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After the Dust Settles – What Does the Telstra Separation Legislation Really Mean?

Shane Barber, Kathryn Edghill, Graham Maher and Mitch Kelly review the content and implications of recently proposed amendments to Australian telecommunications legislation.

On 15 September 2009, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, announced fundamental reforms to Australia's telecommunications regulations by way of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (**Bill**).

As speculation continues about who will be the likely winners and losers from the rollout of the National Broadband Network (**NBN**), it is useful to examine if and how this opening regulatory salvo will achieve the Government's stated aims of 'enhancing' competitive outcomes within the telecommunications industry and strengthening consumer safeguards.

The Government's targeting of specific industry sections and participants to achieve its broader policy aims, in this case the structural or functional separation of Telstra, contrasts with the approach adopted by its predecessor government, which generally reflected a technology and participant neutral approach to regulation.

If the initial industry response is anything to go by, there is much to commend this new, more targeted approach, but closer inspection of the reforms indicates some lurking problems. For instance, there is a real concern that there is much scope for the Australian Competition and Consumer Commission (**ACCC**) to increase its influence in the telecommunications industry in a manner which is, in fact, not conducive to long term competition.

Objectives and structure of the Bill

The Bill is stated to have three primary objectives:

(a) addressing Telstra's vertical and horizontal integration;

(b) streamlining the access and anti-competitive conduct regimes provided for under Parts XIB and XIC of the *Trade Practices Act 1974* (Cth) (**TPA**); and

(c) strengthening consumer safeguard measures and reducing unnecessary red tape.

The Bill contains amendments to the following pieces of legislation:

(a) the *Telecommunications Act 1997* (Cth);

(b) the *Radiocommunications Act 1992* (Cth);

(c) the *Trade Practices Act 1974* (Cth);

(d) the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth); and

(e) consequential amendments to the *National Transmission Network Sale Act 1998* (Cth).

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Inside This Issue:

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Contents

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Addressing Telstra's vertical and horizontal integration

Telstra's integrated position across all telecommunications platforms has long led to concerns that the existing telecommunications structure is failing consumers, businesses and the economy in general. The Bill proposes fundamental reforms aimed at addressing Telstra's vertical and horizontal integration and the power imbalance which flows from Telstra's dominance in the provision of fixed line carriage services.

The Bill will allow Telstra to voluntarily undertake structural separation and to voluntarily offer to divest control over its hybrid coaxial networks and subscription television broadcasting licences (Foxtel). Strong incentives are included in the Bill for Telstra to provide such voluntary undertakings, in the form of denial of access to designated parts of the spectrum if it does not do so. If structural separation is not offered, the Government will impose a strong functional separation framework on Telstra by requiring it to:

(a) conduct its network operations and wholesale functions at arm's length from the rest of Telstra;

(b) provide equivalent price and non-price terms to its retail business and non-Telstra wholesale customers; and

(c) be transparent to the regulator and competitors via strong internal governance structures.

Changes to Parts XIB and XIC of the TPA

In order to address concerns that the access provisions of Part XIC of the TPA have failed to adequately provide access to telecommunications infrastructure in a timely fashion and that the provisions of Part XIB of the TPA have not adequately addressed possible breaches of competition law within telecommunications markets, the Bill proposes certain amendments to both Parts.

Surprisingly, the amendments to Part XIB are relatively minor. They remove the procedural fairness requirements which previously obliged the ACCC to consult with a party before issuing a Part A competition notice (a process which the Government believes was previously prone to delay and obstruction).

The amendments to Part XIC are more substantial and give the ACCC a greater role in determining the terms and conditions on which access is to be granted to telecommunications infrastructure by allowing the ACCC to:

(a) determine up-front terms and conditions for a 3-5 year period (following industry consultation);

(b) determine principles to apply for longer periods;

(c) make binding rules of conduct to immediately address problems with the supply of regulated wholesale services; and

(d) reject 'serial' undertakings offered by access providers as a means of delaying the grant of access.

Strengthening consumer safeguard measures

The Bill identifies the following two objectives:

(a) strengthening consumer safeguard measures in the transition to the NBN;

(b) reducing red tape by addressing the requirement for carriers to pay the universal service obligation (**USO**) levy, carrier licence fees, the costs of the National Relay Service and funding for the Australian Communications and Media Authority (**ACMA**); and

The Bill introduces a number of measures to affect these objectives, some of which include:

(a) requiring Telstra to meet new minimum performance benchmarks in their management of the USO (including civil penalties of up to $10 million for failures to do so);

(b) providing new minimum performance benchmarks on the Customer Service Guarantee provided by telephone companies to meet or exceed CSG time periods;

(c) requiring telephone companies to either offer priority assistance services or inform them of their availability to be purchased;

(d) providing the ACMA with increased powers to issue infringement notices instead of commencing court proceedings; and

(e) exempting carriers with revenue less than $25 million per annum from paying an annual carrier licence fee.

If structural separation is not offered, the Government will impose a strong functional separation framework on Telstra

What is the impact for Telstra?

The Bill creates a dilemma for Telstra. It must either:

(a) agree to divest its copper line network and, potentially, control of its hybrid fibre – coaxial network and control of Foxtel in return for access to the communications spectrum it will require to compete in the market for the next generation of wireless broadband services; or

(b) retain these networks and control of Foxtel in circumstances where it will be excluded from access to the relevant spectrum, at the same time facing increasing regulation of its business with the ACCC seeking to achieve 'functional separation'.

The first 'structural separation' option, which is the Government's preferred option, may well result in Telstra having to divest assets at a substantial discount to their current book value, either to a competitor or more likely to the Government's NBN Co, which may very well cherry pick which of these assets it chooses to acquire.

The second 'functional separation' option will result in Telstra holding on to a copper line network, which Senator Conroy was quick to note requires extensive maintenance and which may very well be redundant in the next ten years once the NBN is established. Further, Telstra may be shutting itself out of developing markets for provision of content through wireless broadband services, which is clearly a key to the future of telecommunication services in Australia.

In seeking to nudge Telstra in the direction of structural separation, the Government is hoping that it has achieved the right balance in its carrot and stick approach, but that does not mean that there are not risks which may stymie the Bill.

The Australian Constitution permits the Government to acquire property but only if such acquisition is on just terms. The critical issue here is whether the Government, despite its insistence that Telstra has the flexibility to choose the future direction of its business, has effectively made Telstra an offer it can't refuse and which, if accepted by Telstra, is likely to result in the Government's NBN Co or Telstra's current or potential competitors, acquiring Telstra assets at steeply discounted prices in what amounts to a forced sale scenario.

No doubt Telstra will be keenly considering this issue in the coming weeks. If the Bill does come into effect, a legal challenge is at least a possibility. Alternatively, Telstra may seek to use this legal uncertainty as a bargaining chip to achieve more favourable terms should it look to agree a voluntary undertaking.

What is the impact on competition and the role of the ACCC?

Based on the wording of the Bill, the role that the ACCC is to play in achieving the Government's aims, although generally applauded by consumers and the industry itself, is deserving of some scrutiny.

When Part XIB (which deals with anti-competitive conduct) and Part XIC (which deals with access to telecommunications infrastructure) were introduced into the TPA in 1997 the intention was that such industry specific competition regulation would ultimately be repealed and that the industry would eventually be subject only to those provisions of the TPA which apply to all industries. Some 12 years later, those Parts remain in force and with some of the most significant structural changes the industry has seen about to occur, we are further than ever away from reverting to non-industry specific competition regulation and closer than ever to a more interventionist ACCC.

The outcome of the proposed reforms is that the ACCC will be able to more readily and directly influence the terms on which access is provided both in the transition period to the NBN and thereafter, with reduced scope for challenge (and regulatory gaming) by the relevant participants.

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The ACCC has long recognised the important part that controlling access to infrastructure, including access pricing, plays in regulating competition in the industry, telling the Productivity Commission in 2000 that "if the preferred outcome is a 'positive act' then Part XIC may be the preferable 'regulatory tool'". It would seem that it will now have the preferable regulatory tool.

Senate

The Bill has received a mixed response from parties in the Senate. While the Government appears to have obtained the support of the Greens, the Coalition was not as responsive, even levelling the accusation that the Government was "holding a gun" at Telstra's head.

While requesting that the Government prioritise access for rural, regional and disabled citizens due to past access concerns, the Greens were prepared to support the Bill within the Senate. Greens communications spokesman Scott Ludlam commented that the Bill was in line with demands made by the industry for many years, and stressed that not only Telstra, but the NBN Co or any other telecommunications provider, should "never be allowed to own public infrastructure and simultaneously compete with retail providers" as competition and national telecommunications growth would be unacceptably affected.

The Coalition however was not so enthused. Shadow communications minister Senator Nick Minchin chastised the Government for what he believed was insufficient analysis of the impact the Bill would have on employees of Telstra, shareholders and customers. Senator Minchin believed that, given the apparent more conciliatory stance and attitude of current Telstra management, the Government should take a more considered and cooperative approach. He believed that if the government was focused on building the NBN and was committed to achieving the stated objectives, the Government should instead take an approach which would not lead to serious risks within the telecommunications sector following any break-up of Telstra.

Consumer and lobby groups

One of the key issues which garnered significant attention in the first days following the Bill's announcement was the potential effect it would have on the shareholders of Telstra. The Australian Shareholders' Association chief executive, Stuart Wilson, believed it represented a "giant kick in the teeth for Telstra shareholders" and that there was "not one good thing for shareholders to come out of the [Bill]". These vehement comments were centred on the belief that those individuals, who had previously purchased shares from the Government, were highly susceptible to the effects of "draconian selective rules" now sought to be imposed by the Government.

The Bill has received a mixed response from parties in the Senate

However, consumer bodies were generally positive towards the introduction of the Bill, with sentiments that the proposal was overdue. Australian Communications Consumer Action Network CEO Allan Asher stated that the new provisions for minimum performance benchmarks and new ACMA powers were overdue as the "past assumption that retail competition will guarantee high levels of customer service has proved false". Additionally, Choice Director of Policy and Campaigns, Gordon Renouf, emphasised that consumers would be the winners from improved productivity where retailers compete on a fair basis.

Access seekers

The reaction amongst access seekers appears unequivocal, with all praising the Bill as a positive step to remedying what was perceived to be a significant deficiency within the industry. Macquarie Telecom was enthusiastic about the Bill's approach, provided "the government and the ACCC, who will play a key role here, do stick to the path that's been set". iiNet regulatory director Steve Dalby echoed these comments and believed that while the Bill was positive, he hoped to see objective criteria set that would measure the outcomes of any proposed separation.

AAPT CEO, Paul Broad, believed the Bill went further than expected, though highlighted that the ultimate focus should remain on ensuring customers can move freely between providers and there was more transparency around access and pricing.

Optus regulatory director Andrew Sheridan believed that the Bill was "done in a way which clearly reaches out to Telstra". Internode carrier relations manager John Lindsay believed that the government was "greenmailing" Telstra into cooperating on the implementation of the NBN.

An initial impression

The Bill represents a vital first step in establishing the regulatory framework in which the NBN will operate. However, it may not deliver the outcomes it seeks to achieve as:

(a) there remains significant uncertainty surrounding the possible structural separation of Telstra. Not only does this uncertainty arise because Telstra is only required to '*voluntarily*' submit a structural separation undertaking, but the effects of a failure to do so, in terms of denial of access to parts of the spectrum, may lead to challenges by Telstra to the constitutional validity of the scheme proposed in the Bill; and

(b) much of the detail surrounding the terms on which structural separation and functional separation undertakings will be approved remains unstated. In the case of the former the role of the ACCC and the Minister in terms of determining the factors which will be taken into account are not specified. In the case of the latter, while the requirements of functional separation are more clearly outlined, the final decision to accept or reject lies with the Minister who must seek the ACCC's advice.

The Government appears to be applying commercial pressure to force Telstra to sell its assets to the NBN without making it do so. In what could be a flag for its true intentions, in its outline of the Explanatory Memorandum, the Government says structural separation:

> *...may involve Telstra progressively migrating its fixed-line traffic to the NBN over an agreed period of time and under set regulatory arrangements, and sell or cease to use its fixed-line assets on an agreed basis. This approach will ultimately lead to a national outcome where there is a wholesale-only network not controlled by any retail company—in other words, full structural separation in time. Such a negotiated outcome would be consistent with the wholesale-only, open access market structure to be delivered through the NBN.*

Telstra will have a difficult decision to make and must make it fairly quickly. The longer it delays deciding to 'roll' its assets in (if that what it ultimately decides), the greater the risk that those assets will have less value to NBN Co as it builds its own network. Historically Telstra has seized every avenue to protect its position. It is arguable that this time the Government has applied some significant pressure to avoid that.

It seems that the Government has chosen to regulate competition in the market in the important transition period to the NBN through means of incentives for Telstra to structurally separate and by giving the ACCC broader powers to determine access terms and conditions. Whether these will be successful in controlling the current 'gorilla' in the industry, Telstra, or preventing the emergence of another dominant market player, or whether they will simply result in the ACCC becoming a de facto industry participant remain to be seen.

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Expanding the Domain Name System – The Introduction of New gTLDs

Adrian Fisher examines the introduction of new generic top-level domains, ICANN's proposed application process and recommendations to address anticipated trade mark issues.

The Domain Name System is set for a shake-up in 2010 as the Internet regulator ICANN (the Internet Corporation for Assigned Names and Numbers) prepares to open-up the previously inviolable top-level domain space to the public. Under a policy currently being finalised by ICANN, an application process would commence in the first quarter of 2010 to allow interested parties to apply for new generic top-level domains (or **gTLDs**). There are currently 21 existing gTLDs (including .com, .info, .org, and .biz). Most of these gTLDs are reserved for particular uses. The new gTLD policy will see a potentially large number of new gTLDs, registered for varying purposes, added to this list.

The proposed policy is significant and touches on a range of technical, procedural and legal issues. The first part of this article provides a high-level summary of the steps involved in and obstacles to successfully registering a new gTLD. The second part of this article discusses the recommendations of the Implementation Recommendation Team which would provide significant further protection to trade mark owners on the Internet.

The proposed gTLD application process

The application submission period for new gTLDs could open as early as the first quarter of 2010. During this period, corporations, organisations and institutions of good standing may apply to register a new gTLD. Applicants may apply for community-based gTLDs (being gTLDs for the benefit of a specific community) or standard gTLDs (being gTLDs for other purposes).

Before ICANN grants an application, the applicant must successfully navigate a number of review stages. A useful map of these stages is available at ICANN's website at http://www.icann.org/en/topics/new-gtlds/interactive.htm. ICANN's Draft Applicant Guidebook, Version 3, which is referenced in this article, provides a detailed description of the proposed gTLD application process.

Initial and Extended Evaluations

Following an initial administrative review, ICANN will conduct what is called the Initial Evaluation. During this evaluation, ICANN will assess the appropriateness of the proposed gTLD string and the capability of the applicant to run a registry. Specifically, ICANN will evaluate:

- The following aspects of the **gTLD string** (ie the letters and/or characters that comprise the gTLD):
  - **DNS Stability**: Will the proposed gTLD adversely affect the security or stability of the Domain Name System?
  - **String Similarity**: Is the proposed gTLD identical or confusingly similar to existing top-level domains, other proposed gTLDs or internationalised country code top-level domains or any prohibited or reserved name (such as "example", "www" and "test")? The proposed test for confusing similarity is whether a proposed gTLD "so nearly resembles another visually that it is likely to deceive or cause confusion… in the mind of the average, reasonable Internet user."[1] Confusion must be probable, not just possible.
  - **Geographical Names**: Does the gTLD comprise a geographical name (such as the name of a region, country, city or area)? If so, does the application include evidence of the support or non-objection of the relevant governments or public authorities?
- The following aspects of the **gTLD applicant**:
  - **Technical & Operational and Financial Capability**: Does the applicant have the capability (technically, operationally and financially) to run a gTLD registry?
  - **Registry Services**: Do the services of the proposed gTLD registry raise significant stability or security (including data protection) issues?

An application that has failed the Initial Evaluation (except in respect of the string similarity review) may request an Extended Evaluation, which could involve ICANN referring the application to one or more expert panels. An application that passes the Initial Evaluation and any Extended Evaluation would then proceed to the dispute resolution stage of the application process.

Resolution of objections to a gTLD application

Certain members of the public may lodge formal objections to a proposed gTLD up until soon after ICANN has completed the Initial Evaluation stage.

Such objections may only be made on one or more of the following grounds:

- That a proposed gTLD "so nearly resembles another that it is likely to deceive or cause confusion"[2] (the ***string confusion ground***).
- That a proposed gTLD infringes an objector's existing legal rights, particularly registered or unregistered trade mark rights (the ***legal rights ground***).
- That a proposed gTLD is "contrary to general principles of international law for morality and public order"[3] (the ***morality and public order ground***).
- For a community-based application, that there is "substantial opposition from a significant portion of the community to which the string may be targeted"[4] (the ***community ground***).

ICANN will appoint independent dispute resolution service providers to administer proceedings to determine objections to gTLD applications. These proceedings would be determined by a relevant expert or experts with reference to the tests and standards developed by ICANN.

Under the string confusion ground, the proposed test is similar to the test applied in the Initial Evaluation, except that it is not limited to visual confusion. Objectors could object on the grounds that a gTLD is aurally similar or similar in meaning to an existing or proposed gTLD.

Under the legal rights ground, in determining whether an objector's existing legal rights are infringed, consideration would need to be given to whether:

the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trade-mark or service mark ('mark'), or unjustifiably impairs the distinctive character or the reputation of the objector's mark, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector's mark.[5]

The Draft Applicant Guidebook lists a number of factors which experts determining legal rights objections should consider. These factors are consistent with principles that panels administering proceedings under the Uniform Domain Name Dispute Resolution Policy (the **UDRP**) have applied, including whether the gTLD applicant has a legitimate interest in the word(s) comprising the proposed gTLD.

ICANN is concerned to avoid people making frivolous or vexatious objections which would increase the administrative burden placed upon the application process. ICANN will therefore only accept objections made by certain members of the public. For example, only existing gTLD registries or new gTLD applicants may object to a gTLD application under the string confusion ground. Only legal rights holders may object under the legal rights ground. Anyone may object under the morality and public order ground, but ICANN will apply a 'quick look' procedure to eliminate any frivolous or vexatious objections at an early stage. An established institution associated with a clearly delineated and relevant community may object on the community ground.

One of the more significant recommendations of the IRT is the creation of an IP Clearinghouse.

ICANN has mooted the idea of an Independent Objector whose role would be to file and prosecute objections under the morality and public order and community objection grounds, and to act "solely in the best interests of the public who use the global Internet."[6] The Independent Objector would act to file an objection in circumstances where no objection had otherwise been filed to an application for a gTLD "that would be considered objectionable across many jurisdictions."[7]

String Contention

During the application process, ICANN will place certain gTLDs into "contention sets". These sets would comprise proposed gTLDs that are either in:

- direct contention with each other (ie they are identical or confusingly similar to each other); and/or
- indirect contention with each other (ie they are in direct contention with a common third gTLD).

If an application makes it through the Initial Evaluation and any Extended Evaluation, and succeeds against any objections, but is in a "contention set", ICANN will resolve that contention set prior to granting the application.

ICANN will resolve a contention set by conducting a "community priority (comparative) evaluation" and/or (if necessary) by auction. The comparative evaluation process applies only to community-based applications, which will be evaluated and given a score depending on a range of factors, including the nexus between the proposed gTLD, the applicant and the community. A successful community-based application will have priority over an identical or confusingly similar standard application.

ICANN expects that most contention sets will be resolved through the comparative evaluation process or by private agreement between applicants. In other cases, contention sets will be resolved by auction. ICANN recognises that it may receive "significant funding" through this auction mechanism. This may certainly be the case if a number of applicants vie for the same or similar generic standard gTLDs. ICANN has flagged that it intends to use funding received through auctions for projects that support its mission statement and not-for-profit status.[8]

Successful applications

If an applicant successfully navigates all of these stages (and provided it has signed ICANN's registry agreement and passed final testing), its proposed gTLD will be deployed into the root zone.

Recommendations of the Implementation Recommendation Team

In response to public comment and concern, ICANN established the Implementation Recommendation Team (the **IRT**) on 6 March 2009 to "develop and propose solutions to the overarching issue of trademark protection in connection with the introduction of new gTLDs".[9] The IRT published its final report to ICANN on 29 May 2009. The report canvasses a number of significant recommendations including:

- the establishment of an **IP Clearinghouse**, effectively a global database of trade mark rights; and
- the introduction of:
  - a **Uniform Rapid Suspension System**, allowing for the expedited resolution of clear-cut cases of cybersquatting; and
  - a **post-delegation dispute resolution process**, allowing for trade mark owners to bring proceedings in certain cases against gTLD registries for endemic abusive practices by their registrants or the registry itself.

ICANN has included a proposed post-delegation dispute resolution procedure in its draft registry agreement for new gTLDs. It is still considering the implementation of the IP Clearinghouse and the Uniform Rapid Suspension System.

The IP Clearinghouse

One of the more significant recommendations of the IRT is the creation of an IP Clearinghouse. The IP Clearinghouse's function would be to collect, hold and verify data about the legal rights of trade mark owners to assist new gTLD registries in their registration processes and their rights protection mechanisms. It is envisaged that the data held by the IP Clearinghouse would be submitted by trade mark owners, registries and registrars.

The IRT has recommended that data held by the IP Clearinghouse would include data relating to both registered and unregistered trade mark rights. The inclusion of unregistered trade mark rights introduces a new level of complexity as different jurisdictions have different understandings of what comprises an unregistered trade mark.

The IRT envisages the creation of a special Globally Protected Marks List, comprising trade marks with a significant level of global protection and recognition. The IRT's recommendation is that any proposed gTLD that is identical or confusingly similar to a trade mark on the Globally Protected Marks List will not pass the Initial Evaluation for string confusion. A failed applicant could request a review from an appointed dispute resolution service provider.

The IRT also recommends that new gTLD registries must initially block the registration of any domain name that is identical to a trade mark listed on the Globally Protected Marks List. The potential registrant could then dispute the blocking of its registration by showing that it has a right or legitimate interest to use the domain name.

For IP Clearinghouse trade marks not listed on the Globally Protected Marks List, the IRT recommends that new gTLD registries must implement a "sunrise registration" mechanism to resolve infringement claims prior to the launch of full registration services. The IRT has recommended a Pre-Launch IP Claims Service that requires a registry to notify a trade mark owner on registration of a domain name identical to its trade mark. The domain name registrant may still register the domain name provided it gives certain warranties as to its rights in that name. Alternatively, the IRT has suggested that new gTLD registries implement a sunrise registration process similar to that used during the launch of the .info gTLD.

The Uniform Rapid Suspension System

Another significant recommendation of the IRT is the introduction of a compulsory expedited dispute resolution process that would complement the fuller processes under the UDRP, or similar procedures implemented by new gTLD registries.

The Uniform Rapid Suspension System (**URS**) would impose streamlined rules and procedures, but could only be used for situations where there is "no genuine contestable issue as to the infringement and abuse that is taking place."[10] The URS is not intended for situations where there is any question about whether a domain name is being used in an infringing or abusive manner.

Although the decision-maker under the URS would decide proceedings on the basis of similar elements as under the UDRP, the proposed standard of proof would be much higher under the URS. A decision-maker would need to satisfy him or herself that the complaint is proven by "clear and convincing evidence that there is no genuine contestable issue."[11] The UDRP, in contrast, requires a decision-maker to make a finding that a complaint is more likely proven than not proven.

Major brands will have the added protection of listing on the Globally Protected Marks List.

The only remedy available under the URS is the take down of a domain name. The infringing domain name would resolve (for the duration of its registration) to an error webpage specifying that it has been suspended under the URS. The registrant would be unable to transfer or otherwise deal with its domain name registration and, at the end of the registration period, the registration would lapse. This remedy differs significantly from the remedies available under the UDRP (ie the transfer of the registration to the trade mark owner or the cancellation of the registration).

Another interesting aspect of the IRT's recommendations is the appointment of an independent URS ombudsman whose role it would be to review first-instance decisions under the URS. There is no similar position under the UDRP system.

Post-delegation dispute resolution

Currently, trade mark owners do not have recourse against registrars or registries who engage in or condone abusive practices such as the endemic registration of domain names that infringe trade mark rights. ICANN has the ability to take action against registries under contract and to revoke registrars' accreditation in certain cases, but traditionally ICANN has not been quick to exercise these powers.

In response to public comment on the issue, the IRT has recommended (and ICANN proposes to implement) a mechanism whereby trade mark owners may commence an administrative proceeding against a new gTLD registry on the basis that the registry is using its gTLD for improper purposes or in bad faith with the intent to profit from registrations of infringing domain names. If a complaint is successful, ICANN may be compelled to take action against a registry, including by terminating the registry agreement (in extreme, repeat cases) or imposing financial penalties.

ICANN's gTLD proposals represent a potentially dramatic overhaul of the Domain Name System.

The IRT's recommendations if implemented represent a significant increase in the armoury of trade mark owners, allowing for the better protection of trade mark rights on the Internet. Trade mark owners will be keen to register their rights with the repository maintained by the IP Clearinghouse (provided it is secure). Major brands will have the added protection of listing on the Globally Protected Marks List. The URS will allow for the cheaper, simpler and quicker resolution of online trade mark infringement disputes on top of the more fulsome procedures under the UDRP and similar policies. And, for the first time, trade mark owners will be able to pursue actions against gTLD registries themselves under the post-delegation dispute resolution mechanism.

Conclusion

ICANN's gTLD proposals represent a potentially dramatic overhaul of the Domain Name System. At this stage, it is not clear what the public take-up of new gTLDs will be. It is also not clear what kinds of gTLDs will be registered. ICANN has consulted widely in formulating its new policy and has developed a coherent and comprehensive draft guidebook. Any entity wishing to register a new gTLD will need to become familiar with that guidebook and, once the application process commences, successfully navigate the numerous steps and obstacles that ICANN has set up to ensure that the integrity of the Domain Name System is not compromised by the introduction of new gTLDs.

ICANN is continuing its consultation phase and intends to publish a final version of the Applicant Guidebook in December 2009. ICANN remains committed to launching the new gTLD application process in the first quarter of 2010.

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(Endnotes)

1 The Internet Corporation for Assigned Names and Numbers, "Draft Applicant Guidebook, Version 3", 2 October 2009, http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf, accessed on 7 October 2009 at page 2-5.

2 Ibid, at 3-14.

3 Ibid, at 3-15.

4 Ibid, at 3-16.

5 Ibid, at 3-14.

6 Ibid, at 3-5.

7 The Internet Corporation for Assigned Names and Numbers, "New gTLD Program Explanatory Memorandum: Description of Independent Objector for the New gTLD Dispute Resolution Process", 18 February 2009, http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf, accessed on 7 October 2009 at page 3.

8 ICANN, above n 1, at 4-15.

9 The Internet Corporation for Assigned Names and Numbers, Board Resolution, 6 March 2009, http://www.icann.org/en/minutes/resolutions-06mar09.htm#07, accessed on 7 October 2009.

10 Implementation Recommendation Team, "Final Report on Trademark Protection in New gTLDs", 29 May 2009, http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf, accessed on 7 October 2009 at page 25.

11 Ibid, at 34.

Search Engine Liability for Defamatory Snippets

Anne Flahvin notes a UK decision on whether 'snippets' provided by online search engines could give rise to liability for defamation.

In a decision that is likely to provide comfort to online intermediaries in Australia, a UK court has held that a search engine is not a publisher, for defamation purposes, either of material on the original website that the search engine links to, or the "snippets" of content which are included in its search results.

The decision will be of particular interest to Australian intermediaries given that the outcome was reached applying general common law principles, and without apparent recourse to European human rights jurisprudence or to UK statutory defences.

Facts

Metropolitan International Schools Ltd v Designtechnica Corporation & Ors[1] involved a claim for defamation by Metropolitan (trading as Train2Game) with respect to bulletin board publications published by Designtechnica Corporation (trading as **Digital Trends**). As well as suing Digital Trends, the plaintiff, a provider of adult distance learning courses, brought proceedings against Google UK Ltd and Google Inc as second and third defendants. The claim against the Google defendants was based on a snippet which appeared when a search was performed on "Train2Game" using the Google search engine:

> *Train2Game new SCAM for Scheidegger…*

Metropolitan claimed that the snippet conveyed an imputation to the effect that its Train2Game course was a scam or fraud intended to deceive.

according to Eady J, Google had "not authorised or caused the snippet to appear on the user's screen in any meaningful sense.

The matter came before Justice Eady in an application by Google Inc (**Google**) seeking to set aside an order granting the plaintiff permission to serve it outside of the jurisdiction. Google submitted that the court either had no jurisdiction to try the claim against it, or, if it did, the court should decline to exercise its jurisdiction. The application was made on several grounds, including that Google had no responsibility for publication of the words complained of and thus there were no reasonable prospects of success as required by the Civil Procedure Rules.

Can the operator of a search engine be liable for publication?

In the absence of any decision which had considered the liability of search engines for content linked to and/or appearing in 'snippets' served up with the search results, Eady J was required to go back to first principles.

Counsel for Google submitted that in light of the automatic nature of a search engine's activities, it could not be held responsible for anything appearing on the site which it directed users to, nor for the content of defamatory snippets appearing on its own website. As a fallback submission, Google submitted that liability could not arise prior to notification from a would-be-claimant as to the specific URL from which the words complained of originated.

Eady J referred to his earlier decision in *Bunt v Tilley*,[2] in which his Honour had held that an internet intermediary that was doing no more than acting as a passive medium of communication (ie a mere facilitator) could not be characterised as a publisher at common law, and would not therefore need to rely on the defence of innocent dissemination.

The question in this case, according to his Honour, was whether Goggle should be regarded as a mere facilitator with respect to publication of the snippet complained of, and, whether that would remain a proper characterisation of Google's role even after it was notified.

Counsel for Google noted that the common law regarding the liability of internet intermediaries for defamatory publications was unclear and uncertain, and urged the Court to develop the law, in so far as it was necessary to do so, having regard to Article 10 of the European Convention on Human Rights. Of significance for Australian observers, however, is that while Eady J commented briefly on the Strasbourg human rights jurisprudence, his Honour did not appear to have felt it necessary to rely on that jurisprudence in order to reach his finding with respect to Google's potential liability. In this regard it is interesting to note his Honour's reference to *Derbyshire County Council v Times Newspapers Ltd*,[3] in which, it will be recalled, the Court of Appeal relied on Strasbourg jurisprudence to find that a democratically elected governmental body had no standing to sue for defamation, but the House of Lords found that the same result could be reached relying on general common law principles, without the need to rely on European convention rights. Shortly after the House of Lords' decision in that case the NSW Court of Appeal applied the Lords' reasoning in *Ballina Shire Council v Ringland*.[4]

In finding that Google was not a publisher, Eady J appeared to place considerable importance on the automatic nature of the search engine's activities. The evidence was to the effect that both the search results and the snippets were generated by computer algorithms, without any human intervention. In that sense, according to Eady J, Google had "not authorised or caused the snippet to appear on the user's screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator."

In testing his own reasoning, Eady J compared Google to a library catalogue in a conventional library, and asked why it was that the conventional library might attract liability were its catalogue records to include defamatory snippets. The answer, according to Eady J, was that the compiler of a conventional library catalogue would have had to have consciously, at some point, chosen the wording of any snippet or summary included in catalogue. That was not the case with a search engine.

Eady J next considered whether the position should be different in the event that the search engine was given notice of the defamatory content of a snippet thrown up by a search result. His Honour noted that in *Godfrey v Demon Internet*,[5] a case in which the defendant ISP was sued with respect to information posted to others and transmitted by it to subscribers, evidence that the ISP had knowledge that the words complained of were defamatory was crucial in determining its liability. According to his Honour, however, search engines are a different kind of intermediary to website hosts. Unlike a website host, for example, they cannot simply press a button to ensure that the offending words will never appear in a search result: they have no control over the search terms typed in by future users. Were Google to have taken steps to ensure that the words complained of did not appear in *any* search, it would have been necessary to "block a huge amount of other material which might contain some of the individual words comprising the offending snippet".

What steps, if any, is a search engine required to take when notified of defamatory material?

Eady J stopped short, however, of saying that search engines could refuse to take *any* steps to remove offending material and still avoid being fixed with liability as a publisher.

The evidence in this case was that Google did have a "take down" policy in place and had taken steps to disable links to URLs relating to the words complained of. That conduct was clearly a significant factor in Eady J's reasoning as to why Google could not be fixed with liability as a publisher of the snippets. His Honour noted that Google's "notice and take down procedure" may not have operated as quickly as the plaintiff would have liked, but said that it did not follow as a matter of law that between notification and take down Google becomes or remains a publisher of the offending material. On the contrary, Google should not be fixed with liability on the basis of authorisation, approval or acquiescence while it was taking steps to achieve a 'take down' in relation to a particular URL.

The unanswered question, of course, is whether a search engine that took no steps to remove offending material could be fixed with liability as a publisher.

The unanswered question, of course, is whether a search engine that took *no* steps to remove offending material could be fixed with liability as a publisher. Based on Eady J's reasoning, it would appear likely that liability *could* arise if a search engine were simply to refuse to take steps to take down offending material.

Implications for Australia

Is the approach adopted by Eady J likely to be followed by an Australian court?

In Australia, broadcasters have been held to be liable as publishers of material broadcast by them even where they simultaneously transmit a broadcast produced by another broadcaster, without ever viewing or considering the content.[6] In *Thompson v Australian Capital Television*[7] the Australian High Court refused to characterise such a broadcaster as a mere facilitator of the content being broadcast for the purposes of the common law defence of innocent dissemination.

Of course, a broadcaster is in a very different position to a search engine. While it may not avail itself of an opportunity to review content prior to transmitting, it *could*, if it chose to do so. It is also knowingly involved in the transmission of the content in the sense that it has a contractual relationship with the party responsible for producing the content.

As was highlighted by this case, the defence of innocent dissemination is likely to be of limited practical assistance to a search engine. That defence, both in its statutory and common law forms, extends

the defence of innocent dissemination is likely to be of limited practical assistance to a search engine.

immunity to certain classes of publisher provided that they were not on notice of the defamatory nature of the material sued on, and that any lack of knowledge was not due to a want of exercise of reasonable care. Eady J noted that it would be difficult to see how a search engine could show that it had exercised reasonable care in circumstances where the "throwing up of the relevant snippet was brought about entirely by the search terms of the web user". Eady J also noted that a search engine, unlike a web host, cannot simply press a button to ensure that the offending words will never appear in a search result.

While the facts of this case would involve novel questions of law for an Australian court, it is submitted that the approach adopted by Eady J is likely to be highly persuasive.

The other point of interest for Australian observers was the consideration given by Eady J to the circumstances in which the common law defence of innocent dissemination can be relied on. Like Australia, the UK has a statutory defence of innocent dissemination. It had been thought that with the introduction of the UK *Defamation Act* in 1996, the common law defence of innocent dissemination had been abolished. Eady J agreed to hear argument from Google's counsel to the effect not only that the common law defence was still available to be pleaded, but also that it afforded better protection to internet intermediaries than did the statutory defence in that it could be relied on where a defendant was aware that words in question were defamatory, provided the defendant had no knowledge that the words were indefensible. This submission was based on obiter comments of Denning LJ in *Goldsmith v Sperrings Ltd*.[8] Google submitted that its Article 10 rights (as well as the Article 10 rights of users of search engines) dictated such an approach to the defence of innocent dissemination given that there was otherwise uncertainty as to the appropriate test. Of course, Eady J's comments with respect to innocent dissemination were obiter, given his finding that Google was not prima facie liable as a publisher, but in any event he rejected the approach contended for by Google and held that notwithstanding that the common law defence did seem still to be available, it "would almost certainly not be available to a defendant who has had it drawn to his attention that the words are defamatory, or at least arguably so". Given that the common law defence remains available to be pleaded in Australian jurisdictions (notwithstanding the introduction of a statutory defence with the uniform Defamation Act) the argument run by Google in this case might well get another airing in Australia.

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(Endnotes)

1 [2009] EWHC 1765 (QB).

2 [2007] 1 WLR 1243.

3 [1992] 1 QB 770 and [1993] AC 534.

4 (1994) 33 NSWLR 680.

5 [2001] QB 201.

6 *Thompson v Australian Capital Television Ltd* (1986) 186 CLR 574.

7 Ibid.

8 [1977] 1 WLR 478.

Telstra Corporation Ltd v ACCC [2008]

Thomas Jones and Piccolo Willoughby provide a case note on a recent decision of the Federal Court.

Telstra Corporation Ltd v ACCC [2008] FCA 1758 involved a successful challenge to an arbitral determination made by the Australian Competition and Consumer Commission (**ACCC**) under Part XIC of the *Trade Practices Act 1974* (Cth) (**TPA**).[1] The telecommunications access regime in Part XIC was introduced by the Federal Government in 1997.[2] However, despite substantial regulatory activity in the intervening years, there are still relatively few judicial authorities on its operation.

The Federal Court's decision in this case provides guidance on the meaning and application of key provisions in Part XIC and sets an important benchmark for the quality of ACCC decision-making. It also demonstrates a need for caution by the ACCC in entering into technical regulation of the telecommunications industry.

Access dispute

The access dispute to which the determination related was notified by Optus. It concerned a telecommunications service called the Unconditioned Local Loop Service (**ULLS**), which has been declared since 1999.[3] The ULLS involves Telstra supplying an access seeker with the exclusive use of a pair of metallic wires that run from a local telephone exchange to an end-user's premises.

The dispute concerned the ordering and provisioning of the ULLS where the end-user's premises are located in an apartment block or other 'multi-dwelling unit' (**MDU**) which has its own main distribution frame (**MDF**) on site.

The Federal Court's decision in this case provides guidance on the meaning and application of key provisions in Part XIC

Ordering and provisioning of ULLS is normally carried out in accordance with an industry code called ACIF C569:2005, *Unconditioned Local Loop Service - Ordering, Provisioning and Customer Transfer* (the **ACIF Code**).[4] The ACIF Code was developed by the Australian Communications Industry Forum, which now forms part of the Communications Alliance.

However, the provisioning of ULLS to an MDU involves an added complication not specifically dealt with in the ACIF Code. In order to provide a continuous metallic path between the end-user's premises and the access seeker's equipment in the exchange, jumper wires need to be connected on the MDF at the MDU.

Under the ACIF Code, when a new occupant of premises wishes to be supplied with voice/data services by a provider other than Telstra, the ordering and provisioning process that must be used is called the 'Vacant ULLS' process. The order does not specify a particular pair of wires, but requires Telstra to search for a suitable pair.

In its dispute notification, Optus complained that the need to use the Vacant ULLS process gave Telstra a competitive advantage in relation to MDUs because a new occupant supplied with services by Telstra could often be connected in as little as 1-2 days, whereas a new occupant who chose a different service provider, such as Optus, may have to wait longer. In addition, the Vacant ULLS process required technicians to visit the MDU to connect jumper wires in the on-site MDF whereas, if Telstra was the end-user's chosen service provider there was often no need for such a visit.[5]

Optus wanted the ACCC to remove Telstra's "advantage" and provide Optus with an ordering and provisioning process that was "equivalent" to the process that Telstra used to connect the end-user if it was the service provider.[6] Optus suggested this might involve using the presence of a Soft Dial Tone to indicate the availability of a continuous metallic path.[7]

After conducting site visits to MDUs, the ACCC issued a draft final determination and invited the parties to make submissions on it. The draft sought to incorporate the use of Soft Dial Tone into a new process for ordering and provisioning the ULLS to MDUs that was partly based on an existing process in the ACIF Code called "Transfer ULLS".[8]

In responding to the ACCC's draft, Telstra emphasised that the presence or absence of a Soft Dial Tone on a line plays no role in ordering and provisioning the ULLS under the ACIF Code. Optus essentially supported the draft determination.

Both parties also made submissions on the costs of implementing the proposed new process. Telstra contended it would need to make substantial changes to its IT systems at a cost of approximately $1.7 million. Optus estimated its own implementation costs at $360,000.[9]

Final determination

The ACCC made its final determination on 30 November 2007, requiring Telstra to implement the new process within 180 days, unless the parties agreed otherwise.[10]

The operative clause in the final determination was clause 10, which included the following key paragraphs:[11]

10. *Except where the parties otherwise agree, the supply by Telstra to Optus in respect of the ULLS in MDUs serviced by a MDF in the building is to be as follows:*

    (a) *Where there is an existing Communications Wire between the Telstra exchange and the end-user customer's premises which has a soft dial tone and Optus submits a ULLS Request to Telstra that provides the Service Number (which includes the full national number) and address associated with the Communications Wire, Telstra must treat the request as if it was a ULLS Transfer Request following the ULLS Transfer process specified in the ACIF C569:2005* Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer *industry code.*

    ….

    (d) *For the purposes of the ULLS Transfer Request and in accordance with the definition of Losing Access Seeker stated in the ACIF C569:2005* Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer *industry code, where Telstra has been supplying the service immediately prior to the transfer, Telstra is to be considered the Losing Access Seeker.*

    (e) *Where there is no Communications Wire between the Telstra exchange and the end-user customer's premises (i.e., there is <u>no</u> soft dial tone) and Optus submits a Vacant ULLS Request, Telstra must follow the Vacant ULLS process specified in the ACIF C569:2005* Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer *industry code. ...*

A critical feature of clause 10 was that it required Telstra to follow the Transfer ULLS process in circumstances where the ACIF Code would normally require Telstra to follow the Vacant ULLS process.

The Transfer ULLS process is designed to be used in relation to a specific metallic pair, where the end user is 'churning' from one service provider to another.[12]

As to the parties' costs of implementing clause 10, the final determination was silent. However, the ACCC's supporting reasons summarised the parties' submissions and expressed the ACCC's views on each of the mandatory relevant considerations in s 152CR(1) of the TPA. On "the direct costs of providing access to the declared service" (s 152CR(1)(d)), the ACCC said:

130. The Commission acknowledges that Telstra incurs costs in supplying the ULLS. However, it is the Commission's view that the costs in implementing the final determination will be minimised as the determination requires Telstra to utilise existing provisioning processes for ULLS Transfer Requests pursuant to the ACIF Code and that any benefit to end-users will outweigh the costs of any necessary changes to Telstra's current systems.

131. On this point the Commission notes that the regulatory regime permits Telstra to recover the efficient costs of supplying and charging for the ULLS. …"

Optus complained that the need to use the Vacant ULLS process gave Telstra a competitive advantage

Application for judicial review

Telstra applied for judicial review of the final determination in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[13] The grounds of review were that the ACCC had:

- failed to comply with s 152CR(1)(d) of the TPA, because it failed to take into account Telstra's direct costs of implementing the ordering and provisioning process imposed by clause 10 (**Direct Costs Ground**);
- failed to comply with s 152AQB(9) of the TPA, because it failed to take into account its own model terms and conditions relating to the ULLS (**Model Terms Ground**);
- failed to take into account the ACIF Code, which was a mandatory relevant consideration by implication from the subject matter, scope and purpose of Part XIC (**ACIF Code Ground**);
- failed to properly exercise the power in s 152CP, because the final determination was uncertain in its operation (the **Uncertainty Ground**);
- exercised the power in s 152CP so unreasonably that no reasonable person in the position of the ACCC could have so exercised it (**Unreasonableness Ground**); and
- acted beyond power, in that paragraph (e) of clause 10 of the determination dealt with a matter that did not relate to access by Optus to the ULLS, because it was expressed to apply where there is no existing metallic pair (**No Communications Wire Ground**).

Expert evidence

Both Telstra and Optus presented expert evidence on the operation of the ACIF Code and the final determination. While this evidence had not been before the ACCC, Rares J held that some of it was admissible to prove the meaning of technical terms.[14] His Honour treated the evidence on the operation of the determination itself as being in the nature of submissions.[15]

Judgment

Rares J delivered judgment on 24 November 2008, deciding the case in Telstra's favour on all grounds.

His Honour:

- declared the final determination invalid;
- quashed the determination;
- remitted the access dispute to the ACCC for redetermination according to law; and
- ordered Optus to pay Telstra's costs.

Direct Costs Ground

On the Direct Costs Ground, Rares J accepted Telstra's submission that s 152CR(1)(d) required the ACCC to take into account the direct costs of providing access to the ULLS, along with the other mandatory considerations listed in s 152CR(1), "as a fundamental element in making its decision". He said at [110]:

> *I am of opinion that the sense in which the High Court used the expression "fundamental weight" in this context is to require the decision-maker to treat the* consideration *of the factors, as opposed to the factors themselves, as a central element in the deliberative process:* Meneling Station *158 CLR at 338 per Mason J.*

He also held that s 152CR(1)(d) required the ACCC "to have regard to the actual direct costs which Telstra would incur in providing the access [to the ULLS] to Optus as required by the final determination."[16] It was "beside the point" that Telstra may be able to recover such costs through charges for the ULLS, because "[t]he incurring of a cost is different from its possible recovery."[17]

His Honour found that the references in the ACCC's supporting reasons to the parties' estimates of their implementation costs were not sufficient to comply with s 152CR(1)(d).[18] Sub-section 152CP(5) required the ACCC to give reasons for making the final determination, and s 25D of the *Acts Interpretation Act 1901* (Cth) provided that the obligation to give reasons "extended to setting out … [the ACCC's] findings on material questions of fact including references to the evidence or other material on which those findings were based."[19]

Rares J decided the case in Telstra's favour on all grounds

He concluded:

> *A mere recitation of submissions to it and then the expression of an unreasoned conclusion, could not suffice to comply with the Commission's obligation, within the meaning of s 152CR(1)(d), to have regard to Telstra's direct costs of providing access and its claim that they would be about $1.7 million.*[20]

Model Terms Ground

The Model Terms Ground related to the ACCC's obligations under s 152AQB(2) of the TPA "to make a written determination setting out model terms and conditions relating to access to each core service". The ULLS is one of four core services for the purpose of the section. Sub-section 152AQB(9) requires the ACCC to have regard to such a determination if it is required to arbitrate an access dispute in relation to the core service concerned.

In making its final determination, the ACCC purported to have regard to the *Final Determination - Model Non-price Terms and Conditions*, which it had made in October 2003 (**2003 Model Terms**).[21] However, Telstra argued that the ACCC had fundamentally misunderstood the 2003 Model Terms, by failing to appreciate that they incorporated relevant provisions of the ACIF Code. Rares J agreed with Telstra that the 2003 Model Terms did incorporate relevant provisions of the ACIF Code, and concluded that the ACCC had not complied with s 152AQB(9).[22]

Somewhat controversially (as it turned out), he also held that s 152AQB(2) required the ACCC to make a determination of model terms and conditions that was comprehensive in its scope, and set out "all material" or "all appropriate" terms and conditions for each core service.[23] This was the subject of appeals by the ACCC and Optus, which were recently decided. A full bench of the Federal Court (*Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68) held that, on its true construction, s 152AQB(2) required the ACCC only to determine "some" model terms and conditions for each core service. The "scope and content" of the model terms and conditions was otherwise a matter for the ACCC's discretion.[24] While this did not substantially alter the effect of the decision below, the Court varied the orders made by Rares J to ensure that, on remitter, the ACCC would not adopt an interpretation of s 152AQB(2) which the Court regarded as erroneous.[25]

the decision makes it clear that the ACCC must have regard (in the sense of giving them fundamental weight in the decision-making process) to the access provider's costs of implementing any system or process changes that a proposed determination would require

ACIF Code Ground

Rares J also found that the ACCC had misunderstood the ACIF Code itself. However, on one view of his Honour's reasons for judgment, this finding simply confirmed the ACCC's failure to have regard to the 2003 Model Terms, as required by s 152AQB(9), rather than giving rise to a separate error of law.

Uncertainty Ground

On the Uncertainty Ground, Rares J held that:

> *In the way it was expressed, the Commission's final determination did not adapt the provisions of Code 569, because it presupposed the fundamental matter that an ULLS transfer request had to determine, namely, the existence of an ULLS to transfer. This created a fundamental uncertainty both as to how the final determination should be construed and the methodology for Telstra to follow postulated in par 10 [of the determination]. If the presupposition is wrong in respect of a request made by Optus, will Telstra be in breach of the final determination since it can never supply the service over the identified pathway used by the soft dial tone? Alternatively, will Telstra be entitled to reject the request in any event because the omission of essential information in the ULLS transfer request process … (namely the ULLS identifier) entitled it to do so?*[26]

Paragraph (a) of clause 10 proceeded on the assumption that the presence of a Soft Dial Tone would indicate that the line consisted only of a metallic pair of wires that were capable of being used to supply the ULLS. It was uncertain how Telstra was supposed to test that assumption, or what consequences would follow if it proved to be false. More generally, it was uncertain which provisions of the ACIF Code were intended to operate with the final determination.

Unreasonableness Ground

On the Unreasonableness Ground, Rares J referred to "the important distinction" drawn by Dixon CJ, Williams, Webb and Fullagar JJ in *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Limited* (1953) 88 CLR 100 at 120, between:

> *… a mere insufficiency of evidence or other materials to support a conclusion of fact where the function of finding the fact has been committed to a person or body by the Parliament and, on the other hand, the absence of any foundation in fact for the fulfillment of the conditions upon which, in point of law, the existence of the power depends.*[27]

He then concluded that:

> *[I]n reality, the Commission was not satisfied of the requisite matters upon which its power to make the final determination depended, namely, it acted on the misconception that the presence of soft dial tone demonstrated the existence of an unconditioned communications wire or ULLS. This was because of its misunderstanding of the subject matter with which it purported to deal, that I have described. The Commission's determination was therefore unreasonable and an improper exercise of power.*[28]

No Communications Wire Ground

Lastly, on the No Communications Wire Ground, Rares J found:

> *The drafting of par 10 was inapt to specify terms and conditions for ordering and provisioning a communications wire or ULLS in a practical or intelligible fashion. The Commission's power was conferred to enable it to regulate a declared service, such as the ULLS, not to regulate something else. The Commission's powers under Part XIC of the Act to determine access to the declared service, being the ULLS, did not extend to determining matters where no ULLS existed as contemplated by par 10(e). I am of opinion that the Commission exceeded its jurisdiction by including par 10(e) in its final determination.*[29]

While paragraph (e) would have been severable from the remainder of clause 10, such severance "would not make the final determination any more meaningful or give it validity" in view of his Honour's conclusions on the other review grounds.[30]

Implications of the decision

The judgment of Rares J and, in particular, his finding on the Direct Costs Ground have significant implications for the making of future arbitral determinations by the ACCC, under Part XIC and Part IIIA of the TPA.

First, the decision makes it clear that the ACCC must have regard (in the sense of giving them fundamental weight in the decision-making process) to the access provider's costs of implementing any system or process changes that a proposed determination would require.

Second, to comply with s 152CR(1), it will not be enough for the ACCC merely to recite in its supporting reasons the parties' submissions on the mandatory relevant considerations listed in that section. Rather, the ACCC must direct an "active intellectual process" at each consideration.[31] The reasons must state the ACCC's findings on material questions of fact, along with references to the material on which those findings were based.[32]

His Honour's finding that the ACCC had fundamentally misunderstood the ACIF Code, and his conclusions on the Uncertainty Ground and the Unreasonableness Ground, also raise questions about the wisdom of the ACCC involving itself in technical regulation. In circumstances where technical standards have been developed by an industry body such as the Communications Alliance, should the competition regulator refrain from imposing changes to those standards? Or should it engage its own technical experts, as contemplated by s 152DC(1)(e), to advise on such changes? In some cases, it may be preferable to refer technical and operational matters to the industry body for inquiry prior to the ACCC making a decision.[33]

Thomas Jones is a Special Counsel and Piccolo Willoughby is a Solicitor at Mallesons Stephen Jaques. Both were involved in the carriage of this matter for Telstra. However the views expressed here are those of the authors.

(Endnotes)

1 The determination was made on 30 November 2007. Public versions of both the determination and supporting reasons were later published

on the ACCC's website at www.accc.gov.au/content/index.phtml/itemId/793062.

2 See *Trade Practices Amendment (Telecommunications) Act 1997*.

3 The ULLS was most recently declared by the ACCC on 28 July 2006: see *Commonwealth of Australia Gazette*, No GN31, 9 August 2006.

4 Clause 8.9 of the ACIF Code in turn requires transactions associated with the ordering, provisioning and customer transfer of ULLS also to be in accordance with an industry guideline called ACIF G587:2002, *Unconditioned Local Loop Service IT Specification: Transaction Analysis*.

5 See the ACCC's supporting reasons, paras 24-27.

6 See the ACCC's supporting reasons, paras 2-3 and TPA s 152AR(3)(c), (4A).

7 ACCC's supporting reasons, para 32.

8 ACCC's supporting reasons, para 58ff.

9 ACCC's supporting reasons, paras 62, 64.

10 ACCC's final determination, cl 11.

11 Clause 10 is quoted in full in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at para 9.

12 ACIF Code cl 11.1.1(c).

13 The application was filed on 28 December 2007.

14 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [48]ff, following *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 398-399 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 566 [458] per Weinberg J; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 437-439 [659]-[666] per Tamberlin J.

15 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [52].

16 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [120].

17 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [117].

18 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [118].

19 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [119]. His Honour referred in this context to *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [68] per McHugh, Gummow and Hayne JJ.

20 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [124].

21 ACCC's supporting reasons, para 69ff.

22 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [133]-[138].

23 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [35]-[45].

24 *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68 at [49] per the Court (Ryan, Jacobson and Foster JJ).

25 *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68 at [66] per the Court.

26 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [173].

27 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [181]. In the same context, Rares J also referred to *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at 120 per McHugh and Gummow JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 223-224 [39] per Gleeson CJ, Gummow and Heydon JJ; and *Avon Downs Pty Limited v Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J.

28 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [183].

29 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [189].

30 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [191].

31 Tickner v Chapman (1995) 57 FCR 451 at 462 C-D per Black CJ, quoted by Rares J in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [106].

32 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [119].

33 In so far as this can be done consistently with confidentiality requirements: see for example TPA s 152CZ.

The Future of the 'Multiple Publication' Rule

Anne Flahvin discusses proposals to introduce a 'single publication rule' for internet publications in the UK and whether Australian defamation law might also move in this direction.

The UK Government is considering abandoning the 'multiple publication' rule in favour of a 'single publication' rule with respect to defamatory internet publications.

Such a reform, which would bring UK law in line with US law, has long been urged by online publishers in Australia and the UK. If adopted in the UK it could be expected to lead for calls for a similar reform to Australian law.

What is the 'multiple publication' rule?

The multiple publication rule stems from the 19th century case of *Duke of Brunswick v Harmer*, in which the Duke of Brunswick sent his servant to purchase a back issue of a newspaper published 17 years earlier, thus triggering an action for defamation by the Duke with respect to material contained in the newspaper. The court held that the delivery of the newspaper to the Duke's agent constituted a separate publication of the newspaper for the purposes of defamation law entitling the Duke to sue. The case remains authority for the proposition that defamatory material is published wherever and whenever it is read, seen or heard.

While the rule was relatively uncontroversial in the context of hard copy publications, its application to online publications has attracted much criticism.

One effect of the rule that has caused particular concern to publishers of online archives is its effect on the statute of limitations. Like Australia, the statute of limitations for defamation in the UK is 12 months from the date of publication. When material is available online, the limitation period is effectively open-ended, with a fresh limitation period starting to run each and every time defamatory material is accessed online.[1]

> ***While the rule was relatively uncontroversial in the context of hard copy publications, its application to online publications has attracted much criticism.***

Courts in the UK have also held that an online publisher who becomes aware that the truth of an article is disputed, and fails to bring readers' attention to that fact, cannot rely on a defence of qualified privilege if sued for defamation: *Loutchansky v Times Newspapers Ltd.*[2] A qualified privilege that arose in respect of the hardcopy original – based on a duty to publish material in the public interest – was not available with respect to successive online publications. By then there was no public interest to warrant publication.

When material is available online, the limitation period is effectively open-ended

Another effect of the multiple publication rule is to enable a plaintiff to commence an action in any jurisdiction in which the matter complained of was read, seen or heard, subject only to considerations of forum non conveniens. In *Dow Jones v Gutnick*,[3] US publisher Dow Jones urged the Australian High Court to apply a single publication rule, the effect of which would have been to enable Dow Jones to avoid having to defend defamation proceedings in Australia with respect to material made available on a US-based server. The High Court held instead that the multiple publication rule was firmly entrenched in Australian defamation law.

How might a single publication rule operate?

In the US, the single publication rule has been applied by the courts to determine both the place of publication and the time of publication. The Consultation Paper released by the UK Ministry of Justice appears only to canvass the question of *when* publication should be taken to have occurred.

One question canvassed in the Consultation Paper is what would constitute a new publication under a single publication rule. The Paper notes that in the US, in relation to hard copy publications, morning and afternoon editions of a newspaper have been held to constitute separate publications, as have hard copy and paperback editions of a book, but the reprinting of a magazine in response to public demand has been held not to constitute a new publication.

The Paper also asks whether modification of online material should suffice to trigger a fresh publication. In *Firth v State of New York*,[4] it was held that unrelated modifications made to a website did not result in a new publication with respect to a report that had published on the website.

Extending qualified privilege to material in online archives

The UK Consultation Paper has also raised the possibility of maintaining the multiple publication rule, but extending a defence of qualified privilege to online archives outside of the one year limitation period "unless the publisher refuses or neglects to update the electronic version, on request, with a reasonable letter or statement by the claimant by way of explanation or contradiction".

Interaction with limitation periods

Finally, the Consultation Paper seeks comment as to whether it is appropriate to reform limitation periods for defamation.

A 2001 report on Limitation of Actions by the UK Law Council recommended extending the limitation period for defamation to three years.[5] A study by the Commission in 2002 reiterated that recommendation, suggesting that the current short (one year) limitation period combined with a multiple publication rule was disadvantageous for both claimants *and* defendants.

Issues raised for consideration by the Consultation Paper include not only the time period for any new limitation period, but also the question of whether time should begin to run from the date of publication or from the date that the claimant first becomes aware, or could reasonably be expected to become aware, of the publication.

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(Endnotes)

1 *Loutchansky v Times Newspapers Ltd* [2002] 1 All ER 652.
2 Ibid.
3 (2002) 210 CLR 575.
4 (2002) NY int 88.
5 Report No 270.

Pre-paid Calling Cards Industry Update:

Federal Court Proceedings, ACCC Investigations and Recent Communications Alliance Industry Guidelines

Mitch Kelly looks at the increased regulatory attention being paid to pre-paid calling cards.

Background

In recent years, a growing telecommunications market has been the provision of pre-paid calling cards (**Calling Cards**). Using a dedicated card number and a PIN, Calling Cards provide a method for accessing either locally or remotely stored credit for the purpose of making telephone calls (predominantly to international locations).

Increased consumer demand has seen service providers utilising more aggressive marketing strategies to improve their market share. Such strategies have tended to focus on price and value as key differentiators in comparison to competitor products. Historically, these strategies have focused on utilising one, or a combination, of the following:

- advertising that Calling Cards have "No Connection Fee[s]", "24 Hour Great Rates", "Flat Rates" or "No Service Fees";
- advertising that a stipulated number of minutes of calls are available on a Calling Card; and/or
- advertising that a Calling Card can be used for "up to" a specified number of minutes.

However, in practice the use of Calling Cards may involve a wide range of charges in addition to the per-minute calling charge predominantly advertised. These charges may include: connection or disconnection fees; service fees; surcharge fees; as well as calls being charged in blocks of minutes. While a Calling Card may advertise low per-minute call charges (e.g. 3 cents per minute to the UK), in practice these additional charges may range from tens of cents to many dollars, and therefore could significantly diminish the value available using the Calling Card within only a handful of short calls.

The marketing strategies identified above, when viewed in light of the reality of charges applied to use of a Calling Card, have the potential to mislead or deceive customers if not appropriately prepared. It is this potential which was a factor in the industry recently coming to the attention of the Australian Competition and Consumer Commission (**ACCC**). Specifically, the ACCC began querying whether the marketing strategies used by the industry could constitute false, misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth) (**Act**).

the ACCC began querying whether the marketing strategies used by the industry could constitute false, misleading or deceptive conduct

The effect of the ACCC's review of industry conduct has been immediate and significant. In the space of six months this review has resulted in:

- two Federal Court orders against the two largest service providers;
- an additional two Federal Court proceedings being commenced against another two service providers; and
- the publication of a set of industry guidelines drafted by the peak communications industry body, the Communications Alliance Limited.

The following is a brief update and review of the recent Federal Court proceedings instituted by the ACCC, as well as the recommendations made within the recently published industry guidelines.

ACCC Investigations and Federal Court Proceedings

Following commencement of proceedings by the ACCC, the Federal Court recently made declarations and orders by consent against the two largest industry service providers, Tel.Pacific Limited and Cardcall Pty Limited.[1] In addition, the ACCC has also commenced separate proceedings against Prepaid Services Pty Limited and Boost Tel Pty Limited. The ACCC has alleged that the service providers misrepresented the benefits and value of their Calling Cards as part of their marketing strategies, and that such conduct was in breach of provisions of the Act (including sections 52, 53(aa), 53C and 55A).

In the concluded proceedings, the Federal Court declared that the relevant conduct by the service providers was false, misleading and deceptive and in breach of the Act. The service providers were made subject to orders including: providing information to retailers, customers, and competitors about the proceedings; providing information on applicable charges to consumers; establishing compliance programs; and paying a fixed amount for the ACCC's legal costs.

In holding that the relevant conduct was in breach of the Act, the Federal Court made the following declarations, believing that certain representations made in relation to the marketing strategies above were false, misleading or deceptive:

- in advertising that Calling Cards had "No Connection Fee[s]", "24 Hour Great Rates", "Flat Rates" or "No Service Fees" it was represented that no fees other than timed call charges would apply - when in fact other fees were charged (including connection fees, service fees and surcharges); and
- in advertising that a stipulated number of minutes or "up to" a specified number of minutes were available in relation to a Calling Card, it was represented that consumers could use the Calling Card for more than one connection, and would still be able to achieve the total stipulated call duration for the location and type of connection specified – when in fact that could only at best be achieved if one continuous call was made. Additional charges could diminish the value and number of available minutes.[2]

On 13 August 2009, the Communications Alliance announced the publication of industry guidelines for Calling Cards

The effect of these proceedings has seen an effort by the service providers to change their advertising practice. A key example of this has been the recent publication of industry guidelines by Communications Alliance.

Communications Alliance Industry Guidelines

On 13 August 2009, the Communications Alliance announced the publication of industry guidelines for Calling Cards (**Guidelines**).[3] The Guidelines focus on providing standards for the provision and advertising of Calling Cards with a view to improving customer satisfaction. They will be reviewed after 2 years of initial publication and every 5 years subsequently (or earlier in the event of significant developments within the industry).

As described in the Guidelines, the objective is to establish community safeguards by ensuring service providers provide sufficient information to allow consumers to make informed decisions about the nature and benefits of the Calling Cards. The Guidelines are recommended to be read in conjunction with other Communications Alliance publications, including the *Telecommunications Consumer Protections Code*[4] (**TCP Code**) and the *Telecommunications Consumer Protections Guideline.*[5]

the objective is ensure service providers provide sufficient information to allow consumers to make informed decisions about the nature and benefits of the Calling Cards

At present, the Guidelines **do not** have any legal effect. They are a guide only and have been developed with the aim of advising service providers on how to provide greater clarity for both the industry and customers. Normally, codes (as opposed to guidelines) developed by the Communications Alliance may be presented to the Australian Communications and Media Authority (**ACMA**) for registration pursuant to section 117 of the *Telecommunications Act 1997 (Cth)*. When a code is registered, ACMA may direct any industry participant which is not complying with the code to comply with it (whether they were a voluntary signatory or not). This gives a registered code effective legal force.

There is no current indication from the Communications Alliance or the ACMA that the Guidelines will be further developed into a code. In the event that there is such an intention, significant participants in the industry would likely be invited to be included in the consultation and/or development of such a code.

It is worth noting though that the Guidelines are not endorsed or approved by the ACCC. As a result, there is the risk that compliance with the Guidelines will not necessarily be sufficient conduct in the eyes of the ACCC.

There are 11 key conduct areas considered by the Guidelines as follows:

(a) **Necessary contact details to be printed on Calling Cards.** Details of the service provider (including a free call or local call helpdesk number and the business name) should be noted on each physical Calling Card.

(b) **General stipulations on advertising Calling Cards.** Calling Card advertisements must not be false or misleading (as also required under the Act). Specifically informed by the ACCC investigations, the Guidelines provide a number of examples. Firstly, Calling Cards may not be advertised by representing that a number of minutes are available when that number is only available from one continuous call. Secondly, if rates do not apply to an entire country, the specific locations should be clearly set out (on an inclusive or exclusive basis). Finally, any advice to a consumer that they have a certain number of minutes for a certain destination must be accurate and any conditions attached must be clearly spelt out at the time the advice is given.

(c) **Information to be included on POS Materials.** A number of provisions relate to point of sale (POS) material (which includes posters or brochures of the size 110mm x 220mm). All advertising must be prominent and legible in plain language and in a minimum 8 point font. Additionally, all advertising must include (as a minimum) the:

- price;
- basis for calculating charges;
- conditions of expiration;
- date at which prices are correct;
- details regarding rounding up;
- details of surcharges or other fees;
- website or call centre details;
- recharge methods; and
- details of how to use the card.

Disclaimers on POS materials should be placed next to the offer, linked by an asterisked footnote (or other symbol), readily available and clearly indicated with regard to the intended audience.

(d) **Information to be included in media advertisements.** Media advertisements should clearly state that terms and conditions may apply and provide the location where those terms and conditions may be viewed. At a minimum the terms must be available on a website and via a toll free number.

(e) **How service fees are to be charged.** Where a Calling Card incurs service fees after a certain number of days, such service fees should be applied only after midnight on the last such day.

The example provided by the Guidelines is that where the first call is made on Tuesday morning and a surcharge is said to be applied after 2 days, the surcharge should only be applied after midnight on Thursday.

(f) **How Calling Card terms may be changed without notice.** The Guidelines appear to acknowledge that Calling Card charges may change frequently due to a change in third party charges. It is permissible to include a term within Calling Card terms and conditions that applicable charges may change without notice. However, service providers are advised to be careful to ensure that such changes are directly referable to a change in the underlying third party charges.

(g) **Requirements to replace out-of-date advertising material.** It can be quite difficult for service providers, given the size, scope and range of marketing material, along with the frequency at which charges may change, to ensure that out of date advertising material is replaced. This is acknowledged by providing that each service provider should maintain a procedure for updating and replacing in-store advertising material which is out of date by 3 months.

(h) **Telemarketing obligations.** Service providers are advised to ensure that they satisfy themselves as to the conduct of telemarketing service providers and ensure such providers are capable of complying with relevant Communications Alliance codes as well as the Act.

Service providers should actively ensure that scripts and training undertaken by the telemarketing service provider are sufficient to comply with the Act and demonstrate extensive knowledge of the service provider's calling cards and applicable charges.

(i) **Customer service staff training obligations.** Provisions dealing with customer service staff training generally echo those relating to telemarketing service providers. There is a requirement placed on service providers to ensure that customer service representatives undergo training prior to commencing duties which ensure that they are conversant with all details of the Calling Cards (including applicable charges) as well as the relevant provisions of the Act (especially those dealing with misleading and deceptive conduct)

(j) **Minimum complaint handling procedures.** Service provider complaint handling procedures should have as a minimum: a free call or local number; be answered by a live agent within a reasonable time; be staffed between 9am-5pm AEST on business days; be capable of providing refunds and/or replacement cards; and include appropriate methods of resolving complaints and monitoring any undertakings made to complaining consumers.

Additionally, the Guidelines recommend that service providers comply with the rules contained in Chapter 9 (Complaint Handling) of the TCP Code, as well as meeting the requirements of standard AS/ISO 10002:2206.

(k) **Return and refund policies.** Service providers should ensure they maintain a return and/or refund policy that is fully communicated and made aware to their retailers, and presumably customer services staff.

there is the risk that compliance with the Guidelines will not necessarily be sufficient in the eyes of the ACCC

Future Performance

As mentioned, there is no current indication that the Guidelines will be further developed into a code. Additionally, the Guidelines have not been endorsed or approved by the ACCC, and while compliance would be a strong presumption for sufficient conduct, there is the risk that compliance with the Guidelines will not necessarily be sufficient in the eyes of the ACCC.

Given the recently commenced Federal Court proceedings, and the immediate reaction of the industry in publishing the Guidelines, it would appear likely that further developments will occur within the near future which should have additional impacts on the industry and associated service providers.

Mitch Kelly is a Lawyer in the Sydney office of Truman Hoyle.

(Endnotes)

1 *ACCC v Tel.Pacific Limited* [2009] FCA 279 and *ACCC v CardCall Pty Limited* [2009] FCA 583

2 *ACCC v Tel.Pacific Limited* [2009] FCA 279 per Gordon J at [8] and *ACCC v CardCall Pty Limited* [2009] FCA 583per Lindgren J at [4]

3 Communications Alliance *Prepaid Calling Card Guideline* G640:2009 (August 2009) available at http://www.commsalliance.com.au/__data/assets/pdf_file/0015/10275/G640_2009.pdf

4 Communications Alliance *Telecommunications Consumer Protections Code* C628:2007 (September 2007) available at http://www.commsalliance.com.au/__data/assets/pdf_file/0014/1346/C628_2007.pdf.

5 Communications Alliance *Telecommunications Consumer Protections Guideline* G631:2007 (Sepember 2007) available at http://www.commsalliance.com.au/__data/assets/pdf_file/0018/1728/G631_2007.pdf

Strengthening Computer Network Protection Laws

Jeremy Storer outlines proposals to amend interception legislation and the implications for computer network owners and operators.

In July 2009, the Australian Government released a discussion paper calling for public submissions on proposals set out in exposure draft legislation to amend the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception and Access Act**) to assist Australians to protect their computer networks from malicious attack and other inappropriate activities.

Currently, interception legislation in Australia only allows national security and law enforcement agencies to protect their networks appropriately – these provisions are due to expire on 13 December 2009.

the Australian Government is seeking to amend the Interception and Access Act to clarify the circumstances in which intercepting, accessing and using communications that pass over a computer network is permissible

For other members of the community, the legislation does not currently provide sufficiently clear guidance on when network activity can be lawfully monitored.. Furthermore, there is little guidance on the legitimate use and disclosure of information accessed by network owners and operators for network protection purposes. Such arrangements, as they currently stand, may expose network owners and operators to inadvertent breaches of the law when monitoring their networks for potentially harmful attack and inappropriate use of computer systems by employees and other users. This could also have the effect of rendering such information inadmissible as evidence in disciplinary processes or criminal prosecutions.

Consequently, the Australian Government is seeking to amend the Interception and Access Act to clarify the circumstances in which intercepting, accessing and using communications that pass over a computer network is permissible.

Network protection

Under the proposed approach, a new s 7(2)(aa) of the Interception and Access Act will provide that accessing communications passing over a computer network without the knowledge of the sender will not constitute unlawful interception if:

- the interception is carried out by a person appointed in writing to carry out duties relating to the protection, operation or maintenance of the network or ensuring its appropriate use; and
- the interception is reasonable necessary for the performance of those duties.

A person will also be permitted under new ss 63(C) and 63(D) of the Act to use and disclose lawfully intercepted communications if it is reasonably necessary to do so for the purpose of protecting the network, or to respond to an inappropriate use of the network.

The person responsible for the computer network must ensure that intercepted communications and other such records are destroyed if no longer required for any of the above legitimate purposes contemplated by the Act. The proposed amendments will not authorise interception of speech for network protection purposes.

Appropriate use of a computer network

The proposed amendments in s 6AAA of the Act will also enable network owners and operators to ensure that their networks are used appropriately by obtaining written undertakings from their employees to use the network in accordance with any reasonable conditions specified by the owner or operator. Where such an undertaking has been given, the network owner or operator will be entitled to use or disclose information collected about inappropriate use by employees for disciplinary purposes.

However, such information can only be disclosed for disciplinary purposes where no other Commonwealth, State or Territory law would prohibit such use or disclosure. This ensures that employers cannot circumvent existing workplace relations requirements by accessing information under the Interception and Access Act.

If a written undertaking has not been given, then intercepted communications cannot be used or disclosed to relevant authorities for disciplinary or other related purposes.

Legislation is expected to be introduced to the parliament and passed by December 2009, prior to expiry of the current laws.

In anticipation of changes to the law, network owners and operators should review their processes and ensure that they have appropriate IT user agreements in place with all of their employees, so that they are able to monitor their computer systems effectively for network protection purposes.

Legislation is expected to be introduced to the parliament and passed by December 2009

In order to be effective, such user agreements will need to be in writing, and their terms must be reasonable in all the circumstances.

The draft legislation does not prescribe what will constitute reasonable or appropriate use, recognising that circumstances may vary, depending on the nature and size of the network owner's organisation, the role of its employees and the duties they may be required to undertake.

However, reasonable terms of use will generally include matters such as permitting moderate use of electronic resources for personal reasons subject to material impact on network performance for legitimate business requirements, prohibiting access to client records other than for work-related purposes, avoiding intentional interference with network capacity, taking steps to prevent virus downloads or other malware, compliance with copyright, privacy and spam laws, and not using electronic resources to download offensive or unlawful material.

Jeremy Storer is a Senior Associate at Blake Dawson in Sydney.

Communications & Media Law Association Incorporated

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

Issues of interest to CAMLA members include:

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

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

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

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

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

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

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