.³¹ Efficiency may be further undermined where the effect of warehousing is to

*impose higher costs on developed countries which may as a consequence have to innovate orbit economizing technologies that are, strictly speaking, uneconomic.*³²

With respect to equitable access, an *a posteriori* approach is arguably unfair to countries currently lacking the capital and technology necessary to utilise the geostationary orbit.³³ Developing countries express concern that given scarcity problems, once they are in a position to utilise the geostationary orbit there will be insufficient orbital slots remaining.³⁴ It is further claimed that in the interim, developed countries may extraterritorially impose values inconsistent with the culture of developing countries.³⁵

In response to such concerns, at the WRC-97 the ITU implemented a number of mechanisms including, the coordination procedure,³⁶ due diligence obligation,³⁷ and stricter

time limits within which to utilise orbital slot allocations.³⁸ Consistent with criticism of the effectiveness of such mechanisms,³⁹ is the continued pursuit by developing countries for an *a priori* approach "in which frequencies and orbits are pre-coordinated"⁴⁰ in the interests of equitable access. Notably, the ITU fails to define 'equitable access'.⁴¹ However, 'equitable' is more broadly defined as "[j]ust, fair, and right, in consideration of the facts and circumstances of the individual case".⁴² Clearly such a definition is inappropriate for the international context characterised by conflicting national interests. This is exemplified by the fact that the purportedly more equitable *a priori* approach may ultimately lead to "long periods of unused and unoccupied parking slots and orbital spectrum",⁴³ where countries allocated orbital slots lack the necessary capital and technology to utilise them. The possible 'chilling effect'⁴⁴ on technological development of an *a priori* approach is explicitly antithetical to not only the economic but also social interests of all nations. Hence, despite failed attempts to assert sovereignty over the geostationary orbit,⁴⁵ following the WRC-2000 equity considerations have led the ITU to establish a hybrid approach⁴⁶ where all countries are granted 'priority access'⁴⁷ to at least one orbital slot.⁴⁸

Equitable Access: Developing Countries' Perspective

In theory, the hybrid approach may relatively speaking enhance equitable access to the geostationary orbit. However, in addition to the fact that priority access constitutes neither registration nor a legal right,⁴⁹ priority access arguably fails to enhance the ability of developing countries to benefit from priority access allocations where they continue to lack necessary capital or technology. In such circumstances, it is arguable that the hybrid approach represents an inadequate compromise, continuing to

*deprive [developing countries] of any near-term share of associated economic rents, and hence of vital resources to develop their own telecommunications infrastructure.*⁵⁰

Even where developing countries possess the necessary capital and technology, the priority access approach arguably fails to address the 'latecomer cost handicap'⁵¹ of countries seeking to utilise the geostationary orbit for the first time. This includes the "higher R&D and engineering costs incurred to open up new bands at higher frequencies"⁵² necessary to avoid harmful interference with existing satellites.⁵³ To this extent, the hybrid approach is arguably inconsistent with the explicit recognition by the ITU of the need "to promote and to offer technical assistance to developing countries in the field of telecommunications..."⁵⁴

It is argued that by demanding the use of outer space for the benefit of all countries 'irrespective of their degree of economic or social development', Article I(1) of the Outer

Space Treaty imposes technology transfer obligations on developed countries to assist developing countries in their pursuit to utilise the geostationary orbit at 'affordable prices'.⁵⁵ Therefore, proposals to assist developing countries include, providing a "temporary waiver [for developing countries] of the requirement to use costly spectrum conservation technologies",⁵⁶ and establishing a collective fund to enhance the rate at which orbital slots may be sought.⁵⁷

Efficiency: Impact Upon National Communications Regulation

Regardless of the relative merits of proposals to assist developing countries, it is arguable that the substantive effectiveness of the ITU framework would nevertheless continue to be undermined by institutional defects of the ITU, giving rise to procedural inefficiencies in the regulation of access to the geostationary orbit.⁵⁸ A non-exhaustive list of such defects includes, firstly, in terms of utilising the geostationary orbit, arguably generous time frames within which to utilise registered slots encourage delay, thereby enhancing inefficiency.⁵⁹ Also, the ITU does not mandate the use of efficiency enhancing technology despite its availability in some member states.⁶⁰ Secondly, in terms of enforcement, since ITU recommendations lack binding force of law the ITU "can only legitimize, rather than guarantee, a spectrum use and orbital slot registration".⁶¹ Similarly, the ITU provides no redress where countries employ the tactic of paper satellites to foreclose access by others,⁶² or rotate satellites between orbital slots.⁶³ Indeed, the relatively low cost of filing for orbital slots arguably encourages unnecessary registrations.⁶⁴ This is particularly problematic given the opportunity for member states to unilaterally exploit the geostationary orbit for economic gain, as exemplified by the Tonga saga.⁶⁵ Thirdly, as a forum for dispute resolution, the ITU framework is very slow.⁶⁶ This is particularly problematic given that "one nation's orbital slot use often can occur only at the expense of another nation's current or future use".⁶⁷ Fourthly, "[t]he fundamental legal instruments of the ITU...continue to be under the exclusive jurisdiction of the Member States."⁶⁸ This is of particular concern given that "there are no institutional procedures to enable Sector Members to appeal against a decision made by Members States or to arbitrate in a dispute with a Member State"⁶⁹ failing to reflect the increasing importance of the private sector.⁷⁰

Future

The current hybrid approach to orbital slot allocation arguably fails all ITU member states, regardless of their state of economic development. Through continuing to prioritise efficiency over equitable access, the current approach to orbital slot allocation arguably fails to assist developing countries in their pursuit to develop national communication networks. However, the substan-

tive effectiveness of the ITU framework in securing such efficiency is arguably undermined by institutional defects giving rise to procedural inefficiencies in the allocation of orbital slots. Such inefficiency is explicitly undesirable from the perspectives of both developed and developing countries.

Nevertheless, it is proposed that future technological developments may remedy such deficiencies of the ITU framework by alleviating relevant scarcity problems and reducing reliance upon the geostationary orbit altogether. In terms of alleviating current scarcity problems, a non-exhaustive list of potentially significant developments includes, increasing commercial use of spectrum formerly used by the military,⁷¹ increasing popularity of unregulated spectrum bands,⁷² and availability of

*"[n]ew satellites [with] onboard signal processing [enabling] operators to transmit on one frequency and receive signals on another frequency...[and enabling] users to change the beam size or location of the signal footprint".*⁷³

In support of declining reliance upon the geostationary orbit, reference is made to the increasing demand for satellites operating at non-geostationary orbits,⁷⁴ exemplified by the recent proliferation of mobile telephony.

Ultimately, it remains to be seen to what extent transformations in the nature of modern communication may alleviate debate regarding the reconciliation of efficiency and equity considerations in regulating access to the geostationary orbit. However, this Article concludes with hope that the difficulty inherent in strengthening a metaphorical international dam for preservation of this 'reservoir of wealth' is bypassed with the aid of technological development.

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Communications: Concepts Older Than Commonly Supposed' (2002) 38(4) *IEEE Transactions on Aerospace and Electronic Systems* 1408.

9 Thompson, above n 6, at 284.

10 Smith, above n 4.

11 ITU Constitution, Article 45.

12 Thompson, above n 6, at 284-285.

13 M.S. Soroos, 'The Commons in the Sky: The Radio Spectrum and Geosynchronous Orbit as Issues in Global Policy' (1982) 36(3) *International Organization*, 665, 669.

14 United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967), Article 1.

15 Id. Article 2.

16 L.D. Roberts, 'A Lost Connection: Geostationary Satellite Networks and the International Telecommunication Union' (2000) 15 *Berk. Tech L.J.* 1095, 111.

17 Thompson, above n 6, at 297.

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19 ITU Constitution No. 196, Article 44.

20 ITU Constitution No. 196, Article 44; ITU Constitution No. 79, Article 12.

21 V. Timofeev, *Radiocommunication Bureau*, available at <http://www.itu.int/ASIA2002/press/presskit/qanda1.html>.

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23 With registrations remaining effective 'until the operator-defined system life expectancy has expired, or until the ITU is notified that the [frequency and] orbital position are no longer in use...' Roberts, above n 16, at 1113.

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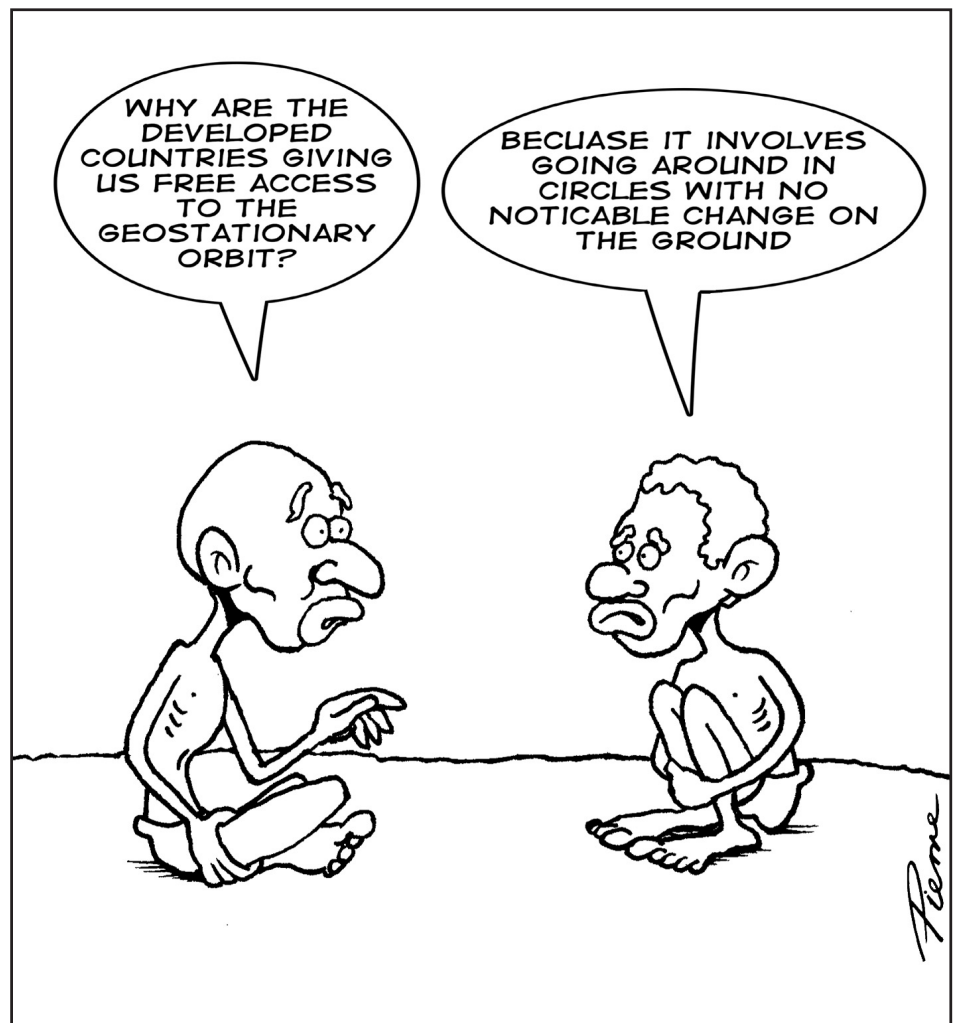
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