

# Communications Law BULLETIN

CAMLA

Communications & Media Law Association Incorporated

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## 2009, A Turning Point

Shane Barber, the President of the Communications and Media Law Association, looks back on the year that was.

There can be little doubt that 2009 will be considered a watershed year for those of us who practise law in the communications and media sectors. The life of the Communications and Media Law Association (CAMLA) this year reflects the enormous challenges and opportunities the industries we serve now face.

CAMLA's year started with a presentation from the Minister for Broadband, Communications and the Digital Economy, The Hon. Senator Stephen Conroy. The Minister advised a packed audience that the government had, at that point, not yet made any decision in relation to its broadband initiative. Less than a week later, the government shocked many in the industry with its announcement that it would go it alone in building its National Broadband Network (NBN).

Much media space has since been devoted to an analysis of the government's NBN proposal, and subsequently its proposed legislation in relation to Telstra's network separation. By the end of the year, many were focusing on the long term consequences of the NBN for content providers and for communications and media regulation generally. Indeed that was where CAMLA finished its year, with a panel discussion regarding the implications for intellectual property rights and communications and media regulation arising from a ubiquitous high speed broadband network and ever changing delivery technology.

2010 will no doubt see the completion of parliamentary consideration of the Telstra network separation bill, rather presumptuously called the *Competition and Consumer Safeguards Bill*, along with considerable proposals for telecommunications regulatory change to reflect the new environment. Equally as important, if not more so, is the government's projected review of the *Broadcasting Services Act* in 2011 which many argue will not occur soon enough.

As we see a rapid move from old delivery mechanisms to new ones, there are a number of key themes which are emerging and on which many commentators have spoken in 2009. These include the following:

### 1. Owners v Consumers

A common criticism levelled at much of the current media legislative regime in Australia is the perception that it is focused more on protecting the interests of operators, often in the guise of the "national interest", than reflecting the reality of new delivery mechanisms and the interests of consumers.

Already it appears that much of the foreign ownership debate which has consumed most of the last two decades is now all but academic. It now seems very odd to us that so much effort was spent in regulating foreign ownership of television and newspapers to ensure balance and reflection of our national character, when we increasingly see the first point of call for news and information being the internet where content is produced by persons whose identity and motives are often not known at all.

### 2. Monetising Content

Proprietors of old media platforms such as newspapers now confront a significant dilemma as sales of product and advertising space diminish. Up to now, online versions of newspapers have often been used as a complement, although an increasingly important one, to hard copy publications with monetisation occurring largely through clicks on advertising placed on the proprietors' sites. Increasingly sophisticated technology aimed at generating click revenue by choosing and personalising advertising content to match the characteristics of the reader, as revealed by their searching patterns, does not appear to be the complete online monetisation solution.

This year, we have seen some newspapers become wholly online affairs. We have also seen one of the world's most significant newspaper proprietors indicate that it is now time for readers to pay directly for online content.

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The Senate Standing Committee on Environment, Communications and the Arts conducted an inquiry into the reporting of sports news and the emergence of digital media earlier this year. In this article, Victoria Wark considers the report of the Senate Inquiry and some of the arguments made for and against providing further protections for sporting events under the Copyright Act.

While many have surmised that appropriately priced access to content will not be as confronting to a growing number of online dependent readers as first thought, a space to watch in 2010 will be the tussle for dominance between providers of solutions for efficient micro payment.

### 3. Copyright is Dead

This provocative proposition was put by members of the panel at the final CAMLA Seminar in 2009. While many in the audience disagreed, it is clear that the utility of copyright now faces a significant challenge in the online environment, particularly in one enhanced by a NBN.

Litigation continues around the world in relation to the protection of interests in copyright, including some high profile litigation in Australia. Interestingly, copyright owners appear to be moving from low profile individuals to the deeper pockets of high profile internet service providers in their quest to protect their rights.

It was clear from the discussion between academics, legal professionals and industry representatives at our panel seminar that a widely accepted alternative solution to copyright is yet to emerge.

### 4. Fixed v Mobile

As the year progressed and the Commonwealth Government developed its plan for a fixed line NBN, early indications were that Telstra was seeing its future increasingly in the provision of mobile services.

During a recent presentation, representatives of the Australian Communications and Media Authority noted that consumers in the under 25 years age group are now predominantly mobile only consumers, with those in the 25 to 35 years age bracket tending towards mobile access to the internet rather than via a fixed line. Those in the 35 to

55 years age group represent a "partial substitution" between fixed and mobile solutions.

This represents a number of challenges for industry, governments and regulators. Where does the government and the regulator position future legislative and regulatory focus on the internet given the divergent consumer use of communications services? Is the significant investment in a fixed line NBN really the appropriate strategy after all? Is the prospect of abundant fixed line capacity quantitatively different from the internet as we know it today?

### 5. Back to the Future

A sleeping issue has to be the rollout of a significant part of the proposed NBN aerially.

Those of us involved in aerial network rollouts in the 1990s know how confronting this is to the community at a time when it wishes to see the beautification of its environment and increasingly the delivery of its communications and media by mobile or wireless means. There will no doubt be some consternation when the community begins to see a thick black cable being hitched up on poles out of their front windows. It seems incongruous to many that in the 21<sup>st</sup> century we are still employing a "Burke and Wills" technology such as overhead cabling.

All of these challenges lie ahead of us. In the meantime, from all of us at CAMLA, we hope you enjoy a safe happy holiday season.

***Shane Barber is President of the Communications and Media Law Association and Managing Partner of Sydney based communications, technology and media law firm, Truman Hoyle. The views expressed are the author's personal views and not those of CAMLA or Truman Hoyle.***

# The Challenge of Outsourcing in the Current Economic Climate

Peter Mulligan and Carrie Neal discuss recent developments in outsourcing and some considerations that should be taken into account in outsourcing agreements.

It has been an interesting year for the outsourcing industry. With the economy slowing, there were predictions that demand for outsourcing would decrease as customers directed spending to other areas. However, recent announcements regarding new outsourcing arrangements between Qantas and IBM,<sup>1</sup> Fosters and Wipro,<sup>2</sup> as well as Optus and EDS,<sup>3</sup> suggest that outsourcing has not lost its popularity. In addition, a Gartner study (Gartner on Outsourcing, 2008-2009) forecasted that outsourcing would continue to grow as organisations seek to generate cost savings and efficiencies.

The Gartner report shows that the global economic slump has meant that customers are re-evaluating their contracts to improve efficiency and costs. Customers are considering more closely the selection and retention of suppliers, how services are or will be delivered, the delivery location and contract pricing.<sup>4</sup>

IDC has also recently reported on the state of the outsourcing market in Australia. According to IDC, the Australian spend on outsourcing in 2008 was \$6.4 billion and is growing at 4% per annum. Despite this growth, IDC has predicted that to succeed in the current market, suppliers will need to differentiate their outsourcing strategies and demonstrate value for money.<sup>5</sup>

## Why outsource?

Outsourcing is the transfer to a third party of the operation of a service or function which would otherwise have been fulfilled internally by an organisation. This could be an IT function or a business process, such as human resources, document management, asset management, procurement, customer care or collection of accounts receivable. Alternatively, an organisation may engage a supplier to conduct only part of the service or function and have the other part performed in-house or by another supplier or suppliers (commonly known as 'multi-sourcing').

In addition to cost savings, organisations choose to outsource for a variety of reasons. This may include gaining access to specialist resources, ensuring that work is performed more efficiently or effectively, increasing flexibility and reducing the amount of time and resources spent in-house on non-core activities.

## Commercial issues to consider

Customers seeking to outsource services or a business process need to consider a range of issues. These include:

- whom to choose as the supplier;
- how to maintain control;

- how to ensure flexibility; and
- how to manage risks (such as the risk of poor performance by the supplier), including by transferring risk to the supplier or using an external measure such as insurance.

The significance of the first point should not be understated. The Satyam scandal from earlier this year is a good example of the importance of paying careful attention to supplier selection.

Satyam is one of India's largest IT outsourcing providers. In early January, its founder, B Ramalinga Raju, revealed that the company had been falsifying its accounts for years, overstating revenues and inflating profits by at least US\$1 billion. The Indian government sacked the board and took control of Satyam as the fraud threatened to affect confidence in India's multi-billion dollar outsourcing industry. Since then, Satyam has been sold to a third party and India's Central Bureau of Investigation has filed charges against Raju. Satyam customers have had to endure disruption and uncertainty as the scandal played out.

*it may be some time before the Indian outsourcing industry regains the confidence of customers.*

Shortly after the Satyam scandal, the World Bank announced that it had barred two Indian outsourcing firms, Wipro Technologies and Megasoft Consulting, from doing business with the bank. The bank said that Wipro had been banned for four years for "providing improper benefits to bank staff".<sup>6</sup> Megasoft was also banned for four years for "participating in a joint venture with bank staff while also conducting business with the bank".<sup>7</sup> In this environment, it may be some time before the Indian outsourcing industry regains the confidence of customers.

## Negotiating an outsourcing contract in the current environment

The types of services that are outsourced are usually either strategically important or a core function within a customer's business. In the wake of the Satyam scandal and in today's context of economic uncertainty, it is particularly important that the parties negotiate a robust yet flexible outsourcing contract.

Some of the key ways of achieving such a contract are set out below.

1 Qantas has signed an agreement to outsource its project delivery function to IBM. See [www.itnews.com.au/News/155428,ibm-qantas-ink-seven-year-outsourcing-deal.aspx](http://www.itnews.com.au/News/155428,ibm-qantas-ink-seven-year-outsourcing-deal.aspx).

2 Reports suggest that Fosters will outsource part of its internal IT function to Wipro. See [www.zdnet.com.au/news/software/soa/Foster-s-confirms-Wipro-deal-job-losses/0,130061733,339298159,00.htm](http://www.zdnet.com.au/news/software/soa/Foster-s-confirms-Wipro-deal-job-losses/0,130061733,339298159,00.htm).

3 It has been announced that Accenture and EDS will provide application development and maintenance outsourcing services to Optus. See [www.zdnet.com.au/news/communications/soa/EDS-Accenture-win-Optus-app-deal/0,130061791,339298126,00.htm](http://www.zdnet.com.au/news/communications/soa/EDS-Accenture-win-Optus-app-deal/0,130061791,339298126,00.htm).

4 See [www.gartner.com](http://www.gartner.com) and [www.gartner.com/it/page.jsp?id=856713](http://www.gartner.com/it/page.jsp?id=856713).

5 See IDC, "Australia Outsourcing Services Market 2009-2013 Forecast and Analysis" (2009).

6 See <http://online.wsj.com/article/SB123178764486274231.html>.

7 As above.

## A. Services and service levels

It is essential that the outsourcing contract sets out the services to be performed in as much detail as possible. This will typically be in either a service schedule or specification attached to the contract. A detailed services description benefits both parties as the expectations of both parties will be clear from the outset.

Additionally, the risk of poor performance by the supplier may be reduced by including in the contract appropriate service levels and remedies should the service levels not be met. This may include an obligation on the supplier to pay service credits. Service credits are often an amount calculated to deprive the supplier of its profit, and thus to provide an incentive to perform. Customers should be careful to ensure that any service credit regime is not penal in nature and so void under the law of penalties.

An alternative approach, which is increasing in popularity, is to use an outcomes-based contract. Rather than prescribing in detail the services which the supplier must provide, this type of contract focuses on the outcomes a customer is seeking to achieve.

## B. Liability

The types of services that customers outsource are usually critical to the operation of their business. In many cases, should the supplier fail to perform, the losses that a customer may suffer are likely to be significant. Customers, therefore, often seek to transfer some or all of this risk to suppliers through a robust liability clause.

The amount of risk that a supplier is prepared to assume is generally dependant upon the value of the contract to the supplier. However, in the current economic climate, suppliers may be willing to take on a greater amount of risk for lower value contracts.

## C. Change control

It is essential to build flexibility into the outsourcing contract. In longer term deals, it is rare that a customer's requirements throughout the term of a contract remain static, especially as the economy contracts and expands. Accordingly, the ability to add or remove services from scope is an essential tool to enable a customer to tailor the services to its needs.

It is in both parties' interests to specify a detailed change control procedure as well as a mechanism for costing agreed changes. This will ensure that introducing changes to the services only results in minimal disruptions and that this occurs in a cost effective manner.

## D. Term and termination

Other risks with longer term contracts derive from the pace of technology change and changing business requirements. For example, the economic downturn may have reduced the services required by many customers. Under an inflexible long-term agreement, a customer may still be paying for an outsourcer to support functions that are no longer in use due to downsizing of staff.<sup>8</sup>

In order to reduce this risk, a customer should seek to avoid a lengthy contractual term. According to Gartner, today's best practice is a base term of 3 to 5 years, with extension clauses of 1 to 2 years.<sup>9</sup>

In addition, a customer should include in its outsourcing contract the right to suspend the contract for a period (if the customer so requires) and the right to terminate for a maximum range of reasons. It is particularly important in the current economic climate that customers include extensive rights to terminate for supplier insolvency or on the first signs of financial distress. There have been a number of high profile casualties of the global economic

slowdown, including international consulting firm BearingPoint and telecommunications equipment manufacturer Nortel. Both of these organisations filed for Chapter 11 bankruptcy protection in the United States earlier this year and have since had parts of their business sold off to competitors.

The Satyam scandal has also exposed the need for customers to include an ability to terminate for supplier fraud or impropriety. A right of termination for convenience should also be considered, although this will typically be subject to the payment by the customer of certain costs, or the lost profit-margin, of the supplier.

*a customer should seek to avoid a lengthy contractual term, best practice is a base term of 3 to 5 years with extension clauses*

## Concluding remarks

There has been a rise in the number of outsourcing deals reported in recent months. This may be due in part to the global economic conditions and the cost-cutting and efficiency gains that outsourcing offers. However, outsourcing is not always the best commercial solution as it throws open a range of legal risks that should be considered. In the current landscape, it is essential that organisations seeking to outsource structure a contract that is flexible enough to accommodate the many changes that might occur in their requirements as the economy enters a recovery phase.

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<sup>8</sup> See [www.crn.com.au/News/151572,cios-warned-against-long-outsourcing-contracts.aspx/2](http://www.crn.com.au/News/151572,cios-warned-against-long-outsourcing-contracts.aspx/2).

<sup>9</sup> Mike Lafford, Group Vice President at Gartner, quoted in [www.crn.com.au/News/151572,cios-warned-against-long-outsourcing-contracts.aspx/2](http://www.crn.com.au/News/151572,cios-warned-against-long-outsourcing-contracts.aspx/2).

# ACMA v 2UE and the Public Interest

The Australian Communications and Media Authority applied to the Federal Court in November 2008 for orders that Radio 2UE Sydney Pty Ltd pay civil penalties for contraventions of the *Broadcasting Services Act 1992* (Cth). The Communications Law Centre intervened in the case in order to make submissions in the public interest. In this article, Professor Michael Fraser, Director of the Communications Law Centre, and Matt Vitins provide a summary of the decision and the submissions made by the CLC.

## Background

In 1999-2000, the Australian Broadcasting Authority, a predecessor to the Australian Communications and Media Authority (the **ACMA**), conducted an inquiry prompted by the 'cash for comment' scandal.<sup>1</sup> The scandal concerned undisclosed commercial arrangements entered into by radio presenters including, amongst others, talk-back hosts John Laws and Alan Jones of Radio 2UE Sydney. The Authority concluded that these undisclosed commercial arrangements had influenced program content (in some cases directly) and it declared three program standards under the *Broadcasting Services Act 1992* (Cth) (the **Act**) in order to address an apparent problem of transparency.

## *Mr Laws obviously resented having to make disclosure announcements*

The *Broadcasting Services (Commercial Radio Current Affairs) Standard 2000* (the **Disclosure Standard**) took effect in January 2001 and remains in force. It requires the on-air disclosure, during current affairs programming, of any commercial agreement between sponsors and presenters that has the potential to affect program content. Compliance with the Disclosure Standard is a standard licence condition for commercial radio broadcasters.<sup>2</sup> In turn, breach of the licence condition is both an offence and gives rise to civil liability under the Act.<sup>3</sup>

In *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No.2)* [2009] FCA 754 the ACMA sought orders from the Federal Court imposing civil penalties on Radio 2UE Sydney Pty Ltd (**Radio 2UE**) for contraventions of the Disclosure Standard, and therefore the Act. It was the first time civil penalties had been sought under the Act.<sup>4</sup>

## The contraventions

It was agreed between the parties that Radio 2UE had breached the Disclosure Standard on thirteen separate occasions over the

course of two months in late 2007.<sup>5</sup> On his morning radio program, *The John Laws Morning Show*, John Laws did not disclose sponsorship arrangements with Qantas, Toyota, Hamilton Island, Roche, Oatley Family Wines and Byron Bay Beer. Mr Laws had sponsorship arrangements with each for over \$100,000 per year, except for Byron Bay Beer which paid Mr Laws between \$10,000 and \$100,000 per year.

The parties' submissions described the contraventions as "careless".<sup>6</sup> However, this was not accepted by the Court. Rares J commented that at least some of the contraventions "demonstrated a disturbing disregard" for the Disclosure Standard and further noted that Mr Laws obviously resented having to make disclosure announcements.<sup>7</sup> In relation to one contravention, Mr Laws said on-air:

As you know Hamilton Island are sponsors of mine and I think in the heat of the moment... maybe we didn't mention that the other day, but of course we live in this environment of total terror and we have to say that Hamilton Island are sponsors of mine in order to appease the Nazis and also to appease the terrified management of this broadcasting station....<sup>8</sup>

In Mr Laws' final broadcast before he retired, he made the following comments referring to the ACMA:

How bloody stupid. When are you going to get over it? Never? What are you going to do next week when you don't have to sit around and listen to me all day in case I say Toyota? [pause] Oh did you hear that, Alice? He said Toyota! God! Boring old bastards!<sup>9</sup>

Laws was a recidivist offender against the disclosure standard. Aside from the thirteen incidents that were the subject of these proceedings and those that gave rise to the cash for comment scandal, Radio 2UE Sydney had also reported a series of suspected contraventions to the ACMA in 2006. In September 2007, Radio 2UE had provided the ACMA with enforceable undertakings designed to ensure future compliance with the Disclosure Standard.

1 Australian Broadcasting Authority *Commercial Radio Inquiry* (August 2000).

2 *Broadcasting Services Act 1992* (Cth) Schedule 2 cl 8(1)(b).

3 *Broadcasting Services Act 1992* (Cth) ss 139(3) and 140A(3).

4 Provisions allowing the ACMA to seek civil penalties for contraventions of the Act were inserted by the *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth). See: *Broadcasting Services Act 1992* (Cth) ss 140A and 205F.

5 Section 140A(3) of the *Broadcasting Services Act 1992* (Cth) imposes direct liability on the licensee. See: *Hamilton v Whitehead* (1988) 166 CLR 121 at 127-128 as cited in *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* [2009] FCA 754 (**ACMA v Radio 2UE**) at [125].

6 As cited in *ACMA v Radio 2UE* at [107].

7 *ACMA v Radio 2UE* at [141]-[143].

8 As cited in *ACMA v Radio 2UE* at [80].

9 As cited in *ACMA v Radio 2UE* at [82].

## *the ACMA and Radio 2UE came to an agreed penalty at the lower end of the penalty range*

### **Agreed penalties**

The ACMA and Radio 2UE made joint submissions as to the penalty that should be imposed by the Court. As noted by Rares J, it is not uncommon for parties to proceedings to agree on the contraventions that have occurred and suggest civil penalties for those contraventions.

The parties' submissions highlighted Radio 2UE's immediate cooperation with the ACMA's enquiry (even before proceedings were begun), its contrition and acceptance of responsibility. Accordingly, the ACMA and Radio 2UE came to an agreed penalty of \$10,000 for each breach (amounting to a total penalty of \$130,000), which was at the lower end of the penalty range. The maximum civil penalty for a contravention of section 140A(3) of the Act is 500 penalty units, or \$55,000. The maximum total possible penalty for the 13 contraventions was therefore \$715,000.<sup>10</sup>

In cases of an agreed penalty the Court will typically impose the agreed penalty unless it is inadequate or inappropriate. However, the Court may of course reject the agreed penalty and impose a different one. As this case was the first to consider civil penalties under the Act, Justice Rares considered it might be of assistance for an intervenor to provide another view regarding the amount of the penalty. While both the ACMA and Radio 2UE opposed that course, the ACMA identified the Communications Law Centre (CLC) as a possible intervenor.<sup>11</sup>

### **Submission made by the CLC**

The CLC is an independent, not for profit, public interest centre specialising in communications, media and online law and policy. The CLC intervened in the case in order to make submissions in the public interest. The CLC submitted that the jointly proposed pecuniary penalties were not commensurate with the seriousness of the breaches and that Radio 2UE should pay a higher total penalty, in the upper half of the range. That is, a sum between \$357,500 and \$715,000. The reasons for the CLC's submission were presented to the Court as follows. In summary, the CLC argued that the 13 breaches by Radio 2UE were breaches of public trust and the public interest and that this should sound in the penalty imposed.

## *A licensed broadcaster enjoys a position of public trust.*

### **Public licence**

A commercial broadcasting licence is valuable not only in allocating the use of a public asset and not only in the commercial value it confers on the licensee. Its value is also in the important position of public trust which it bestows on the licensee. With the licence comes a privileged position in the national communications environment. This privileged position of the licensee carries with it a duty to fulfil its obligations as a commercial broadcaster under the Act.

Commercial radio news and current affairs services play a key role in the nation's political, social and commercial life. Large sections of

the community rely on commercial news and current affairs broadcasting to inform their views about current events in politics, commerce and social questions of the day. The major national issues of interest to the public are ventilated through commercial news current affairs and talkback radio. A licensed broadcaster enjoys a position of public trust. The community is entitled to have confidence in the honesty and candour of these broadcasts by licensed commercial broadcasters.

In addition to the central role which commercial radio plays in providing news, current affairs and commentary, Radio 2UE itself has a prominent position as a commercial broadcaster of long standing, having held a commercial broadcasting licence since 1924. Radio 2UE positions itself and is recognised as a prominent source of information. It has successfully promoted itself in the commercial market place and in the market place for ideas as a current affairs and talk-back radio station and it has invited the community to participate in a civic debate over the airwaves on a daily basis.

## *The CLC submitted that the jointly proposed pecuniary penalties were not commensurate with the seriousness of the breaches*

The community is entitled to expect that the ground rules for this civic engagement are as they appear and are without hidden bias or hidden interests influencing the discussion without disclosure of the interests that the presenter was in fact serving, namely undisclosed sponsors. Maintaining the proper distinction between advertisement and editorial comment, and compliance with the Disclosure Standard are critical in this regard.

Failure to comply with the Disclosure Standard prevents the fair and accurate coverage of matters of public interest which is an object of the Act.<sup>12</sup> It undermines the validity and reliability of the current affairs and talk-back discourse, it undermines public confidence in it and it undermines the public's confidence in the possibility of genuine news, current affairs and public discourse over the radio or indeed anywhere. This undermining of public discourse has a corrosive effect on the public debate which is the life blood of a pluralistic, liberal and tolerant democratic society.

It may be said that the breaches were in respect of commercial sponsorships for commercially available products and services and were not undisclosed sponsors who hold a major political or socio-economic position, and that consequently the breaches are not significant in terms of their specific effect on public debate. The fact that the undisclosed sponsors in these particular instances before the Court were for products and services such as Toyota Motor Corporation Australia Limited does not make the contraventions unimportant. Information about these products and services influences the public's views about those products and services and that in turn informs their attitude towards social, economic, commercial and political conditions. Because these products and services are part of their day to day lives does not make them unimportant. On the contrary.

It may be said that the Disclosure Standard is no longer of significance in today's communications and media environment because current affairs, news and commentary of every colour are available

<sup>10</sup> *Broadcasting Services Act 1992* (Cth) ss 139(3), 140A(3) and 205F(4).

<sup>11</sup> *ACMA v Radio 2UE* at [5].

<sup>12</sup> *Broadcasting Services Act 1992* (Cth) sub-s 3(1)(g).

## ***The media free for all in the online environment makes the fact of regulation of commercial broadcasters more important.***

on the internet and are unregulated under the Act or similar legislation. The commercial broadcasters however, licensed under a public licence, enjoy a special position of prominence, confidence and trust in the community. The community looks to them in particular for reliable news and commentary and the licensee benefits from the imprimatur which the broadcast licence bestows on them.

The licence is the most important asset of commercial broadcasters' business. The media free for all in the online environment makes the fact of regulation of commercial broadcasters more important. The community knows that Radio 2UE is regulated and therefore assumes that in general, what they are hearing on Radio 2UE complies with the regulation. That means that the contraventions were a serious breach of public trust.

### **Laws: A radio broadcast icon**

Radio 2UE employed Mr Laws as a presenter, who for decades was an iconic figure in the talk-back radio arena. He was a (if not 'the') pre-eminent talk-back radio news and current affairs presenter, with a following throughout Australia. He had a large and faithful following in metropolitan, regional and country areas. Mr Laws was genuinely regarded as a reliable authority by many people who tuned in to his show to listen to his current affairs broadcasts, editorial commentary and interviews with prominent figures. Many people used Mr Laws' show as an important source for their news and for informing their views.

Studies have shown that John Laws was one of the most influential figures in popular media.<sup>13</sup> His opinions were the subject of public discussion and his views were very influential in the community and were a great mobiliser of public opinion. Senior political, corporate and other prominent figures frequently appeared on his program for interviews and discussion and to field calls from members of the audience because of this influence.

Radio 2UE employed Mr Laws because of the power to attract an audience and advertisers to 2UE. Mr Laws had a lot to say about political, social and commercial issues and this stirred debate which attracted an audience and in turn attracted advertisers to Radio 2UE. In his show Mr Laws presented himself as independent, self-opinionated, fair dinkum and untroubled by controversy; as his own man, unafraid to express his own opinion when confronted with powerful people or interests. He did not present himself in his show as a man whose opinion could be bought. The public was offended to learn otherwise. Mr Laws fashioned a public image of himself as the defender and protector of community standards and people believed him.

### **Penalties**

The CLC argued in its submissions that if penalties are perceived by licensees as merely an acceptable operational cost, less than the reasonable cost of compliance, they will not be an effective sanction, nor will they be credible in the eyes of the community. They will not protect the public interest in compliance. It is important to the public interest that penalties imposed by the court should not

be seen by 2UE and by others as merely a 'brush off', or a cost of doing business, which would amount to an expense to 2UE which is less than the cost of implementing and operating a systematic, robust and effective corporate compliance program. If the penalties imposed in the face of the history of recidivism and inadequate compliance at 2UE, were less than the cost of compliance, they would not act as a deterrent to future breaches of licence conditions.<sup>14</sup>

The CLC submitted that consideration of the penalty should take into account the need for deterrence and that the agreed penalty proposed by the parties would have been counter-productive. It would not have been effective in engendering compliance in individual licensees. It would not give cause for public confidence in the commercial radio broadcast licence or the broadcasters.

### **Outcome**

***if penalties are perceived by licensees as merely an acceptable operational cost they will not be an effective sanction***

The Court accepted that Radio 2UE had cooperated with the ACMA, that it had a new compliance program in place and that it showed genuine contrition. However, the Court also held that there had been a significant failure of Radio 2UE to ensure compliance with the Act and that Laws' conduct would not be addressed in an appropriate way by the agreed penalty.<sup>15</sup>

Rares J explained:

*While Radio 2UE is entitled [to] have the penalties mitigated because of its responses to the contraventions and its good faith in its ineffective attempts to comply with the disclosure standard, it cannot relieve itself of the gravity of its contravening conduct (being the conduct of its presenter, Mr Laws).<sup>16</sup>*

The Court found that the breaches were of a serious nature and that the agreed penalties were manifestly inadequate. The Court ordered that Radio 2UE pay pecuniary penalties in varying amounts for each of the breaches of its licence, totalling \$360,000.

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<sup>13</sup> Terry Flew 'A Medium for Mateship: Commercial Talk Radio in Australia' in Andrew Crisell (ed) *More Than a Music Box*: (2006), 232.

<sup>14</sup> See *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 re the deterrent purpose of civil penalties cited in *ACMA v Radio 2UE* at [31].

<sup>15</sup> *ACMA v Radio 2UE* at [128].

<sup>16</sup> *ACMA v Radio 2UE* at [148].

# Switching Channels and Changing Laws: Managing the Radiofrequency Spectrum

Valeska Bloch reviews the regulation and management of spectrum in Australia, before outlining some fast approaching policy questions that will emerge from the digital dividend, the expiry of current spectrum licences and the National Broadband Network.

## Introduction

As a finite, though non-depletable natural resource, the radiofrequency spectrum is both highly valuable and highly regulated. From the inception of the first radio services, spectrum 'scarcity' has been central to the spectrum allocation framework adopted by governments. However, the co-existing influences of digital technology (supplanting analogue) and deregulatory ideology sparked in the 1980s, have reshaped the way spectrum is used and valued.

*digital switchover and the expiry of spectrum licences will afford an opportunity to re-evaluate radiocommunications regulation.*

Broadband ubiquity is now demanding a more efficient and effective use of spectrum as spectrum-intensive technologies such as HDTV and IP based applications and wireless access services (**WAS**) are delivered.<sup>1</sup> Broadband also generates a secondary demand for spectrum by providing a platform and a market for media-rich and bandwidth-intensive services. The need for mobility and accessibility (particularly in sparsely-populated Australia) is increasingly requiring (or at the very least raising the expectation) that mobile and other wireless access services that utilise the radiofrequency spectrum match the speeds and capabilities available over fibre networks. The challenge for spectrum management lies in the ability to meet this demand whilst adhering to the objects of the *Radiocommunications Act 1992* (Cth) (the **RA** or the **Act**) and the Spectrum Principles.<sup>2</sup> This includes balancing the needs of both new and incumbent service providers and users.<sup>3</sup>

The demand for spectrum from the broadcasting and telco sectors has arguably come to a tipping point in 2009, which has been a transformative year for communications both globally and locally. In Australia alone, 2009 has seen the acceleration of preparations for the switchover to digital television, the launch of digital radio and the announcement and commencement of a plan to build a national fibre-to-the-premises broadband network (**NBN**). Each of these projects has been driven by a demand for accessibility, mobility and high-speed media-rich services, all of which can be delivered by next generation networks. On a more technical level, this demand for services translates to a demand for radiofrequency spectrum.

This recent spike in demand has coincided with the potential release of valuable spectrum over the next five years. Two upcoming develop-

ments in spectrum management in particular – the digital switchover and the expiry of spectrum licences – have afforded the Minister for Broadcasting Communications and the Digital Economy and ACMA the opportunity to re-evaluate radiocommunications regulation. The NBN will also provide an impetus for spectrum management reconsideration. This paper sets out the current regulatory and economic framework for spectrum management and examines these transformative developments, all of which will provide both challenges and opportunities for stakeholders in the media and communications sector as they vie for prime spectrum.

## Regulatory framework

### Spectrum management regulatory framework

Spectrum management is the process by which spectrum is allocated and spectrum access rights are licensed<sup>4</sup> and it occurs via a hierarchy of planning powers. At its highest level, spectrum management involves management by the International Telecommunication Union (**ITU**), which coordinates the international allocation and registration of spectrum in order to minimise spectrum interference between countries.<sup>5</sup> As a signatory to the Constitution and Convention of the ITU, Australia has agreed to comply with the ITU's Radio Regulations, which include the table of frequency allocations.<sup>6</sup>

*There are, and always have been, competing theories as to how spectrum should be managed.*

Spectrum planning at a national level therefore operates within the framework set by the ITU. The ACMA manages Australia's radiofrequency spectrum in accordance with the RA, section 9 of the *Australian Communications and Media Authority Act 2005* (the **ACMA Act**) and the Spectrum Principles.

At the next level, spectrum management is conducted by ACMA via the formulation of: the Australian Radiofrequency Spectrum Plan (**ARSP**) (which generally follows the assignment of spectrum developed by the ITU); band plans (which prescribe usage and channelling arrangements in relation to a frequency band or bands); and licensing plans and policy which are administered through instruments called Radiocommunications Assignment Licensing Instructions.<sup>7</sup>

### Licensing framework

There are, and always have been, competing theories as to how spectrum should be managed. Nonetheless, it is generally agreed that the

1 WAS include WiFi, WiMAX, 3G and 4G mobile telephony, Long Term Evolution (**LTE**) technologies and Mobile TV.

2 The Spectrum Principles (published by ACMA in May 2009) provide guidance for ACMA in its spectrum management functions.

3 ACMA, 'Release of the 3.6 GHz band for wireless access services (WAS)', *Spectrum Planning Discussion Paper SPP 02/09*, (2009) 1.

4 Ben Freyens, 'The Economics of Spectrum Management: A Review', (paper commissioned by ACMA), (2007).

5 International Telecommunications Union, *Radiocommunication Sector* (2009) <<http://www.itu.int.net/about/itu-r.aspx>> at 23 July 2009.

6 ACMA, *ITU Regulations* (2009) <[http://www.acma.gov.au/WEB/STANDARD.PC/pc=PC\\_552](http://www.acma.gov.au/WEB/STANDARD.PC/pc=PC_552)> at 23 July 2009.

7 Ian Hayne, 'Spectrum Property Rights and Practical Auction Design: the Australian Experience' (Paper submitted for the Communications Research Forum 1997, Old Parliament House, 2-3 October 1997), 5.

## ***The typical approach to managing the scarcity is twofold: encourage efficient spectrum usage and 'ration' the demand for it.***

mechanisms contained in the planning hierarchy are necessary to provide a minimum level of protection from interference and to meet the spectrum needs of defence, emergency and other essential services. The primary area of controversy lies in the methods used to license or authorise access to spectrum.

Historically, spectrum management was undertaken by government administrative processes and the licensing regime granted exclusive access to spectrum.<sup>8</sup> In Australia, licences were short-term, non-tradeable, highly prescriptive, and usually issued administratively on a 'first-in' basis.<sup>9</sup> This central planning approach came under pressure as a result of rapid technological changes and the development of new uses for spectrum.<sup>10</sup> Critics of the traditional approach have proposed alternatives ranging from full privatisation or exclusive property rights to unlicensed sharing through the creation of 'spectrum commons'.<sup>11</sup>

Australia was one of the first countries to liberalise its licensing approach by adopting a hybrid model. The RA introduced market-based reforms and used property rights to increase efficiency of spectrum use. It also deviated from traditional device-based licensing by introducing class licences and technology-neutral spectrum licences to meet the needs of new technologies.<sup>12</sup>

Under the Act, all users of 'radiocommunications devices' in Australia must be licensed.<sup>13</sup> There are 3 licence regimes available in Australia to authorise the operation of radiocommunications: (1) class licences; (2) apparatus licences; and (3) spectrum licences. In addition, the broadcasting and datacasting licensing regimes are also directly linked to the licensing of spectrum. The licence category chosen in relation to a segment of spectrum depends on individual circumstances and generally takes place in the context of a public consultation.

### **(a) Class licences (spectrum commons)**

Class licensing is sometimes referred to as the 'spectrum commons' or 'public park' approach. This approach suggests that rather than providing exclusive access to spectrum, frequency bands can be shared by users adhering to codes of conduct or technical standards.<sup>14</sup> In Australia, class licences permit users to operate devices in a designated segment of spectrum on an uncoordinated, shared basis, with no requirement for individual licences, device approval, or fees. However, users must operate devices in accordance with specified parameters that typically relate to frequency bands, radiated power limits and out-of-band emission levels.<sup>15</sup>

Although class licensing offers flexibility and efficiency, reducing barriers to entry for smaller operators and new applications, the use of devices within class licensed bands is limited in other ways. The lack

of protection from interference and the disruptive effects of overuse of class-licensed spectrum, mean that class licences are not viable for many purposes, particularly in areas of high spectrum usage. As a consequence, class licensing is generally used where there is a low potential for interference, for example, devices which use low power such as mobile phone handsets, cordless phones, remote controls and WiFi.

### **(b) Apparatus licences (command and control)**

Apparatus licences, which adopt the traditional form of licensing, authorise the operation of individual devices. As they are issued individually and are coordinated with other spectrum users and devices, a degree of protection from interference and quality of service is assured. Apparatus licences are generally issued 'over-the-counter,' for a fee, on a 'first-in' basis, although they have been auctioned where there is excess licence demand. Licences can be issued for up to 5 years, although most have terms of 1 year.<sup>16</sup> Apparatus licences have a presumption of renewal, unless renewal would be inconsistent with ACMA's plans.<sup>17</sup> Licences may also be traded or leased.<sup>18</sup> Apparatus licences tend to be used for space systems, in particular for providing an uplink or downlink to/from satellite. However, they are also used for broadcasting which is largely a terrestrial service.

### **(c) Spectrum licences (private spectrum)**

Spectrum licences are technology-neutral in that they grant exclusive rights to a segment of spectrum in a specified geographic area, rather

***As a result of switch-off significant amounts of spectrum will become available. This is known as the 'digital dividend'.***

than in relation to a particular device. Spectrum licences offer greater flexibility than apparatus licences by allowing licensees to utilise the licensed frequency bands in any way they see fit, provided that they comply with the licence conditions and the technical parameters set out by ACMA (usually relating to interference and emissions). Spectrum licences are granted for a fixed period of up to 15 years,<sup>19</sup> but are non-renewable. They are generally issued by way of a price-based allocation, usually an auction. They can be sub-divided, combined and traded.<sup>20</sup> Spectrum licences are currently used for a variety of uses, including land mobile, 2G and 3G technologies.

## **The economics of spectrum management**

In 2007, the ACMA commissioned an independent review (the **Review**) entitled the Economics of Spectrum Management. The Review characterised the radiofrequency spectrum as a "key strategic asset for the economies of industrialised nations".<sup>21</sup> That spectrum is economically significant means that the mechanisms by which spectrum is licensed and priced is integral to the spectrum management process.

8 Johannes Bauer, 'A Comparative Analysis of Spectrum Management Regimes' (Department of Telecommunication Michigan State University, East Lansing, Michigan 48824, USA) 2, <[www.ictregulationtoolkit.org/en/Document.2298.pdf](http://www.ictregulationtoolkit.org/en/Document.2298.pdf)> at 11 August 2009.

9 Productivity Commission, *Radiocommunications*, Report no 22, AusInfo, Canberra (2002), xxxi.

10 'The usable spectrum today is five thousand times larger in terms of bandwidth than in 1927'; Kevin Werbach, 'Supercommons: Toward a Unified Theory of Wireless Communication' (2004) 82 *Texas Law Review* 867. See also Productivity Commission, *Radiocommunications*, above n5, xxxiv.

11 Bauer, n 8, 2; Kevin Werbach, 'Supercommons: Toward a Unified Theory of Wireless Communication' (2004) 82 *Texas Law Review* 863.

12 Productivity Commission, *Radiocommunications*, above n9, xxx.

13 RA s 46.

14 Freyens, n 4, 8.

15 ACMA, 'Spectrum Options: 403-520 MHz', *Discussion Paper*, (2008) 7.

16 RA s 103.

17 RA s 130. See ACMA, 'Spectrum Trading: Consultation on trading and third party authorisations of spectrum and apparatus licences' (2008) 21.

18 RA ss 131AA-131ACA.

19 RA s 65.

20 RA ss 85-88.

21 Freyens, n 4, 2.

## ***Determining who gets what spectrum once restacking has occurred, is the crucial issue.***

### **Pricing approaches**

The perception that spectrum is a scarce resource with competing uses has driven the economic interest in spectrum management. The typical approach to managing the scarcity is twofold: encourage efficient spectrum usage and 'ration' the demand for it.<sup>22</sup> This can occur via both regulatory and technical means.<sup>23</sup>

Historically, spectrum inefficiencies have been managed with technical responses that increase the productive capacity of spectrum.<sup>24</sup> However the growing demand for multi-use spectrum is placing increasing pressure on spectrum management. As technical advances have not yet caught up to this demand, market pricing and trading options have emerged as a complementary solution.<sup>25</sup>

#### **(a) Traditional approach to pricing (administrative pricing)**

Traditionally, licences were allocated on a first-in basis with prices set administratively. However, in 2002, the Productivity Commission stated that spectrum charges should not be aimed at raising government revenue or providing a return to the community but should rather be based on opportunity cost (that is, the value of the best forgone alternative use of that spectrum).<sup>26</sup> There has since been an increasing trend towards a market approach to radiofrequency spectrum licensing.

#### **(b) Market-based approach to pricing (auction / opportunity cost pricing)**

ACMA is now permitted to use auctions, tenders, pre-determined prices and negotiated prices for the sale of spectrum licences.<sup>27</sup> It may also determine a price-based system for the allocation of apparatus licences.<sup>28</sup> Auctions are now widely accepted as legitimate and effective methods of allocating spectrum, particularly for high demand.<sup>29</sup> Auctions are not fool-proof however and exceptions can arise where incumbent monopolies have a competitive advantage. However in Australia, bidders are subject to competition limits which prevent acquisitions which would have the effect of substantially lessening competition in a market.<sup>30</sup> Indeed the Act treats the issue of spectrum licences as an acquisition of an asset for this very purpose.

ACMA has recently stated that "auctions should always be used in allocation unless there is a good reason not to use them".<sup>31</sup> ACMA

has nonetheless acknowledged that there will be occasions where auctions are not possible, even in cases of very high excess demand.<sup>32</sup> As a result, the practice of non-auction based allocation of licences has continued, though pricing methods have changed in recent times. Apparatus licences in particular tend to be licensed administratively. The first two Spectrum Principles<sup>33</sup> reflect and will no doubt reinforce the trend towards market-based pricing.

### **Secondary markets for spectrum – trading and leasing provisions**

Secondary markets help to increase spectrum efficiency by enabling and encouraging spectrum to move to its highest value use or uses. Trading and leasing mechanisms help to correct inefficient allocations made – often because of uncertainty of demand for services or rapid technological and market changes – in the primary issue of licences.<sup>34</sup> These mechanisms can also enable licensees to consolidate or aggregate contiguous blocks of spectrum.

## ***The digital dividend spectrum is being sought after by a range of prospective spectrum users.***

The RA permits both spectrum and apparatus licences to be traded<sup>35</sup> by allowing licensees to assign spectrum under their licence,<sup>36</sup> transfer apparatus licences,<sup>37</sup> or authorise third parties to operate devices under their licence.<sup>38</sup> A Consultation Paper was issued in 2008 on the measures that ACMA may take to facilitate the efficient transfer of spectrum to users or uses which value the spectrum more highly.<sup>39</sup> Submissions identified a lack of certainty regarding licence tenure beyond licence expiry as a particular barrier to trading.<sup>40</sup> Nonetheless, ACMA recently noted that since 2002 "there have been thousands of successful trades".<sup>41</sup> As a recent example, Austar has confirmed that it will lease its 2.3GHz spectrum to SP AusNet for a WiMAX smart-metering rollout in Victoria.<sup>42</sup>

### **The digital dividend**

#### **Background**

Since 2001, Australia has been transitioning from analogue television broadcasting to a system requiring broadcasting in digital mode. Currently, commercial television broadcasting licensees each have 7MHz of spectrum (in addition to the 7MHz they are each allocated to provide an analogue service) to provide a core broadcasting service that simulcasts their analogue station in digital mode, as well as an HDTV

22 Productivity Commission, *Radiocommunications*, n 9, 75.

23 Freyens, n 4, 8.

24 *Ibid* 10.

25 *Ibid* 11.

26 Productivity Commission, *Radiocommunications*, n 9, 191.

27 RA, s 60.

28 RA, s 106(1).

29 Coutts in Productivity Commission, *Radiocommunications*, n 9, 169.

30 *Trade Practices Act 1974* s 50.

31 ACMA, 'Opportunity Cost Pricing of Spectrum: public consultation on administrative pricing for spectrum based on opportunity cost' (2009) 8.

32 For example, there are certain fixed point-to-point services that require careful frequency assignment and coordination. ACMA argues that in these circumstances, auctions would be 'unwieldy'. In addition, compliance with the objective in section 3(b) of the Act requires that sufficient spectrum be allocated for defence and essential services. In these cases, open auctions are also inappropriate.

33 (1) Spectrum should be allocated to the highest value use or uses; and (2) enable and encourage spectrum to move to its highest value use or uses.

34 Productivity Commission, *Radiocommunications*, above n 9, 145.

35 Spectrum licences were actually designed to be traded and were able to be traded from the time they were first introduced in 1992. Apparatus licences were only permitted to be traded from 1995. Trading is not applicable to class licences as these licensees are not allocated to a specific licensee.

36 RA s 85.

37 RA s 131AA.

38 RA ss 68 (for spectrum licences) and 114 (for apparatus licences).

39 ACMA, 'Spectrum Trading: Consultation on trading and third party authorisations of spectrum and apparatus licences', (2008), 1.

40 ACMA, 'Responses to submissions on Spectrum Trading' (2009) 4.

41 ACMA, n 39, 5.

42 Luke Coleman, 'SP AusNet to use Austar 2.3GHz spectrum', *CommsDay*, 13 June 2009.

## *The US administration last year raised US\$19 billion from its digital dividend licence auctions, with the lion's share of spectrum going to mobile networks.*

multichannel and an SDTV multichannel.<sup>43</sup> Eventually, the number of multichannels, high definition or otherwise, that a commercial broadcaster will be able to broadcast, will be restricted only by their spectrum capacity. From 2010 to 2013, analogue television will be progressively switched off through a staged process commencing with certain regional areas and concluding with metropolitan areas.<sup>44</sup> As a result of the switch-off, significant amounts of spectrum will become available. The benefit of using this freed-up spectrum is known as the 'digital dividend'.<sup>45</sup>

### **Decision making**

Although ACMA fulfils various planning, management and compliance functions in respect of spectrum,<sup>46</sup> the replanning of the Broadcasting Services Bands (BSB) specifically is a decision for the Minister,<sup>47</sup> who may (after consulting with ACMA) designate part of the spectrum for broadcasting purposes and refer it to ACMA for planning under Part 3 of the BSA.<sup>48</sup> The Minister may also determine by written instrument that such a designation ceases to be in force at a specified time. The power to determine what is in the BSB implies a power to determine what falls outside of the BSB.

If the spectrum vacated following the cessation of analogue broadcasting remains part of the BSB, ACMA must continue to manage that spectrum in accordance with the BSA.<sup>49</sup> The Minister has powers to give certain directions to ACMA.<sup>50</sup> ACMA's functions also explicitly include reporting to and advising the Minister in relation to the radio-communications community.<sup>51</sup>

The Minister has not yet decided how the digital dividend will be used and whether the newly available spectrum will remain within the BSB. The Minister is preparing a green paper seeking views for this purpose. What is clear, is that this will undoubtedly be a policy decision, albeit one likely to take into account recommendations from ACMA.

### **Technical considerations**

The BSB encompass the UHF and VHF bands of the radiofrequency spectrum which are highly valuable because of their propagation characteristics and flexibility of use. The 7MHz of digital spectrum assigned to each broadcaster were allocated in blocks of spectrum adjacent to the corresponding blocks of analogue spectrum. In order to determine the size and fully realise the benefit of the digital dividend, the spectrum in the BSB may need to be restacked. This will enable a contiguous block of spectrum to be made available for potentially alternative uses. Some of the digital dividend spectrum may also be needed to provide coverage for digital broadcasting blackspots.

However, restacking is costly and may mean that users will need to retune their digital set top boxes in order to receive the new signal.

Broadcasters may also require new or adjusted transmitters. The benefits of using the digital dividend spectrum for alternative uses will need to be weighed against the costs to both users and broadcasters of restacking and reallocating existing spectrum. Determining who gets what spectrum once restacking has occurred, is the crucial issue. As Australia is switching off analogue later than other countries (for example, the UK and the USA), it is likely that it will be influenced by the decisions made internationally in respect of the digital dividend.

### **Options for the digital dividend**

There are a variety of uses for the digital dividend, including: new mobile services with high quality video and interactive media; wireless broadband services offering high-speed data and voice services; wider coverage for advanced services in rural and remote areas; advanced business and broadcasting services; and additional television channels, including possible HDTV channels carried on Freeview.<sup>52</sup> The digital dividend spectrum is consequently being sought after by a range of prospective spectrum users.

## *Most countries have not yet established concrete plans for the use and allocation of the digital dividend spectrum.*

To date, the most vocal of these have been the mobile and the free-to-air broadcasting sectors. Despite, or perhaps because of this, Senator Stephen Conroy emphasised at the Radcomms09 conference that "the government does not see the digital dividend as a telecoms versus broadcasting debate".<sup>53</sup>

### **(a) Mobile broadband**

Interest in the digital dividend spectrum from the mobile sector is due to the propagation characteristics of the UHF spectrum (particularly around 700MHz), which is suitable for low-cost wider-area coverage. These characteristics mean fewer base stations and heavily reduced infrastructure costs, which would enable the provision of greater coverage, especially throughout rural and regional Australia, and reduced interference risk.<sup>54</sup>

As emphasised in its submission to the national broadband network Regulatory Reform Discussion Paper, the mobile sector regards mobile wireless broadband as a market that is already saturated by demand.<sup>55</sup> 3G subscriptions grew by 88 percent in 2007/2008 from 4.6 million to 8.6 million and it is forecast that mobile phones will be the primary device used in connecting to the internet by 2020.<sup>56</sup> Redeploying digital dividend spectrum for mobile operators, it is argued, will enable the mobile telcos to better meet this burgeoning demand.<sup>57</sup>

In advancing its case, the mobile sector has focused efforts on presenting the economic benefits of allocating spectrum for various uses. The Australian Mobile Telecommunications Association (AMTA)<sup>58</sup> commissioned a study to examine the potential economic value of

43 One of the benefits of digital television is that where only one station could be broadcast using 7MHz of analogue, digital television enables the multichanneling of several stations as well as the use of HDTV within 7MHz.

44 Note that whilst the Minister has announced a timetable for switch-off, this timetable is not legislated and has been postponed several times already due to the initially slow uptake of digital television.

45 ACMA, 'Five-year Spectrum Outlook 2009-2013: ACMA's spectrum demand analysis and indicative work programs for the next five years', (2009) 24.

46 See s 9 of the *ACMA Act*.

47 *Ibid*.

48 RA s 31

49 *Ibid*.

50 *ACMA Act* s 14.

51 *ACMA Act* s 9(c); See also definition of 'radiocommunications community' in s 3 of the *ACMA Act*.

52 Alastair Gellatly, 'The Digital Dividend', (Paper presented at Radcomms06, 11-12 December 2006).

53 Stephen Conroy, 'Address from Senator the Hon. Stephen Conroy', (Podcast recorded at RadComms09 – Foundations for the Future, Sydney, 29 April 2009).

54 Chris Althaus, 'Digital Dividend', (Podcast recorded at RadComms09 - Foundations for the Future, Sydney, 30 April 2009).

55 Australian Mobile Telecommunications Association (AMTA), 'National Broadband Network: regulatory reform for 21st century broadband, Discussion Paper', (submission by AMTA) (2009), 4.

56 Althaus, n 54.

57 Wireless broadband subscriber numbers more than tripled to 1.5 million in 2008 alone. Dominic White & Neil Shoebridge, 'PM's \$1bn digital dividend', *MIS Financial Review*, 23 July 2009.

58 AMTA's members include Telstra, Optus and VHA.

## Australia is likely to take its cue from overseas developments

the digital dividend in a range of scenarios. The study found that the economy would be boosted by up to \$10 billion over a 20 year period if 40 percent or 120MHz of the band of low-frequency spectrum (that is, 700MHz spectrum) released after analogue switch-off was made available for mobile broadband use.<sup>59</sup>

Although Senator Conroy has insisted that “the digital dividend is not about revenue to the budget” but rather “the economic and social benefits of the services that it can support”,<sup>60</sup> commentators have noted that the revenue opportunity offered by the digital switchover is unlikely to be ignored. Further, “the well-capitalised mobile phone industry is best placed to pay the biggest fees”.<sup>61</sup> The US administration last year raised US\$19 billion from its digital dividend licence auctions, with the lion’s share of spectrum going to mobile networks. Nonetheless, the mobile industry faces another potentially large bill to renew its 2G and 3G spectrum licences as they expire between 2013 and 2016. The capacity and appetite of industry participants to acquire rights to additional spectrum therefore remains to be seen.

As most of the spectrum relevant technology deployed in Australia is designed overseas, there are also technical and commercial benefits of aligning Australia’s digital dividend spectrum with global trends in spectrum allocation. Internationally, analogue television spectrum has already been identified for use for International Mobile Telecommunications (IMT).<sup>62</sup> Nine administrations in Australia’s region (including New Zealand, Japan, Korea, China and India) have recently indicated that they support the use of the 700MHz band for IMT.<sup>63</sup>

It is worth noting that the digital dividend spectrum is currently being proposed as the ‘stick’ to encourage Telstra to structurally separate. The *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* provides that if Telstra does not structurally separate, then it will be forced to functionally separate and it will be prohibited from controlling spectrum useful for advanced wireless broadband, including 520 MHz to 820 MHz (digital dividend spectrum).

### (b) Broadcasting Services

The free to air television networks have also been lobbying the government, expressing both a desire to retain their current spectrum to enable them to provide enhanced digital services, as well as their concerns that the allocation of a significant portion of this spectrum to the mobile sector might cause interference with the reception of their broadcasts. Lobbying efforts have attempted to secure a guarantee from the government that the freed up spectrum will not be used to provide new commercial television services. The fracturing of audiences in recent years as a result of Pay-TV and new media services such as IPTV, means that further fracturing as a result of a fourth commercial television channel could be detrimental to the already “debt-laden networks”.<sup>64</sup> The preference for the free to air television networks if they are unable to retain the spectrum, is that the relevant

spectrum is allocated to the mobile sector with restrictions on use.

At the National Press Conference in June 2009, FOXTEL chief executive Kim Williams called for the auctioning of the analogue spectrum before the switch-off (as has already occurred in the USA). More controversially, he also demanded an end to the protection of the incumbent free to air broadcasters by proposing that others, like FOXTEL, should be given the opportunity to own and operate a new television network either terrestrially or via satellite.<sup>65</sup>

Although Senator Conroy has stated publicly that a fourth commercial television channel has not been ruled out, it seems unlikely that the analogue spectrum will be used for this purpose. Auctions of digital dividend spectrum overseas have led to estimates that the Australian spectrum could be valued at about \$1 billion, which would more than offset the costs associated with analogue switch-off.<sup>66</sup> As broadcasting licence fees are tied to revenue rather than spectrum usage, the allocation of spectrum for use by another commercial television network would make it less likely that this amount could be recovered. Further, there is a reduced incentive to use spectrum efficiently.<sup>67</sup>

### Overseas approaches

Most countries have not yet established concrete plans for the use and allocation of the digital dividend spectrum. Nonetheless, there are a number of countries that either have or will switch off their analogue television signal prior to Australia and who may provide guidance.

**Between 2012 and 2021, a total of 679 spectrum licences are due to expire. Most of these licences are used for mobile telephony... Some of these licences are extremely valuable.**

To date, the USA is leading the way in freeing up and allocating the digital dividend spectrum. The USA ended all full-power analogue television broadcasts at midnight on June 12, 2009. It completed the auction of spectrum in the 700MHz band over a year earlier, in March 2008. The nation’s two largest mobile phone providers – AT&T and Verizon – won most of the spectrum and the auction generated proceeds of US\$19 billion.<sup>68</sup> Although the subsequent economic downturn could result in lower than anticipated proceeds, the revenues raised nonetheless demonstrate the value placed on this spectrum by wireless operators.

The last transmitters in the UK are scheduled to be switched off by March 2013<sup>69</sup> and in July 2009, Ofcom (the UK regulator) officially announced its plans to free the 800MHz band to provide mobile broadband services. Some other European nations have also decided to release the entire 800 MHz spectrum for wireless services, including Finland, France, Switzerland, Germany, Sweden, Denmark and Spain.<sup>70</sup> It is expected that other European nations will follow suit.

59 Spectrum Value Partners / Venture Consulting, *Getting the most out of the digital dividend in Australia: Allocating UHF spectrum to maximise the economic benefits for Australia*, (Report commissioned by AMTA) (2009).

60 Conroy, n 53.

61 White & Shoebridge, n 57.

62 International Mobile Telecommunications-2000 (IMT-2000) is the global standard for third generation (3G) wireless communications, defined by a set of interdependent ITU Recommendations; International Telecommunications Union, *ITU Activities on IMT-2000* (2009) <<http://www.itu.int/home/imt.html>> at 23 July 2009.

63 AMTA, n 55, 10.

64 Stephen Bartholomeusz, ‘Recasting the digital revolution’, *Business Spectator*, 16 June 2009 <<http://www.businessspectator.com.au/bs.nsf/Article/Recasting-the-digital-revolution-pd20090616-T3B5T?OpenDocument>> at 23 July 2009.

65 Jane Schulze, ‘Kim Williams calls for fourth free-to-air TV network’, *The Australian*, 16 June 2009.

66 Bartholomeusz, n 64.

67 For a long while, Ten was the only commercial broadcaster using an additional channel (called One HD), although Nine began broadcasting its new channel Go! in August 2009 and Seven began broadcasting its new channel 7two in November 2009.

68 PWC, ‘Timing is Everything: releasing the value of spectrum’, <[http://www.pwc.com/en\\_GX/gx/communications/pdf/spectrum\\_releasing\\_value.pdf](http://www.pwc.com/en_GX/gx/communications/pdf/spectrum_releasing_value.pdf)> at 10 August 2009.

69 Independent Spectrum Broker, *Report from the Independent Spectrum Broker: findings and policy proposals*, UK (2009) 42.

70 ‘Digital Dividend Spectrum: the way ahead’, *CXOtoday.com*, 16 July 2009, <[http://www.cxotoday.com/India/News/Digital\\_Dividend\\_Spectrum\\_-\\_the\\_Way\\_Ahead/551-104423-912.html](http://www.cxotoday.com/India/News/Digital_Dividend_Spectrum_-_the_Way_Ahead/551-104423-912.html)> at 10 August 2009.

## *the role of wireless broadband services within the NBN framework has been given little attention to date.*

As Australia is predominantly an importer of technology, it is likely to take its cue from these overseas developments in order to ensure that the relevant technologies are suitable for domestic use.

### **The need for certainty**

For all the stakeholder lobbying, the ministerial releases and overseas digital dividend activity, the digital dividend debate in Australia is still plagued by uncertainty as to timing and approach. Reallocation and auctioning of spectrum cannot occur until a date for analogue switch-off has been finalised and transmission blackspots have been identified. Although switch-off timelines have been published and the Minister has released media statements claiming this will occur in 2013, there has to date been no official declaration confirming the actual timing for switch-off.

The Productivity Commission recommended that the remaining analogue spectrum "should be replanned and sold two years before the conclusion of the simulcast period."<sup>71</sup> Not only will this reveal the opportunity cost of continued analogue use, but new spectrum owners would have an incentive to encourage the digital conversion process,<sup>72</sup> as well as allowing time for new infrastructure build.

### **Spectrum licences**

#### **Background**

Between 2012 and 2021, a total of 679 spectrum licences which range from 500MHz to 31GHz are due to expire. Most of these licences are used for land mobile, mobile telephony, WAS or 3G mobile telephony. Some of these licences are extremely valuable.<sup>73</sup> The commercial and political focus is expected to be on licences in the 800MHz, 1800MHz, 2.1GHz, 2.3GHz and 3.4GHz bands which were auctioned to VHA, Telstra and Optus.

#### **Options for expiring spectrum licences**

There are two main options for the re-issue of spectrum licences under the RA: (1) reallocation by an auction, tender, or pre-determined or negotiated price<sup>74</sup> within 2 years of expiry; or (2) renewal of the licence to the incumbent in certain circumstances, in which case incumbent licensees will be charged a spectrum access charge determined by ACMA.<sup>75</sup> A third, though less likely option, is to re-assign the spectrum for another use, for example, by issuing an apparatus licence in the relevant band. The Act permits ACMA to vary the conditions of re-issued spectrum licences under any of these options.

The government has not yet determined the approach that it will take. However, the urgency of assuring a degree of certainty for stakeholders is increasing as the expiry dates approach.

### **The National Broadband Network**

#### **The final 10%**

In April 2009, the Minister announced its intention to establish a company (**NBN Co**) that will build and operate a new national broadband network. Over an expected eight year construction phase, up to \$43 billion will be invested in the NBN. The NBN will connect 90 per cent of all Australian premises with broadband services with speeds of up to 100 megabits per second and the remaining 10 per cent of premises with next generation wireless and satellite technologies that will

deliver broadband speeds of 12 megabits per second.

### **The Implementation Plan**

As one of its first steps in the NBN process, the government released a discussion paper to consult on the options for broader reforms to make the existing regulatory regime more effective in the transition period before the network is fully rolled out (the **Discussion Paper**).<sup>76</sup>

The Discussion Paper contained only a brief section on spectrum, which noted that:

*Spectrum may need to be reserved at appropriate frequencies to deliver superfast broadband services using wireless and satellite technologies in areas that will not be covered by fibre optic to the home and workplace...[T]hese future demands will place pressure on available spectrum.*<sup>77</sup>

The Discussion Paper and the relevant submissions focused on whether competition restrictions are necessary to limit access to valuable spectrum, as well as how the Commonwealth can encourage competition between different technology platforms.<sup>78</sup> It also noted that "the relative roles of satellite and wireless in the National Broadband Network will be determined by the Government following the Implementation Study". The majority of submissions that commented on these issues found that the current competition restrictions provided under the *Trade Practices Act* are adequate.

*the perceived spectrum scarcity is not actually reflective of spectrum utilisation, with many bands heavily underutilised for much of the time.*

### **Further issues**

Aside from the limited competition-focused issues mentioned in the Discussion Paper, the role of wireless broadband services within the NBN framework has been given little attention to date. However, in order to realise its commitment to providing wireless broadband access to 10 percent of the population, the government will need to acquire or provide access to adequate spectrum and necessary services, within the confines of the NBN mandate. Consideration will therefore need to be given to the following issues, which will undoubtedly intersect with spectrum management and spectrum demand.

#### **(a) Operational structure**

The way that the provision of wireless broadband to the remaining 10 per cent will fit into the operational structure of NBN Co, especially given the requirement to construct and operate a wholesale only open-access network, will require consideration. Some options could include:

- **Option 1:** NBN Co provides backhaul to retail service providers. The Commonwealth could provide a subsidy to either retail service providers or to consumers to close the gap between retail prices in metropolitan and rural areas in exchange for the retail service providers providing services in the relevant areas.
- **Option 2:** NBN Co acquires the spectrum (or satellite bandwidth where applicable) and makes this spectrum/bandwidth available to retail service providers at a subsidised rate.

71 Productivity Commission, *Broadcasting*, Report no.11, AusInfo, Canberra (2000), 13.

72 Ibid.

73 ACMA, 'Five-year Spectrum Outlook 2009-2013: ACMA's spectrum demand analysis and indicative work programs for the next five years', above n 45, 23.

74 RA s 60.

75 RA s 294.

76 Department of Broadband, Communications and the Digital Economy, *National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper*, (2009) 1.

77 Ibid 26.

78 Ibid 27.

- **Option 3:** NBN Co acquires the spectrum/bandwidth and provides retail services to the remaining 10 per cent (this would require an exemption from the requirement that NBN Co operate a wholesale only network).

### (b) Universal Service Obligation (USO)

Whether any of the options set out above would obviate the need for the USO also needs to be considered. For example, as noted by the ACCC in its submission to the Discussion Paper, consideration could be given to whether universal service should focus on ensuring access to a wholesale level service or the infrastructure element that provides services (for example, access to NBN or spectrum or satellite bandwidth) rather than retail services. Alternatively, if Option 3 is adopted, an issue is whether the USO should apply to NBN Co as a retail service provider in relation to its provision of wireless broadband services, such that it would be a provider of last resort.

### (c) Technical requirements

The most appropriate spectrum for the purposes and the speeds that can be delivered using the technologies available will need to be taken into account. Although some retail service providers such as Telstra, Optus and VHA offer broad network coverage, they may need to upgrade their networks to deliver services with speeds of at least 12 megabits per second. If Options 1 or 2 are adopted, subsidies to retail service providers may need to be subject to a condition that the retail service providers provide wireless or satellite services with speeds of at least 12 megabits per second. Further, if Options 2 or 3 are adopted, regard will need to be had to the most suitable spectrum and technologies for delivering wireless access services (which could include 3G or LTE services).

### (d) Licensing

Options 2 and 3 will also require consideration of the appropriate licensing framework (for example, apparatus licensing, spectrum licensing or class licensing), as well as the nature of any licence conditions.

### An integrated approach

The implications of the digital dividend and the upcoming expiry of spectrum licences will both need to be considered when making decisions about the use of spectrum for the NBN. The occurrence of all of these events within a relatively small time period, offers a unique opportunity to harmonise spectrum management and in doing so, maximise the efficiency and standard of relevant services. Although in Australia each of these spectrum issues appears to be being considered in isolation, this is not the approach being taken elsewhere and Australia can be guided by these approaches.

The Digital Britain Report has recognised that adopting an integrated approach to spectrum management, and more specifically, these upcoming developments, could have significant benefits. For example, the report noted that:

*[t]he rationale for an integrated approach derives largely from the fact that [Next Generation Network] technologies require large blocks of spectrum both at low and high frequencies. Addressing these requirements in an integrated way, if that can be achieved quickly, should give operators greater certainty over their future spectrum holdings whilst continuing to support a competitive market outcome.<sup>79</sup>*

The need for an NBN solution that provides competitive and early deployment of wireless next generation networks, should in theory drive such an integrated approach in Australia. Whether this approach is adopted, however, remains to be seen.

## Conclusion

Spectrum management is now at a vital juncture. The demand for spectrum is increasing exponentially as new bandwidth-intensive and media-rich wireless broadband services are becoming essential utilities; as important as electricity or gas.<sup>80</sup> Nonetheless, the perceived spectrum scarcity is not actually reflective of spectrum utilisation, with many bands heavily underutilised for much of the time. Licensing mechanisms and a lack of longevity are providing damaging uncertainty to incumbents. At the same time, the upcoming digital switch-off, expiry of spectrum licences and roll-out of the NBN, offer a unique opportunity to reassess the spectrum management regime, including the allocation mechanisms by which spectrum management has traditionally been undertaken.

Tensions between the property rights and commons models reflect broader political and economic relationships.<sup>81</sup> Accordingly, the policy shift towards privatising the public airwaves over the past few decades reflects a more general shift to market-based approaches and deregulation. In addition, there has been an increasing recognition that exclusive forms of allocation predicated on assumptions of spectrum scarcity are becoming inappropriate, particularly as spectrum is being used less for traditional broadcast media and more for data communications services.<sup>82</sup> This shift in paradigm has particularly gained traction internationally with the adoption of hybrid commons models.

In Australia, developments appear to have stalled. Despite the influx of spectrum consultations conducted in late 2008 and early 2009, upcoming spectrum issues suddenly took a back seat on the national communications agenda following the announcement of the NBN in April 2009. Remarkably, spectrum issues have barely garnered a mention in (public) NBN discussions. This is despite the fact that spectrum management will have both a significant role to play in, and will also be significantly affected by, the provision of broadband access via the NBN. The NBN will undoubtedly be a catalyst for higher volume communication and radiofrequency spectrum will necessarily be part of the network structure. Poor NBN planning with little regard to spectrum could result in wireless bottlenecks or last-mile failures. The speed with which the NBN is gaining momentum only accentuates the urgency and the importance of making decisions about spectrum management which will factor in considerations relating to *all* of the upcoming developments discussed above.

Spectrum mis-management can have serious social and economic implications. Both ACMA and the Department for Broadband, Communications and the Digital Economy now have the potential to reshape the spectrum environment for the long term. Where spectrum policy has typically evolved haphazardly, the coincidence of these regulatory and technological developments provides a unique opportunity to streamline the approach to spectrum management, leading to greater efficiencies in both the regulation and use of spectrum. In order to do so, however, there is a need to adopt a holistic approach, commit the necessary resources and provide a degree of certainty to the relevant stakeholders. Importantly, these steps need to occur without political motivation and without regard to the fact that there are at least two federal elections due before most of these developments will be complete.

79 Department for Business Innovation and Skills, *Digital Britain Report: Impact assessment* (2009) 73.

80 Department for Culture, Media and Sport and Department for Business, Innovation and Skills (UK), *Digital Britain Final Report* (2009), 52.

81 Victor Pickard and Sascha Meinrath, 'Revitalizing the Public Airwaves: Opportunistic Unlicensed Reuse of Government Spectrum' (Working Paper No. 24, New America Foundation, 2009) 7.

82 *Ibid.*

# The Trafigura Super-Injunction

Natalie Buck discusses the Trafigura 'super-injunction' episode in the UK, the role Twitter played in undoing the injunction and whether such injunctions are ever appropriate.

The recent and rather spectacular failure of the 'super-injunction' obtained by oil trader Trafigura in the UK is a compelling reminder about the importance of open justice, parliamentary processes and the mobilising power of the internet and social networking sites like Twitter.

The injunction was intended to prevent a document called the Minton Report from becoming public which showed that Trafigura knew that the waste it dumped in the Ivory Coast's biggest city, Abidjan, was potentially toxic and could have a serious impact on the health of people exposed to it. The term 'super-injunction' was coined because the order also prohibited any disclosure of the injunction's existence. The company also obtained anonymity orders so that a person searching in the law lists for the case would never know that Trafigura, a multi-national corporation, was involved.

***Carter-Ruck applied for the now infamous super-injunction to prevent publication of anything about the Minton Report, including its contents and the fact of its existence. The order also prohibited any publication of the existence of the injunction itself.***

Trafigura and its lawyers, Carter-Ruck, tried to stop the *Guardian* newspaper, which had a copy of the report, from publishing anything about the Minton Report or the existence of the injunction. Subsequently a member of parliament tabled a question about the injunction in parliament and Trafigura tried to prevent the debate from going ahead on grounds that the matter was sub judice.

The company also tried to stop the *Guardian* from reporting on the proceedings of parliament during which the question on the injunction was to be asked. A 'tweet' by the *Guardian's* editor mobilised the Twittersphere and the relevant details were quickly uncovered and made public. Thus in the midst of a collision of the courts, parliament and media, with a little help from the Twitterati, Trafigura's super-injunction quickly became defunct.

## Background

Trafigura has operations in 42 countries and had a turnover of US\$73 billion in 2008. It is one of the world's largest commodity trading enterprises in the energy sector.<sup>1</sup>

In July 2006 the *Probo Koala*, a vessel chartered by Trafigura, attempted to discharge the contents of its slop tanks in the port of Amsterdam.<sup>2</sup> The vessel was informed that due to the waste's high level of toxicity and its high content of mercaptans, which was causing a foul stench, it would have to be processed at Rotterdam a cost of €900 per m<sup>3</sup>.<sup>3</sup> Trafigura rejected this quote.<sup>4</sup> On 19 August 2006 in the Ivory Coast, the *Probo Koala* engaged a local contractor to off-load its toxic waste and dump it in various sites in the district of Abidjan for a cost of between \$30-\$35 per m<sup>3</sup>.<sup>5</sup> The sites included drains, village tips and waterways. According to a UN Report, "none of the dumping sites had proper facilities for the treatment of chemical waste [and] suffocating odours originated from the dumping sites."<sup>6</sup> On 20 August 2006 and the weeks afterwards, tens of thousands of people in Abidjan reported symptoms of nausea, headaches, vomiting, abdominal pains, skin lesions and a range of respiratory, pulmonary and gastric problems.<sup>7</sup> Official estimates state that 15 people died, 69 were hospitalised and more than 108,000 medical consultations took place in relation to the incident.<sup>8</sup> An assessment by the Ivorian Ministry of Health and Public Hygiene concluded that there were 63,296 probable and 34,408 confirmed cases of exposure to the waste from the *Probo Koala*.<sup>9</sup>

Trafigura told the UN Special Rapporteur investigating the issue that the characteristics of the waste from the *Probo Koala* could have resulted in a highly unpleasant smell, but could not have led to the widespread injuries, illnesses and deaths alleged.<sup>10</sup> The company has issued a series of statements, stating that the waste had been routinely disposed of and was not harmful.<sup>11</sup>

In February 2007 a class action was brought in the High Court of England and Wales against Trafigura on behalf of thousands of people in Abidjan who alleged they were injured after being exposed to the waste. The company paid £100m to the Ivorian government to remove the waste but denied any liability for the events.<sup>12</sup> This payment allegedly led to the release from an Ivorian prison of Trafigura's company president, Claude Dauphin, and the dropping of criminal charges in Ivory Coast.<sup>13</sup> In October 2007 the head of the local Ivo-

1 United Nations Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum: Mission to Côte d'Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008)*, A/HRC/12/26 ADD.2, 3<sup>rd</sup> September 2009: <<http://www.unhcr.org/refworld/type,MISSION,UNHRC,CIV,,0.html>> (18 Nov 2009) at 7.

2 Ibid, at 8.

3 Ibid.

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid at 9.

8 Ibid.

9 Ibid.

10 Ibid at 10.

11 See eg, *Trafigura's Response to Professor Ibeanu's Report*, 16 September 2009: <[http://www.trafigura.com/our\\_news/probo\\_koala\\_updates.aspx#Lr4tyNmXEwR5](http://www.trafigura.com/our_news/probo_koala_updates.aspx#Lr4tyNmXEwR5)> (18 Nov 2009); Meirion Jones and Liz MacKean, 'Dirty tricks and toxic waste' *BBC*: live stream at <<http://news.bbc.co.uk/2/hi/programmes/newsnight/8048626.stm>> (18 November 2009).

12 '16 September 2008' *Trafigura*: <[http://www.trafigura.com/our\\_news/probo\\_koala\\_updates.aspx#MRvVKzZTDVND](http://www.trafigura.com/our_news/probo_koala_updates.aspx#MRvVKzZTDVND)> (18 Nov 2009); Liz MacKean, 'Trafigura "to pay out over waste"' *BBC*: <<http://news.bbc.co.uk/2/hi/programmes/newsnight/8259482.stm>> (18 Nov 2009).

13 See eg, 'Case profile: Trafigura lawsuits (re Côte d'Ivoire)' *Business and Human Rights Resource Centre*: <[http://www.business-humanrights.org/Categories/Law-lawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire?&batch\\_start=11](http://www.business-humanrights.org/Categories/Law-lawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire?&batch_start=11)> (18 November 2009); Jones and MacKean, above n11.

rian contractor engaged by Trafigura was jailed in relation to the dumping of the waste.<sup>14</sup>

In May 2009 the BBC2 programme Newsnight obtained documents from the Amsterdam port authority detailing the composition of the waste dumped in Abidjan. The programme broadcast a segment on the dumping and published a story on its website, including an interview with a toxicologist from the Royal Society of Chemistry saying that the waste "would bring a major city to its knees."<sup>15</sup> Trafigura announced shortly afterwards that it would sue Newsnight for libel.<sup>16</sup> These proceedings are still underway.

In September 2009 the *Guardian*, BBC and media in the Netherlands and Norway published internal emails from staff at Trafigura revealing that they knew that the waste was highly toxic; its disposal was potentially hazardous; and that proper treatment of it would have been expensive.<sup>17</sup> Around this time Trafigura agreed to a compensation payment of £1,000 each to 30,000 people allegedly made ill after exposure to the dumped waste.<sup>18</sup>

## The Minton Report

In September 2009 *The Guardian* also obtained a copy of The Minton Report (the **report**). The report had been commissioned by Trafigura in 2006 to obtain a preliminary picture of the extent of the possible damage resulting from its dumping of waste in Abidjan.<sup>19</sup>

## *The threat of injunction or as happened here, super-injunction, poses a major challenge for journalists engaged in responsible journalism.*

The report stated that based on the "limited" information provided, the dumped waste was potentially harmful and "capable of causing severe human health effects".<sup>20</sup> It said that the large scale reports of medical problems in Abidjan were consistent with the release of a cloud of hydrogen sulphide gas over the city as a result of the dumping of the untreated waste.<sup>21</sup> It stated that possible consequences of exposure to the waste include "burns to the skin, eyes and lungs, vomiting, diarrhea [sic], loss of consciousness and death."<sup>22</sup> The report recommended that the waste be treated by a special chemical process called "wet-air oxidation" in order to make it safe.<sup>23</sup> It also concluded that the dumping was in contravention of European Council Directive 1999/31/EC and "would be forbidden in a European member state".<sup>24</sup>

The contents of the report were clearly highly sensitive and allegedly were not disclosed to Trafigura's opponents in the personal injury class action.<sup>25</sup> Trafigura continues to maintain that the Minton Report was both preliminary and inaccurate and that further tests of the vessels' contents revealed the waste to be harmless.<sup>26</sup> The *Guardian* asked the scientific consultant Minton, Treharne and Davies which authored the report about the truth of its contents.<sup>27</sup>

## The super-injunction

In response to *The Guardian's* questions, Carter-Ruck on behalf of Trafigura, applied for the now infamous super-injunction against the newspaper and 'persons unknown' to prevent publication of anything about the Minton Report, including its contents or the fact of its existence.<sup>28</sup>

The order also prohibited any publication of the existence of the injunction itself. It states:

*The application hearing to which this Order relates was held in private and the publication of all information relating to these proceedings or of information describing them or the intended claim is expressly prohibited.*<sup>29</sup>

Trafigura also applied to have its name anonymised and substituted with the letters 'RJW' and 'SJW'.<sup>30</sup> The proceedings would then be referred to as *RJW and SJW v The Guardian*. As well, the company sought orders that any person notified of the order who knowingly assisted or permitted a breach of the order would be in contempt of court.<sup>31</sup>

On 11 September 2009 Mr Justice Maddison heard the application in private and issued the injunction. The court file was sealed. A breach of the injunction would constitute contempt of court, punishable by imprisonment, fine or seizure of the company's assets.<sup>32</sup> There is no specific defence to this kind of contempt. The injunction against publication was apparently argued on the grounds that the report was confidential and privileged because it had been commissioned for use in litigation.<sup>33</sup>

## The Parliamentary Debate

On 12 October 2009 Paul Farrelly, Labour MP for Newcastle-under-Lyme placed a question on the House of Commons' order paper (known here as a notice paper) asking what measures were being taken by ministers to protect whistleblowers and press freedom following the injunction obtained by Trafigura.<sup>34</sup> Order papers are published and freely available online. Two days later, Carter-Ruck wrote

14 'How the Trafigura story unfolded' *Guardian*: <<http://www.guardian.co.uk/world/2009/oct/13/how-trafigura-story-unfolded>> (18 November 2009).

15 Jones and MacKean, above n11.

16 'Trafigura sues BBC for libel' *Trafigura*: <[http://www.trafigura.com/our\\_news/probo\\_koala\\_updates.aspx#GXyU09JbF2DB](http://www.trafigura.com/our_news/probo_koala_updates.aspx#GXyU09JbF2DB)> (18 Nov 2009)

17 'Trafigura knew of waste dangers' *BBC*: <<http://news.bbc.co.uk/2/hi/programmes/newsnight/8259765.stm>> (18 Nov 2009).

18 'Settlement vindicates Trafigura' *Trafigura*: <[http://www.trafigura.com/our\\_news/probo\\_koala\\_updates.aspx#MRvVKzZTDVND](http://www.trafigura.com/our_news/probo_koala_updates.aspx#MRvVKzZTDVND)> (18 Nov 2009); *Guardian*, above n14.

19 *Guardian*, above n14.

20 Minton, Treharne & Davies Ltd, 'RE: Caustic Tank Washings, Abidjan, Ivory Coast' (Minton Report) at 1, pdf at <<http://www.guardian.co.uk/world/2009/oct/16/carter-ruck-abandon-minton-injunction>> (19 Nov 2009).

21 *Ibid* at 5.

22 *Ibid*.

23 *Ibid* at 7, para 8.3.

24 *Ibid* at 6, para 8.2.

25 David Leigh, 'Revealed: Trafigura-commissioned report into dumped toxic waste' *Guardian*: <<http://www.guardian.co.uk/world/2009/oct/17/trafigura-minton-report-revealed>> (18 Nov 2009).

26 'Probo Koala Updates' *Trafigura*: <[http://www.trafigura.com/our\\_news/probo\\_koala\\_updates.aspx#MRvVKzZTDVND](http://www.trafigura.com/our_news/probo_koala_updates.aspx#MRvVKzZTDVND)> (18 November 2009).

27 *Above* n25.

28 *RJW and SJW v Guardian News and Media Limited and the person or persons unknown*, Claim No. HQ09 (11<sup>th</sup> September 2009); see pdf at Alan Rusbridger, 'Trafigura: the anatomy of a super-injunction' *Guardian*: <<http://www.guardian.co.uk/media/2009/oct/20/trafigura-anatomy-super-injunction>> (18 Nov 2009).

29 *Ibid*, at 3, para 6.

30 *Ibid*, at 3, para 5(b).

31 *Ibid*, at 5, para 18.

32 *Ibid*, at 1.

33 David Leigh 'Minton Report: Carter-Ruck give up bid to keep Trafigura study secret' *Guardian*: <<http://www.guardian.co.uk/world/2009/oct/16/carter-ruck-abandon-minton-injunction>> (18 Nov 2009).

34 Paul Farrelly, United Kingdom, House of Commons, *Parliamentary Business*, 13 Oct 2009, at Column 163: <<http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm091013/debtext/91013-0004.htm>> (18 Nov 2009).

to the Speaker of the Commons, John Bercow, and circulated the letter to every MP and peer, arguing that parliament should not proceed with a debate on the issue because the matter was sub judice.<sup>35</sup> The speaker has discretion to allow debate on matters which are sub judice within specified limits. Bercow, allowed Farrelly's question and a debate on "the effects of English libel law on the reporting of parliamentary proceedings" to proceed on 21 October 2009.<sup>36</sup>

## Reporting on Parliamentary Proceedings

The *Guardian* made several requests to Carter-Ruck to have the terms of the injunction varied to allow the paper to report on the question and parliamentary debate. The paper was told by Carter-Ruck the paper would be in contempt of court if it reported the proceedings.<sup>37</sup> The *Guardian* reported on its front page that it had been "prevented from identifying the MP who has asked the question, what the question is, which minister might answer it, or where the question is to be found".<sup>38</sup> In turn parliamentarians accused Carter-Ruck of being in contempt of parliament and threatened to report the firm to the Law Society for obtaining an injunction which had the effect of banning reporting on parliamentary proceedings.<sup>39</sup>

As he left his office at 9.05pm on 12 October 2009, *Guardian* Editor Alan Rusbridger posted this on Twitter:

*Now Guardian prevented from reporting parliament for unreportable reasons. Did John Wilkes live in vain?*<sup>40</sup>

Wilkes is often cited as the father of political journalism. A parliamentarian in the 18<sup>th</sup> century, he was instrumental in securing the right to report parliamentary proceedings and was jailed in the process of his campaign.

42 minutes later, Twitter users had revealed that the source of the question was Paul Farrelly MP and that it concerned a toxic waste dumping incident by Trafigura in West Africa.<sup>41</sup> Common #hashtags were created by users, making access to the information faster and easier. The next morning *Private Eye* published Farrelly's questions on its political page and by noon the three most popular search terms on Twitter were 'outrageous gagging order trafigura dumping scandal', 'ruck' and 'guardian'.<sup>42</sup> Shortly after this and an hour before *The Guardian* was due in court, Carter-Ruck agreed to alter the terms of the injunction to allow the *Guardian* to report Farrelly's question.<sup>43</sup> Rusbridger responded that Trafigura's attempt at obscurity had morphed into mass notoriety: "Twitter's detractors are used to sneering that nothing of value can be said in 140 characters. My 104 characters did just fine."<sup>44</sup> Comedian Stephen Fry, who has around 830,000 followers on Twitter tweeted: "Can it be true? Carter-Ruck caves in! Hurrah! Trafigura will deny it had anything to do with Twitter, but we know, don't we?"<sup>45</sup>

## Discussion

There are constant pressures on courts not to give effect to open justice, and this case provides another illustration. Trafigura is a powerful interest which sought to prevent an issue of public inter-

est from being discussed and presented a clear challenge to open justice and the integrity of parliamentary processes. Open justice is an integral principal of the English (and Australian) legal system. It is a means of ensuring public confidence in the justice process: justice is not only done, but also seen to be done. Whilst injunctions have a proper place in preserving people's rights, a super injunction, where the public does not even know of the existence of the underlying injunction, is deeply concerning – especially where the justification for blanket secrecy is highly questionable.

The reasons for which the super injunction were issued are unlikely to ever be entirely clear, because the proceedings were conducted in private and not recorded. There appears to be a pivotal argument about the confidentiality and privileged nature of the Minton Report on the basis that it was prepared in relation to legal proceedings. The finding by the judge that the report was in fact confidential is highly problematic given that it had been published on the Wikileaks website and media outlets in Norway and the Netherlands had copies of it. Assuming for a moment that it was confidential, the judge should have given serious consideration to the public interest in the public having access to information about the conduct and knowledge of a large multi-national in the developing world.

## *A newspaper should not be threatened with contempt of court for reporting parliament.*

Carter-Ruck's argument to stop parliamentary debate was that the injunction related to a matter currently before the court. There are ongoing libel proceedings between the BBC and Trafigura in relation to the Newsnight programme. The Minton Report could be highly damaging in these proceedings in establishing that what was broadcast about the knowledge of Trafigura staff, regarding the harmful nature of the Abidjan-dumped waste, is true. However, given that the report predates the matter complained of in the UK libel proceedings by three years, it was arguably not prepared in relation to those proceedings and should never have been granted on that basis.

As to the personal injury proceedings, Trafigura had reached a settlement and made compensation payments to the victims exposed to the waste in Abidjan, so arguably that matter was no longer sub judice. Trafigura is being prosecuted in the Netherlands in relation to representations it made to Amsterdam port authorities about the contents of the *Probo Koala's* slop tanks. It may be that the report relates to these proceedings but this arguably would not support a total secrecy order in the UK, which is a different jurisdiction.

In a statement from Trafigura published on the BBC website, the oil trader complained to the broadcaster that in any story about the UN Special Rapporteur's Report into the company's activities "it is incumbent upon you to ensure that Trafigura's response to the report is reflected in full..."<sup>46</sup>

35 Letter, Adam Tudor of Carter-Ruck to David Bercow, Speaker of the House of Commons, 'Trafigura Ltd and Trafigura Beheer BV', 14 October 2009, at 2: <<http://www.paulfarrelly.com/news/westminster-news/news.aspx?p=102173>> (18 Nov 2009).

36 Robert Booth, 'MPs' "super-injunction" debate to go ahead' *Guardian*: <<http://www.guardian.co.uk/politics/2009/oct/18/mps-superinjunction-debate-to-go-ahead>> (18 Nov 2009); David Leigh, 'Carter-Ruck in new move to stop debate in Parliament' *Guardian*: <<http://www.guardian.co.uk/uk/2009/oct/15/carter-ruck-trafigura-parliament-injunction>> (18 Nov 2009).

37 Letter, Isobel Hudson of Carter-Ruck to Isobel Griffiths of the *Guardian* '(1) RJW (2) SJW – and – (1) The Guardian (2) Persons Unknown', 12 Oct 2009: pdf at <<http://www.paulfarrelly.com/news/westminster-news/news.aspx?p=102173>> (18 Nov 2009).

38 David Leigh, 'Guardian gagged from reporting parliament' *Guardian*: <<http://www.guardian.co.uk/media/2009/oct/12/guardian-gagged-from-reporting-parliament>> (18 Nov 2009).

39 See eg, above n34.

40 Alan Rusbridger, 'The Trafigura fiasco tears up the textbook' *Guardian*: <<http://www.guardian.co.uk/commentisfree/libertycentral/2009/oct/14/trafigura-fiasco-tears-up-textbook>> (18 Nov 2009).

41 Robert Booth, 'Trafigura: a few Tweets and freedom of speech is restored' *Guardian*: <<http://www.guardian.co.uk/media/2009/oct/13/trafigura-tweets-freedom-of-speech>> (18 Nov 2009).

42 Ibid.

43 Ibid.

44 Above, n40.

45 Stephen Fry, *Twitter*: <<http://twitter.com/stephenfry/status/4833549338>> (18 Nov 2009).

46 'Trafigura statement' BBC: <<http://news.bbc.co.uk/2/hi/programmes/newsnight/8260004.stm>> (18 Nov 2009).

The irony of Trafigura now insisting on having its response voiced will not be lost on *Guardian* journalists. When the *Guardian* contacted the authors of the Minton Report to give them an opportunity to respond, they were slapped with a super-injunction prohibiting any mention of the report or the order itself. The threat of injunction or as happened here, super-injunction, poses a major challenge for journalists engaged in responsible journalism.

### Could it happen here?

Privacy law in the UK appears to have led to an increasing number of injunctions with broad terms of reference being granted on privacy grounds to protect individuals' privacy. The *Guardian* reports that it has been served with at least 12 notices of injunctions that could not be reported so far this year, which it reports is double the number issued to it in 2006.<sup>47</sup> The courts in the UK are supposed to weigh up the public interests in privacy and free speech. It is not clear that an effective balance is being struck.

Is a similar scenario playing out in Australia, or could it? Obviously one of the problems of super-injunctions is that they are secret, so an exercise designed to quantify their existence and assess their impact in Australia faces some significant stumbling blocks. We just don't know.

It is possible to argue, however, that the fact that the Australian legal system takes a different view of corporations' reputations and refuses to afford niceties such as standing for defamation means that courts may look significantly less favourably on a similar application for a Trafigura-style super-injunction. It seems difficult to imagine an instance where an application to anonymise the name of a multi-national corporation would be viewed by courts in this country as in the public interest. Here, party names are often anonymised in family court or immigration proceedings and some criminal proceedings. This is because on a particular set of facts the defendant's right to a fair trial outweighs the importance of open justice, or there is a public interest in the suppression of a party's identity – and the party in question is generally not a multi-national corporation.

The mere fact that something is embarrassing to an individual party will generally not be grounds for the court to be closed or a party's name to be anonymised or suppressed. There are of course questionable exceptions to this, such as the suppression of the names of three footballers in 2006 who tested positive in drug tests under the Australian Football League's 'three strikes policy'.<sup>48</sup> It is important that there is vigilance amongst appeal judges towards any readiness by themselves or trial judges to unnecessarily suppress or anonymise party names or close courtrooms to the public and the media. That a multi-national company should have taken steps to prevent the media from reporting on proceedings of parliament is a marked assault on freedom of the press and the integrity and openness of parliamentary processes established over hundreds of years. A newspaper should not be threatened with contempt of court for reporting parliament.

Fairfax was recently subject to an injunction in relation to a story it sought to publish in the Sydney Morning Herald on the Advanced Medical Institute's (AMI) impotence treatments. AMI was granted an interlocutory injunction by Justice Ian Gzell on the basis that the story would have published confidential details leaked by a former employee of its practices in relation to the treatment of erectile dysfunction.<sup>49</sup> When a Commonwealth Parliamentary Standing Committee held a roundtable forum on impotence medications, Fairfax applied for

a variation of the injunction on the basis that its reporting of those proceedings would constitute a breach of the court order. The forum was broadcast on the internet. Justice Nigel Rein ordered a variation of the injunction, saying that the Herald was "entitled to publish a fair and accurate report of the proceedings."<sup>50</sup> He cited Blackburn CJ in *Comalco Ltd v Australian Broadcasting Corporation*<sup>51</sup> and referred to Article 9 of the Bill of Rights 1688 which provides:

*That the freedom of speech, and the debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.*<sup>52</sup>

The same article that was frequently quoted by UK politicians in the wake of the Trafigura incident.

The difference between this example and the UK is that the existence of the AMI injunction was public and could be published. Furthermore, unlike Trafigura and the BBC, AMI as a corporation cannot sue Fairfax for defamation, so it has to rely on breach of confidence to protect its interests. It should be noted, however, that when the confidentiality proceedings did occur, NSW Supreme Court Justice Paul Brereton closed the court.<sup>53</sup>

Both here and in the UK, orders which place restrictions on the ability of publishers to report on either the proceedings of courts or those of parliament which are critical of the courts should be approached with extreme caution by judges.

### Is a super-injunction ever justified?

The chair of the Press Complaints Commission in the UK, Conservative peer Lady Buscombe, has described the use of super-injunctions as "anathema to democracy."<sup>54</sup> Only in exceptional circumstances should this type of secret injunction be granted. In cases concerning state secrets they may warranted. Lord Judge, the Lord Chief Justice of England and Wales has pointed to the necessity of secrecy, for example, when imposing an order to freeze the assets of one member of a fraud ring in order to prevent other members of the ring from disposing of their assets or fleeing the country.<sup>55</sup> The incident highlights the importance of the separation of powers in the Westminster model. Lord Judge has also emphasized that the decision by parliament on whether to discuss sub judice proceedings should be decided by parliament on public interest grounds and should not be the result of a court order.<sup>56</sup> Paul Farrelly, the MP who tabled the questions told the *Guardian*: "Carter-Ruck's manoeuvres this week, were it not so serious, would be tantamount to high farce."<sup>57</sup>

### The internet

The Trafigura incident is a compelling illustration of the fact that the internet is a powerful force and repository not necessarily respectful of court orders. It is salient to note that it is not the province of Twitter or the internet to discriminate between information in the public interest and information that the public is interested in. It should be up to the courts to provide that guidance. However, if courts refuse to adopt a strict view of open justice by providing shields of secrecy, then they must recognise that they themselves may be subjected to judgment from the online community – the ultimate of open judgments on open justice.

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47 James Robinson, 'How super-injunctions are used to gag investigative reporting' *Guardian*: <<http://www.guardian.co.uk/uk/2009/oct/13/super-injunctions-guardian-carter-ruck>> (18 Nov 2009).

48 *Australian Football League v Age Company Ltd* [2006] VSC 308.

49 *AMI Australia Holdings Pty Limited v Fairfax Media Publications Pty Limited* [2009] NSWSC 612.

50 *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2009] NSWSC 863 at 20.

51 [1983] 50 ACTR 1 at 3.

52 *Ibid* at 17.

53 *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1290.

54 'Baroness Buscombe speech to the annual conference of the society of editors' *Press Complaints Council, UK*: <<http://www.pcc.org.uk/news/index.html?article=NjA0OA>> (18 Nov 2009).

55 Judicial Communications Office, Statement of the Lord Chief Justice, *Lord Chief Justice's views on 'super-injunctions'*, 20 Oct 2009: <[http://www.judiciary.gov.uk/publications\\_media/media\\_releases/2009/jco-statement-super-injunctions.htm](http://www.judiciary.gov.uk/publications_media/media_releases/2009/jco-statement-super-injunctions.htm)> (18 Nov 2009).

56 *Ibid*.

57 Leigh, above n36.

# Next Generation Broadband Regulation: NBN Co. and the Government's New Role in the Market

Kelvin Liew considers the potential of the NBN to address ongoing competition issues in telecommunications. This essay won the 2009 CAMLA essay competition.

The Australian Government's \$43 billion dollar National Broadband Network (NBN) represents a major shift not only in the way Australians will communicate in the future, but also for the role of government in market regulation. Australia's broadband penetration, speed and prices lag behind most of the developed world. Within the OECD, Australia ranks 16<sup>th</sup> on penetration, 15<sup>th</sup> for fastest speed and has the 7<sup>th</sup> most expensive broadband per megabit.<sup>1</sup>

*the current access regime does not adequately strike a balance between creating competition and encouraging investment.*

This paper aims to explore the conditions behind, reasons for and the potential effectiveness of government addressing competition and market shortcomings through being an active participant, rather than external regulator. The paper is divided into three sections. The first argues the current situation is a result of regulation that discourages investment and a market structure that has allowed the incumbent to exercise monopoly power to stifle competition. In seeking to address these shortcomings, the government has established NBN Co to build and operate a wholesale only fibre network to 95% of the population. The second section considers the hypothesis that the NBN represents a shift in the way in which government is willing to address market shortcomings. It argues that this approach is a departure from the traditional responses that are open to government including those contained in the *Trade Practices Act 1974* (Cth). The third section considers the inherent tension between the role of the NBN addressing competition failures and the stated desire to earn a commercial return. The Government will have to answer the critical questions of who will determine prices, how will the government avoid past mistakes and ultimately will it work.

## One – current situation

Australia has had a deregulated telecommunications industry since 1997 when the current regulatory regime was implemented in the *Telecommunications Act 1997* (Cth) and Part XIB and XIC of the *Trade Practices Act 1974* (Cth) (the TPA). The industry is characterised by a large incumbent, Telstra whose regulated natural monopoly in its telephone exchanges and copper phone lines forms the basis

on which the majority (69.2%) of broadband services are provided, either directly through BigPond, on a wholesale basis or through third party owned equipment co-located at exchanges.<sup>2</sup> Telstra also owns 51% of Foxtel, which provides broadband through a hybrid fibre coaxial network (HFC). Optus HFC is the only significant fixed line competitor and passes approximately two million homes.<sup>3</sup> Australia's broadband is expensive, relatively slow and not universally available. These problems are linked with a lack of competition and underinvestment.

## Linkages: competition, investment, take-up & lower prices

Broadband take-up, much like other areas of technology is circular. The first movers pay a premium for a new technology. As the technology matures, efficiencies are created, economies of scale are generated and prices inevitably come down. With the lower prices those who avoided the new technology before jump on board. A critical mass is formed and companies start to see business opportunities in providing services that make use of high-speed always-on internet. In Australia this includes ABC's iView, provision of online government services and communication technologies. This turns the tables, as it is now the demand for services that drive broadband demand. However, high prices have limited penetration. Correspondingly, low penetration rates restrict the business opportunities to provide new services. The innovation cycle slows and Australia falls behind countries where this cycle is driving novel uses of broadband in medical services, education and e-government.

A brief examination of the broadband industry appears to suggest a competitive active market. Australia has two competing HFC networks passing roughly two million homes, 13 competitors have installed their own equipment in over 537 Telstra exchanges<sup>4</sup> and over 324 providers compete on a retail level.<sup>5</sup> Indeed the Connecting Regional Australia Report described competitive interest and activity as high and recommended that government expenditure should therefore be directed at promoting competition.<sup>6</sup> However this competition is largely based around Telstra's existing infrastructure.

## Regulatory uncertainty and underinvestment: Optus case study

The current regulatory system has been argued to not reflect the commercial realities and high-risk nature of investing in next generation broadband.<sup>7</sup> The role of the regulatory system in competition and investment will be considered in light of Optus's HFC network. Ergas argues that this network is technically and commercially capa-

1 Organisation for Economic Co-operation and Development, *Broadband Statistics for December 2008*, (2008) OECD Broadband Portal, at 1d, 5h & 4f.

2 Australian Bureau of Statistics, 8153.0 – *Internet Activity*, Australia, June 2008.

3 Singapore Telecommunications Limited and Subsidiary Companies, *Management Discussion and Analysis of Financial Condition, Results of Operation and Cash Flows for the First Quarter Ended 30 June 2009*, at p 45.

4 Kate McKenzie, 'Commsday Summit Speech' (Speech delivered at the Commsday Summit, Sydney, 31 March 2009) at p 1-2.

5 Broadband Choice, *All broadband ISPs* (2009) Whirlpool, <http://bc.whirlpool.net.au/bc/?action=list> at 18 August 2009.

6 Regional Telecommunications Inquiry, Parliament of Australia, *Connecting Regional Australia*, (2002) at p 263.

7 KPMG and Alcatel, *Fostering investment in broadband infrastructure – the need for regulatory certainty* (2006).

## *The wholesale-only nature of the company completely changes the incentive structure.*

ble of being a fully-fledged competitor.<sup>8</sup> However a failure to complete the cable rollout, upgrade the network to higher speeds and an inability to service almost 36% of passed homes for 'commercial' reasons means it has failed to reach any such potential.<sup>9</sup>

This has occurred for three reasons. First, the current access regime does not adequately strike a balance between creating competition and encouraging investment. Second, the combination of regulatory uncertainty and a large monopolistic incumbent creates an environment that is not conducive to large investment in new broadband technologies. Third, linking the first two points, underinvestment and over-reliance on copper means that there is no facilities based competition, service offerings are largely homogenous and flowing from this, the incumbent has no incentive to invest in new technology.

### **One part regulatory regime, one part industry structure**

The basic policy for regulating natural monopolies is to set access prices low enough to prevent the incumbent from attaining monopoly profits and encourage retail level competition, but high enough to avoid rent seeking and provide large market participants with the incentive to invest in their own networks. The argument here is that the ACCC has erred too much in favour of the former. First, underpricing access has been one factor that has skewed the incentive structure for Optus to invest in its HFC network. Rather Optus can utilise Telstra's copper network for less than the cost of upgrading its own network. This was the primary argument made by Telstra in applying for an access exemption where access would be excluded within the Optus HFC footprint.<sup>10</sup> Telstra argued that underpricing Unbundled Local Loop (ULL) means that it is only commercially attractive to put a customer on HFC in a limited range of cases because for the vast majority ULL is cheaper.<sup>11</sup> While this has allowed for an explosion in the number of ISPs rolling out their own infrastructure to Telstra exchanges, it is an approach that has been argued to bring short-term competitive gains while ignoring long-term effects.<sup>12</sup> In this way Optus has been aggressive in seeking new customers but has shown little interest in upgrading its own network.

The second problem concerns regulatory uncertainty and industry structure. Gilles argues that access pricing principles, the scope of obligations of access providers and definitional ambiguities in the regulatory regime create an "environment of commercial uncertainty."<sup>13</sup> He argues that this ultimately works against the long terms interests of end users by hampering growth and damaging innovation. Coupling regulatory uncertainty with an industry structure characterised by a highly vertically and horizontally integrated incumbent acts as an active deterrent against large-scale investment.<sup>14</sup> The rationale behind the access regime is to prevent inefficient duplication. How-

ever, this didn't stop Foxtel from almost exactly duplicating Optus's HFC network.<sup>15</sup> Anybody contemplating the economics of building a new network would clearly be concerned about Telstra responding by chasing the new entrant up and down every street with its own fibre. It is not difficult to see that any telco with the investment clout to deploy a new network would be deterred by a regulatory regime that has not changed significantly since Foxtel/Optus-Cablevision debacle or adopted an adequate balance between monopoly profits and rent seeking.

Third, rent seeking and regulatory uncertainty has caused underinvestment that has resulted in a lack of facilities based competition. Service offerings are largely homogenous and flowing from this, the incumbent has no incentive to invest in new technology. Indeed in the past, Telstra has been able to artificially hold back the speed of its' ADSL1, ADSL2 and cable service when its equipment and capacity were more than capable of supplying higher bandwidth broadband at little or no additional cost.

## *There is an inherent tension between the role of the NBN addressing competition failures and the stated desire to earn a commercial return.*

### **Comparative analysis – the United States**

The situation is very different in Japan and the United States. Cable operators have challenged incumbent telecoms by providing voice and broadband services in addition to television. In response the incumbents have responded by announcing new fibre networks and the cable operators have countered again with upgrades to their HFC networks. For example, HFC in Japan is capable of speeds up to 160mb/s<sup>16</sup> and in the United States to 101mb/s.<sup>17</sup> Optus HFC supports a mere 20mb/s.<sup>18</sup> This dichotomy of market situations is well highlighted in the difference marketing strategies. Cablevision's broadband marketing slogan is "No one, *including the phone company*, even comes close."<sup>19</sup> Verizon's FTTH television advertisement stars Hollywood director, Michael Bay, being told that FiOS speeds "blows cable away" and carries the slogan "It's the network."<sup>20</sup> In contrast Optus makes no attempt to distinguish between the broadband services it provides using its own network and those it offers through Telstra's.

### **Two – a new regulatory paradigm**

#### **Regulation 2.0 – what makes the NBN different?**

The previous section established that the current broadband problems are a result of a lack of competition that have forced up prices and resulted in underinvestment. In response to this, the NBN will dramatically alter the broadband landscape. It is expected to "fundamentally transform the competitive dynamics of the Australian telecommunications sector."<sup>21</sup> This argues that the NBN represents

8 Henry Ergas, *Wrong Number – Resolving Australia's telecoms. impasse* (1<sup>st</sup> ed, 2008) at p 19-26.

9 Ibid.

10 *Application by Telstra Limited* [2009] ACompT 1.

11 Submission to Telstra application for fixed line services exemption in Optus cable networks areas, December 2007, (Telstra).

12 Short-termism of current competition approach.

13 P Giles, B Salter & N Selvadurai, 'Roadblocks on the information superhighway – reconsidering the telecommunications access regime' (2008) 4 Issue 1, *Monash Business Review* at p 22.

14 Commonwealth, *National Broadband Network: Regulatory Reform for the 21<sup>st</sup> Century*, Discussion Paper (2009) at p 4.

15 Ergas, n 8.

16 Organisation for Economic Co-Operation and Development, *Broadband Portal – Press Release*, (2008), OECD Broadband Portal.

17 Optimum, *Introducing Optimum Online Ultra*, (2009) Cablevision, <http://www.optimum.com/online/ultra.jsp> at 24 August 2009.

18 Optus, *Media Release – Optus Cable Network hits High Speed*, (17 December 2007) <http://www.optus.com.au/portal/site/aboutoptus/menuitem.813c6f701cee5a14f0419f108c8ac7a0/?vgnnextoid=4c3024a4ac6d6110VgnVCM10000029867c0aRCD&vgnnextchannel=daf6d7ef03820110VgnVCM10000029867c0aRCD&vgnnextfmt=default> at 23 August 2009.

19 Optimum, n 17.

20 Bobbi Henson, *Verizon Taps High-Octane Filmmaker Michael Bay for New FiOS Advertising Campaign*, Verizon, <http://newscenter.verizon.com/press-releases/verizon/2008/verizon-taps-high-octane.html> at 26 August 2009.

21 Commonwealth, *National Broadband Network: Regulatory Reform for the 21<sup>st</sup> Century*, Discussion Paper (2009) at iii.

## **At \$43 billion dollars the NBN is clearly a radical way to address market shortcomings.**

a shift in the role of government from one of market regulator to market participant. In doing so an analysis of what makes the NBN different as a response to a competition problem and a comparison with the existing regulatory regime's approach to promoting competition will be explored.

### **Fundamental changes to incentives**

The key advantage of the NBN is that it avoids the balancing act between allowing a natural monopoly network to attain monopoly profits, which haemorrhage competition, and rent seeking behaviour that discourages investment. The wholesale-only nature of the company completely changes the incentive structure. Currently, every extra Telstra wholesale or ULL based customer means a thinner profit margin compared to a BigPond subscription. Therefore there is incentive, as the provider of infrastructure that supplies the majority of broadband connections, to price at the profit maximising monopoly level. In contrast, with the NBN an additional wholesale customer will not come at the expense of a much higher margin retail customer since it will be wholesale only. This means that NBN Co. will have incentives to price at a level that will allow for fierce retail level competition in order to maximise penetration levels. The NBN will also be a competitor to existing technologies and drive innovation and investment in these networks.

### **Market principles, not legal regulation**

Ultimately the problem with regulatory mechanisms is that they do not address structural problems within the telecommunication industry, they merely mitigate them. Regulatory responses operate by forcing or coercing a monopolist with a historically entrenched position and business model to open up its business. In contrast, by establishing the NBN "long standing structural issues"<sup>22</sup> will be addressed by using market principles rather than legal regulation to achieve these outcomes. In comparison, the Government has three primary regulatory mechanisms for addressing Telstra's significant market power. The first is the imposition of downstream price controls. Local calls and line rental paid by consumers are regulated by the ACCC. Second is an interconnection access regime. Third party ISPs are able to access Telstra exchanges to install their own Digital Subscriber Line Access Multiplexers (DSLAMs) in order to provide ADSL. Telstra's access rates to ULL paid by the ISP are regulated but the amount charged by the ISP to the consumer is not. Finally, anti-competitive conduct laws such as the industry specific Part XIB of the *TPA*, act as a deterrence against monopoly conduct.

### **Three – regulatory situation under the NBN**

Historically, governments established monopolies in postal, telecommunications and energy. As market principles became entrenched policy, industries were deregulated and monopolies sold off or corporatised. In this way the NBN will attempt to achieve the reverse, re-establish a government monopoly to instil market competition. Further, NBN Co. is to earn a commercial return and eventually be fully privatised. There is an inherent tension between the role of the NBN addressing competition failures and the stated desire to earn a commercial return. The critical questions facing the Government at the moment are who will determine prices, how will the government avoid past mistakes and prevent an abuse of market power and ultimately will it work.

### **A natural monopoly? – The role of government in setting price**

Access pricing is one of the most controversial aspects of infrastructure economics.<sup>23</sup> The Government has stated that it intends to play a role in setting access prices for an initial currently undetermined period. It was argued earlier that establishing the NBN as a wholesale only provider removes the ability and incentive for it to favour a retail arm as has become problematic with Telstra. This is consistent with the OECD recommendation that where a monopoly in fixed infrastructure is unavoidable that steps should be taken to prevent a monopoly in the services provided.<sup>24</sup> However, access pricing is still relevant as an opportunity to charge high access prices will discourage serviced based competition and lead to high retail prices.<sup>25</sup> In answering the question of the role of government in access pricing it is necessary to consider whether the NBN is a natural monopoly, the tension of the NBN promoting competition, providing affordable broadband and earning a commercial return.

While a toll-road or railway establishes a natural monopoly on the first day of operation, a 'natural' monopoly for the NBN will established after years of operation and after privatisation. In the short-term, while services and uses for broadband are being developed, consumers will be able to switch between technologies such as ADSL, HFC or wireless. However, if we accept the premise of the superiority of fibre for the delivery of high bandwidth services then as demand for these services drives take-up of fibre and as use of these services becomes the norm, then NBN Co. will have significant market power in what it can charge buyers of its wholesale access. This is the operation of the cycle referred to earlier and is supported by the KPMG-Alcatel whitepaper which argues that any next generation network must achieve both "scale in both reach and utilisation" before it can be classed as a natural monopoly.<sup>26</sup>

### **Conclusion**

At \$43 billion dollars the NBN is clearly a radical way to address market shortcomings. It is clear from the discussion that current regulatory approaches have actually resulted in the impasse that we are faced with today. Australia's lack of facilities-based competition is a result of an entrenched industry structure, a troubled access regime which skews investment incentives, and a lack of regulatory certainty. In this way the NBN will use market principles to fundamentally alter industry structure, drive innovation, and promote competition. While the Government faces a number of issues by being a market participant, structuring the company right from the beginning and establishing sound pricing principles before privatisation, will go some way to ensuring that the NBN is a success. In any event, it may very well be that the social and economic gains will outweigh the risk that this is not achieved from the word go.

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22 Commonwealth, *National Broadband Network: Regulatory Reform for the 21<sup>st</sup> Century*, Discussion Paper (2009) at p 1.

23 Productivity Commission, *Telecommunications Competition Regulation*, No. 16, (2001) at XXXIII.

24 Working Party on Communication Infrastructures and Services Policy, *Developments in Fibre Technologies and Investment*, (2008) Organisation for Economic Co-operation and Development at p 40.

25 Productivity Commission, n 23.

26 KPMG and Alcatel, n 7.

# No Free Kicks: Copyright in the Sporting Arena

The Senate Standing Committee on Environment, Communications and the Arts conducted an inquiry into the reporting of sports news and the emergence of digital media earlier this year. In this article, Victoria Wark considers the report of the Senate Inquiry and some of the arguments made for and against providing further protections for sporting events under the Copyright Act.

Despite being “indisputably part of modern life”<sup>1</sup> the common law does not recognise any property interest *per se* in a sporting event and event organisers do not ‘own’ the spectacle they produce. As a result, sporting bodies rely on various measures – including terms of entry, intellectual property actions<sup>2</sup> and special purpose legislation<sup>3</sup> – to protect against unauthorised commercial exploitation of ‘their’ major sporting event. This article discusses the copyright reforms raised at the Senate inquiry into the reporting of sports news and the emergence of digital media (**Senate Inquiry**).<sup>4</sup> The article concludes that sporting bodies who rely on copyright or call for its reform, need to appreciate the extent of, and basis for, its limited application to major sporting events. Copyright will not give sports a free kick in the digital environment.

## *The courts have resisted recognising copyright in a major event per se.*

### I Copyright and sporting events

Since the High Court decision in *Victoria Park Racing*, the law in Australia has been unambiguous; event organisers do not own a spectacle<sup>5</sup> and there is no general legal protection “around all intangible elements of value”.<sup>6</sup>

The courts have resisted recognising copyright in a major event *per se*.<sup>7</sup> In particular, the courts are reluctant to protect the production of a sporting event as a ‘dramatic work’ under the *Copyright Act 1968* (Cth) (the **Act**).<sup>8</sup> In *Australian Olympic Committee v Big Fights Inc* Justice Lindgren said a film of a sporting event was not itself a dramatic work and more is required than recording real life events.<sup>9</sup>

A ‘dramatic work’, he suggested, presupposes the action has been staged, contrived or directed and that the ‘producer’ has been responsible for the arrangement, form or combination of incidents which create an original end product.<sup>10</sup> He also said skill and labour in filming and editing would not transform “naturally occurring events”, over which the producer had no control, into a dramatic work under the Act.<sup>11</sup>

Similarly in Canada, the Federal Court of Appeal found that “despite the high degree of planning” in the performance of team sports, there is no copyright in a sporting contest because “what transpires on the field is usually not what is planned...[n]o-one can forecast what will happen”.<sup>12</sup> The court distinguished sport from choreographed works like ballet and found that while sporting teams may attempt to follow a game plan, a sporting event is largely a random series of events and the unpredictability is “so pervasive” it is not copyrightable.<sup>13</sup>

In the United States, copyright in an event *per se* has also had brief attention.<sup>14</sup> The National Basketball Association failed to establish that basketball games were original copyright works.<sup>15</sup> The court pointed to the opportunity for the legislature to include sporting events as a protected work<sup>16</sup> and the practical difficulties that would ensue if events were protected.<sup>17</sup> It was unclear who, in addition to the NBA – perhaps the teams, the stadium workers, referees or fans who all contributed to the event – would be a copyright owner and whose consent would have to be obtained before using copyrightable portions of the game.<sup>18</sup> The court observed that protecting an event would not accord with copyright’s interest in furthering the arts, sciences and knowledge of society.<sup>19</sup> There was also a risk that protecting the event would negatively impact the longevity of

1 Justice Ian Callinan, ‘Privacy, Confidence, Celebrity and Spectacle’ (2007) 7 *Oxford University Commonwealth Law Journal* 1, 1.

2 See eg, *Telstra Corporation Pty Limited v Premier Media Group* (2007) 72 IPR 89 (*Telstra v Premier Media Group*) *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333 (*Nine v ABC*).

3 See eg, *Commonwealth Games Arrangements Act 2001* (Vic); *World Swimming Championships Act 2004* (Vic).

4 See generally, Senate Standing Committee on Environment, Communications and the Arts (*Committee*), Parliament of Australia, *The Reporting of Sports News and the Emergence of Digital Media* (2009) (*Report*).

5 (1937) 58 CLR 479, 496.

6 *Ibid* 509.

7 See eg, *Nine v ABC* (1999) 48 IPR 333, 337. Justice Hill thought copyright in the spectacle was Channel Nine’s weakest claim.

8 The definition of dramatic work under the Act is not exhaustive and includes a choreographic show and a scenario or script for a show: s 10.

9 (1999) 46 IPR 53, 67.

10 *Ibid*

11 *Ibid*.

12 *FWWS Joint Sports Claimants v The Copyright Board of Canada* [1992] 1 FC 487, 496.

13 *Ibid*.

14 See eg, *National Basketball Association v Sports Team Analysis and Tracking* 931 F Supp 1124 (SDNY, 1996) (*NBA I*); and on appeal *National Basketball Association v Motorola Inc*, 105 F 3d 841 (2<sup>nd</sup> Cir, 1997) (*NBA II*). Cf *Baltimore Orioles Inc v Major League Baseball Players Association* 805 F 2d 663 (7th Cir, 1986) (*the Baltimore decision*).

15 *NBA I* 931 F Supp 1124, 1140 (SDNY, 1996).

16 *NBA I* 931 F Supp 1124, 1141 and 1143 (SDNY, 1996).

17 *NBA II* 105 F 3d 841, 841 (2<sup>nd</sup> Cir, 1997).

18 *NBA I* 931 F Supp 1124, 1144 (SDNY, 1996).

19 *Ibid* 1141–42.

## ***The Senate Inquiry's terms of reference included the appropriate balance between commercial and public interest in sports news reporting, whether specific limitations on use are required to address new technologies and the practice of issuing accreditation terms.***

the sport if competitors could prevent their rivals from copying their athletic feats.<sup>20</sup>

Judicial support for a legal interest in sporting events has been underwhelming.<sup>21</sup> One former member of the High Court of Australia, Justice Callinan, said that the time for recognising property in a spectacle may be overdue<sup>22</sup> and that copyright should protect sporting events in the same way as other original works of interest or utility.<sup>23</sup> Callinan also acknowledged that event organisers are left to rely on rigid causes of action to preserve legitimate commercial opportunities while undeserving exploiters flourish.<sup>24</sup> He adapted the copyright aphorism to suggest that what is worth copying or *exploiting* is worth protecting.<sup>25</sup> However, any such augmentation of copyright was recently rejected by the current High Court in connection with compilations, as a distraction from the focus on protecting expressions and not content or commercial value.<sup>26</sup> Without significant legislative or judicial action, the traditional reluctance and practical difficulties in recognising copyright in a sporting event, are likely to continue.

## **II The Inquiry**

### **A. Background**

Digital television and radio, internet protocol television, multi-channeling, and the proliferation of on-line and mobile telephony news services mean sports fans today can and do demand sporting news "anywhere, anytime, and on any platform".<sup>27</sup> Media organisations and sporting bodies have traditionally enjoyed a symbiotic relationship: news stimulates public interest in sport and drives up its commercial value<sup>28</sup> and access to sporting events enables the media to provide a breadth of coverage to the public and disseminate information, ideas and debate.<sup>29</sup> However, the unprecedented opportunities to gain the attention, interest and patronage of sports fans has created significant tension amongst some sporting bodies, their rights holders and media organisations.<sup>30</sup> The distinction between

news and entertainment and the previously separate domains for sporting bodies and news organisations – to develop and invest in grass-roots and elite sport and to report sports news (respectively) – are becoming blurred.

The media claim the low barriers to entry to the on-line space mean sports are fast becoming competitors; providing their own up-to-date scores, reports, images and video.<sup>31</sup> They also claim sports use accreditation to control and sanitise news reporting and to unreasonably and unrealistically offer exclusivity arrangements to rights holders.<sup>32</sup> Sports, on the other hand, claim the media has pushed the boundaries of fair dealing too far in the type, frequency and duration of content used in the reporting of sports news.<sup>33</sup> They say the media is monetising their intellectual property under the guise of fair dealing by aggregating content (videos, interviews, archives and photo galleries) and exploiting the associated commercial opportunities.<sup>34</sup>

## ***The Committee said parliament should not amend the fair dealing provisions in the Act***

At their extreme these issues were manifest in high profile disputes over access to events and use of event content.<sup>35</sup> These incidents and the trajectory of the relationship between sport and the media in the digital environment led to the Senate Inquiry. The Senate Inquiry's terms of reference included the appropriate balance between commercial and public interest in sports news reporting, whether specific limitations on use are required to address new technologies and the practice of issuing accreditation terms.<sup>36</sup> The Committee recommended against any formal amendment to the Act. It said sporting bodies had not made a "strong case" for copyright reform and in particular was not convinced current news practices eroded broadcast rights or the value of online rights.<sup>37</sup> The Committee was also not satisfied of a public interest in ensuring a growing revenue stream to certain sports given that mass participation in a sport does not necessarily reflect its media profile and that increased availability of sporting information online can generate wider public interest in the sport.<sup>38</sup> The Committee's responses to the various arguments for and against copyright reform focus all stakeholders in major sporting events on the scope and adequacy of copyright in the digital environment.

### **B. A 'Sporting' Work**

Several sporting bodies claimed that intellectual property is at the heart of their business and that because they 'put on the show' they should be protected under the Act.<sup>39</sup>

20 *NBA I 931 F Supp 1124, 1141 and 1144 (SDNY, 1996)* The better option, the court said was to confine the protection of athletic events to right of publicity, misappropriation, and other established legal doctrines outside the ambit of statutory copyright: *NBA I 931 F Supp 1124, 1144 (SDNY, 1996)*.

21 See eg, the treatment of the *Baltimore decision* in *NBA I 931 F Supp 1124, 1143 (SDNY, 1996)* and comments in *NBA II 105 F 3d 841, 846 (2<sup>nd</sup> Cir, 1997)*.

22 *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, 321 (Callinan J).

23 Callinan, above n 1, 3.

24 *Ibid.*

25 *Ibid.*

26 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386, 394.

27 Valeska Bloch, 'Sports Broadcasting in the Digital Era' (2009) 27(4) *Communications Law Bulletin* 15,16.

28 Tennis Australia, *Submission to the Senate Standing Committee on Environment, Communications and the Arts Inquiry into the Reporting of Sports News and the Emergence of Digital Media ('Inquiry')* (2009) 1, 2.

29 Report above n 4, [1.4–1.9].

30 See generally, *ibid* [3.1–3.58]

31 Evidence to the Committee, Parliament of Australia, Canberra, 15 April 2009, 54 ('*ninemsn*').

32 Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 75 ('*Fairfax*'). Fairfax queried what Telstra actually bought from the Australian Football League as online rights and said 'there is certainly no way [to insist] that Telstra now has football online so everyone else please stop'.

33 Evidence to the Committee, Parliament of Australia, Canberra, 15 April 2009, 46 (David Smith) ('*Smith*').

34 Evidence to the Committee, Parliament of Australia, Canberra, 15 April 2009, 38 ('*AFL*').

35 For example, Cricket Australia's dispute with various media organisations during the 2007/2008 cricket season and the dispute between the AFL and news agencies including Australian Associated Press ('*AAP*'): see Report, above n 4, [3.1–3.58].

36 *Ibid* [1.1 ]

37 *Ibid* [5.15]

38 *Ibid* [5.16]

## ***For the most part the media thought the current fair dealing provisions balanced the public interest in sports news and the commercial interest of sports***

One proposal to provide further protection to event organisers was the inclusion in the Act of a 'sporting works' category and a description of the rights in the event which belong to the organiser.<sup>40</sup> The amendment was justified by sporting bodies on the basis that they should be able to exploit (and stop others from using) the commercial opportunities around an event in the same way as other forms of intellectual property.<sup>41</sup> The submission also contrasted the limited application of copyright and performers' rights in sporting events under the Act, with the rights granted to other choreographed productions, dramatic works and performances.<sup>42</sup> The proposed definition of 'sporting works' included the rules of the game, games played under, or recognised by, the peak body for that sport and the fact that the sporting body provides the officials and the venue and ensured that the event proceeds.<sup>43</sup> The specific rights comprising copyright in a 'sporting work' were not exhaustively discussed, but included the ability to enter exclusive arrangements in respect of sounds or images of the event, regulating access to an event, and supervising the reporting of events to the public.<sup>44</sup> While the new category would also be subject to statutory exceptions, including fair dealing for the news reporting,<sup>45</sup> proponents of the reform conceded there was still a risk sports could sanitise the news.<sup>46</sup>

This proposal was strictly outside the Senate Inquiry's terms of reference and received little attention from media organisations (although one said it was "laughable").<sup>47</sup> The Committee said vesting copyright in a sporting event was not relevant to the issue of the media using content for non-news purposes.<sup>48</sup> The proposal is, however, relevant to the bigger issues raised at the Senate Inquiry. Rather than copyright attaching only to discrete elements of an event, a sporting works category would bring the event and third party dealings with the event clearly within the copyright regime.<sup>49</sup> It may also more effectively protect the commercial opportunities arising from an event or deter unauthorised exploitation of event content. Further, any judicial determination of fair dealing with a sporting work may

become a precedent for industry practice or create an impetus for sporting bodies and the media to agree what constitutes fair dealing in the sport event context.<sup>50</sup>

### **C. No enhanced fair dealing provisions**

The Committee said unless and until future case law warrants legislative intervention, parliament should not amend the fair dealing provisions in the Act or otherwise legislate specific parameters for a fair dealing for news reporting in the digital environment.<sup>51</sup> In retaining the status quo, the Committee refused to act on the sports' concern that the media was using fair dealing and new technologies to unfairly deliver sporting event content to consumers.

Sporting bodies claimed the current fair dealing provisions do not accommodate the digital, mobile and online platforms and should be updated.<sup>52</sup> The AFL, for example, said that without clear guidelines around fair dealing with digital technologies, the media can use these new platforms to communicate football content, purportedly as 'news', and directly compete with the on-line rights it sold to Telstra.<sup>53</sup> It follows, according to these sports organisations, that the scope and ambiguity of fair dealing in the digital space erodes the value of exclusivity offered to rights-holders and jeopardises sports' ability to reinvest in grass-roots participation or elite sport.<sup>54</sup>

#### **1. Flexibility or certainty**

Sporting bodies urged the Committee to recommend replacing the "wide and indefinite" concepts of news and fair dealing, with exhaustive definitions, and quantifiable limits. In particular, the sports wanted guidance on what constitutes 'news' (as opposed to monetising content) and pre-determined benchmarks of the volume, frequency and duration of the media's use of sporting event content.<sup>55</sup> The mechanisms sporting bodies proposed to achieve these reforms were, however, diverse and included non-binding advice from government, amendment of the Act or regulations to prescribe limits on fair dealing in certain circumstances and legislative protection of accreditation terms which prohibit certain use of event content.<sup>56</sup> In response to questions from the Committee about the form and content of any proposed amendment to the fair dealing provisions, sporting bodies conceded that it was a "difficult" issue and that the specific details of "frequency, duration and dissemination" would require "consultation between media and sport".<sup>57</sup> One submitter even acknowledged that while uniform guidelines would ensure that "the media are not driven crazy", they should still reflect the very diverse nature of each sport.<sup>58</sup>

39 AFL, *Evidence to the Committee*, above n34, 38 and Lander & Rogers Lawyers, *Submission to the Inquiry* (April 2009) 1, 5. See also, Coalition of Major Professional Sports ('COMPS') *Submission to the Inquiry* (May, 2009) 1, 5.

40 Report, above n 4, [4.44]. See also, *Evidence to the Committee*, Parliament of Australia, Melbourne, 29 April 2009, 50–6 ('Lander & Rogers Lawyers'); COMPS, above n 39, 21.

41 See eg, Lander & Rogers Lawyers, *Submission*, above n 39, 5.

42 *Copyright Act 1968* (Cth) s 248A(2)(c). While not conferring copyright in the performance, the Act entitles the performer to bring an action for 'unauthorised use' of the performance including the making, selling, copying or communication of the performance to the public without permission. For a contravention of these provisions a court may impose an injunction and damages (including any additional damages the court considers appropriate in the circumstances) or criminal penalties: see eg, ss 248J(2),(3) and 248PA–248PA.

43 Report, above n 4, [4.45].

44 See eg, Lander & Rogers Lawyers, *Submission*, above n 39, 5.

45 *Ibid.* See also, COMPS, above n 39, 21.

46 Lander & Rogers Lawyers, *Evidence to the Committee*, above n 40, 55.

47 Fairfax, above n 32, 77.

48 Report, above n 4, [4.48].

49 Cf the status quo where sports try to predetermine fair dealing or use accreditation terms to contract out of the operation of the Act. See generally, *Evidence to the Committee*, Parliament of Australia, Canberra, 5 May 2009, 21 (Senator Lundy and representatives of the Attorney General's Copyright Branch ('Copyright Branch')).

50 See eg, *British Broadcasting Corporation v British Satellite Broadcasting Ltd* [1992] Ch 141 ('BBC') which became a basis for determining fair dealing for television broadcasters.

51 Report, above n 4, vii. The fair dealing provisions in the Act for the purpose of reporting news are: ss 42 and 103B.

52 Cricket Australia, *Submission to the Inquiry* (April 2009) 1, 9. See also, *Evidence to the Committee*, Parliament of Australia, Canberra, 15 April 2009, 30 ('Cricket Australia'); AFL; *Submission to the Inquiry* (2009) 1, 10–11.

53 AFL, above n 52, *Submission* 8.

54 Cricket Australia, *Evidence to the Committee*, above n 52, 20. See also, COMPS, above n 39, 1 and Report, above n 4, [3.53].

55 AFL, *Submission*, above n 52, 8– 10. See also Cricket Australia, *Submission*, above n 52, 9; Report, above n 4, [4.18].

56 COMPS, above n 39, 20.

57 Lander & Rogers, *Evidence to the Committee*, above n 40, 53.

58 *Ibid.* 54.

## ***The Committee may have too easily dismissed the difference between the traditional and new media or overstated the acceptance of the conventions.***

The Committee's recommendation against legislative amendment or government intervention in respect of fair dealing effectively endorsed the media's submissions to the Senate Inquiry. Some media organisations were prepared to accept an explicit exclusion from fair dealing of live streaming or semi-streaming to protect rights-holders in the digital environment.<sup>59</sup> For the most part, however, the media thought the current fair dealing provisions balanced the public interest in sports news and the commercial interest of sports.<sup>60</sup> They also said the commercial or entertainment value of sporting events does not make those events any less newsworthy and that there is no sound basis for scaling back fair dealing or differentiating between technological platforms.<sup>61</sup>

Premier Media Group said that while fair dealing may appear to erode an exclusive right, in its experience as a rights holder, the news reporting regime was very limited and did not enable a third party to establish a valuable association with a sport or event.<sup>62</sup> By contrast, it said, sports, rights-holders and their sponsors can create an 'official' and superior association with the event across multiple platforms and seek remedies under the Act where the fair dealing regime is misused.<sup>63</sup> According to Premier Media Group, the fact that there are very few, if any cases, or actions by sporting bodies who feel so aggrieved suggests that prohibited conduct operates at the edges and not in the mainstream.<sup>64</sup>

The Committee emphasised the flexibility of the status quo and seemed particularly reluctant to recommend legislating today, for technology which may be superseded tomorrow.<sup>65</sup> While it acknowledged that the proposed reforms may provide greater certainty about the scope of fair dealing, the Committee thought the absence of any prescriptive limits on frequency, duration or use was in the public interest. This approach resonates with the submissions of various media organisations including SBS and the ABC. These organisations spoke of the virtue of courts having the flexibility to determine fair dealing in the context of the particular use. They also wanted to allow the current system to evolve with the new technology without prescriptive regulation, particularly while new platforms or new modes of consumer behaviour are difficult to predict.<sup>66</sup> The Committee's preference for flexibility also accords with Justice Allsop's comments, in the only reported case on fair dealing in the digital environment, that notions of fair dealing are not easy to govern by rules laid down in advance.<sup>67</sup>

### **2. Gentlemen's agreements and news access rules**

One reason the Committee gave for not recommending enhanced fair dealing provisions was that it expected conventions like the

3x3x3 'gentlemen's' agreement in the free-to-air television industry to emerge in the on-line and mobile telephony space.<sup>68</sup> This expectation may, however, be optimistic. It ignores the fact that many sporting organisations and their rights-holders have been "very slow" to come to terms with fair dealing in the digital and on-line environment and that any developments will need to reflect the different ways these new media outlets operate.<sup>69</sup> It also down plays the incidents which led to the Senate Inquiry and other examples of tension – including media lockouts, refusal to cover events, increased use of photo galleries, archival content, on-demand services and accreditation terms which claim copyright in media content, pre-determine future use, vet customer lists, and are subject to withdrawal at the discretion of a sporting body – which make amicable or mutually satisfactory arrangements, unlikely.<sup>70</sup>

## ***The ABC insisted that rules limiting online news to three bulletins per day, three hours apart, have no practical application and are meaningless on-line where news is not a one-off broadcast.***

The Committee may have also too easily dismissed the difference between the traditional and new media or overstated the acceptance of the conventions. The 3x3x3 convention grew out of an environment where today's rights holder is tomorrow's non-rights holder and a common interest and dependency for news content. Television broadcasters had an incentive to share news feeds with other news broadcasters and knew that technological and commercial pressures restricted their rivals' use of the content. The footage would be a small part of a larger program which had to fit within an existing broadcast schedule and the commercial imperatives of the other broadcaster. In the current environment the issues are more complex. Television broadcasters have no incentive to share real-time feeds with internet or mobile telephone content providers. These organisations convert television footage to internet files to stream or provide as part of on-demand or interactive services to consumers who would otherwise be watching the broadcast or paying another rights-holder for these services.

At the Beijing Olympics, the International Olympic Committee (IOC) introduced news access rules for the online space to complement the existing news access rules for traditional media and to deal with the "aggressive media environment" in Australia. The on-line rules specified that a maximum of 180 seconds of Olympic material per day could be used to report news on-line. The use was, however, subject to certain conditions including that the content only appear in a highlights package, as a news update bulletin and in no more than three bulletins per day, with each bulletin being three hours apart and removed after 24 hours.<sup>71</sup> While the IOC referred to the significant differences between the new and old media platforms,

59 See eg, Australian Broadcasting Corporation ('ABC') *Submission to the Inquiry*, (April 2009) 1, 5.

60 See eg, Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 31 (Special Broadcasting Services ('SBS')). See also, Agence France-Presse, *Submission to the Inquiry* (2009) 1, 8. Several media organisations, did, however, seek, an amendment to the Act to make provisions in contracts which exclude or modify the application of the fair dealing provisions unenforceable: see below Part II (D).

61 See eg, ninemsn, *Submission to the Inquiry* (April 2009) 1, 6–7.

62 Evidence to the Committee, Parliament of Australia, Melbourne, 29 April 2009, 21 ('Premier Media Group').

63 Ibid.

64 Ibid 28.

65 Report, above n 4, [4.22].

66 ABC, Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 29. See also SBS, above n 60, 31 and 36.

67 *Telstra v Premier Media Group* (2007) 72 IPR 89, 96.

68 The 3x3x3 rule allows media organisations to use three minutes of content, three times a day, at least three hours apart.

69 ABC, Evidence to the Committee, above n 66, 22.

70 Smith, above n 33, 47–50.

71 IOC, Evidence to the Committee, Parliament of Australia, Melbourne, 29 April 2009, 7.

## ***The Committee accepted that in some instances accreditation was being used to override the ordinary operation of copyright***

the on-line news access rules were, the IOC admitted, “based on the terrestrial television rules”.<sup>72</sup> In fact they seemed to effectively neutralise the technological advantages of the new medium and take it closer to the traditional television broadcast environment.

The IOC told the Committee the rules were “taken very well by the Australian media” and “were not abused”<sup>73</sup> and the Committee thought the rules were the best example of an agreement where on-line rights are associated with broadcast rights.<sup>74</sup> However, the IOC also admitted that this ‘agreement’ was “very quietly” negotiated with its broadcast partners and was not discussed with the media.<sup>75</sup> The IOC also has a reputation for requiring and strongly enforcing an undertaking from non-rightsholding media organisations to abide by the terms of any news access rules.<sup>76</sup>

Several media entities at the Senate Inquiry noted their concern with the IOC’s news access rules and the role of the 3x3x3 conventions in the new environment. The ABC insisted that rules limiting online news to three bulletins per day, three hours apart, have no practical application and are meaningless on-line where news is not a one-off broadcast.<sup>77</sup> It said the rules needed to further adapt to the on-line environment.<sup>78</sup>

### **D. Contracting out of fair dealing?**

One reform which did receive some tentative support from the Committee was a proposal in the 2002 Copyright Law Review Committee Report.<sup>79</sup> The Committee recommended that the government consider and respond to the 2002 Report and specifically a proposal that the Act include a provision that any agreement or provision in an agreement which excluded, or modified fair dealing (or had these effects), is unenforceable.<sup>80</sup> The 2002 Report described how fair dealing exceptions were fundamental to the scope of copyright in Australia and that exclusions or modifications via contract created an imbalance by extending the ambit of copyright under the Act.<sup>81</sup>

It is not clear what, if anything, will flow from this recommendation. The Report was provided to a previous government, did not receive a response and, although still lying around, is not under active consideration.<sup>82</sup> The original recommendation was directed to a

power imbalance where big corporations pre-determine contractual and intellectual property rights of consumers. While smaller media entities may be vulnerable consumers presented with accreditation terms “on a take it or leave it basis”,<sup>83</sup> the reform may be unjustified and ill-suited where two equal or powerful parties negotiate agreements.<sup>84</sup> During the Senate Inquiry several media organisations referred to their considerable power in negotiating accreditation agreements. News Limited said it did not want legislative help and will negotiate with sports until they lose sleep.<sup>85</sup> AAP also noted that sports’ dependency on the media to ensure exposure for their sponsors often meant the media ultimately gained access to an event, even if it was pressure from the sponsors which cleared the way.<sup>86</sup>

These submissions also pointed to the media’s main concern with the practice of sporting bodies issuing accreditation terms, namely that they can restrict, compromise or threaten the freedom of the press and access to information.<sup>87</sup>

### **E. Beyond copyright?**

The Committee regarded the use of accreditation terms and its actual and potential consequences for the free flow of news as the most significant matter raised at the Senate Inquiry and provided several recommendations for government involvement and intervention. The Committee went to some effort to understand, from all parties, the way accreditation terms are currently issued, negotiated, and accepted or rejected.<sup>88</sup> It also investigated a number of proposals to address the public interest in receiving news, including voluntary industry guidelines, codes of practice under the *Trade Practices Act 1974* (Cth) (TPA) and legislative rights of access to sporting events.<sup>89</sup>

The Committee accepted that in some instances accreditation was being used to override the ordinary operation of copyright by modifying the media’s use of its own content without going through the process of formal assignments or asserting a legal right over the images.<sup>90</sup> However, the Committee insisted that accreditation issues are not a matter for copyright law.<sup>91</sup>

It also rejected the proposal to address the accreditation issue by including in the Act a right of access to sporting events for the media.<sup>92</sup>

The Committee recommended that future negotiation of entry conditions be conducted on the premise that all journalists (including photojournalists and news agencies), regardless of their platform, can access sporting events.<sup>93</sup> It also suggested that if these negotiations are unsuccessful, the government should introduce a process for consideration of a code of practice under the TPA.<sup>94</sup>

72 Ibid 6.

73 Ibid.

74 Ibid 9.

75 Ibid 6.

76 See eg, IOC *Submission to the Inquiry – Annexure 5* (April 2009) 1, 4.

77 ABC, *Submission*, above n 59, 7.

78 Ibid.

79 Copyright Law Review Committee, *Copyright and Contract* (2002) (‘2002 Report’).

80 Report, above n 4, [7.49].

81 Report above n 4, [7.16].

82 Evidence to the Committee, Parliament of Australia, Sydney, 5 May 2009, (Copyright Branch), 23.

83 Georgina Waite, ‘Sport Broadcasting and News Reporting – The Current Legal Landscape and the Senate Committee Report into Sports News’ (Paper presented at the 2009 Copyright Symposium, Sydney, 15 and 16 October 2009) 1,5 (copy of paper available with author).

84 Copyright Branch, above n 82, 24.

85 Evidence to the Committee, Parliament of Australia, Sydney, 15 April 2009, 52 (News Limited).

86 Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 91 (‘AAP’).

87 Ibid 93. See also, Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 100 (‘AFP’). AFP told the Senate Inquiry that accreditation terms made it impossible for international news agencies to cover sporting events including the 2008-09 Australian cricket season and deprived fans of a source of interest: See also, PANPA, *Submission to the Inquiry* (April 2009) 1, 9; Getty Images, *Submission to the Inquiry* (April 2009), 1, 3.

88 See eg, Report, above n 4, [3.10 –3.46]. See also, Cricket Australia, *Evidence to the Committee*, above n 52, 17–20.

89 See Report, above n 4, [4.1–4.50].

90 Evidence to the Committee, Parliament of Australia, Melbourne, 29 April 2009, 42, (SMP Images)

91 Report, above n 4, [5.26].

92 AAP, *Submission to the Inquiry* (2009) 1, 18. See also, Smith, above n 33, 47.

93 Report, above n 4, vii.

94 Ibid.

The Committee's proposals in response to the accreditation issue stopped just short of escalating the issue. A prescribed voluntary or mandatory code would be a significant form of government intervention and a regulatory burden, a breach of which could be pursued by either an aggrieved party or the Australian Competition and Consumer Commission.<sup>95</sup> The Committee's reluctance to recommend the immediate introduction of a code of practice may reflect the diverse submissions in respect of industry regulation it received from the media *and* sporting organisations. Some entities rejected any need for further regulation.<sup>96</sup> Others proposed alternatives which lie somewhere between voluntary guidelines and mandatory codes of practice and cover either or all of the process for negotiation, the method and content of fair dealing and the conditions for dispute resolution or withdrawal of accreditation.<sup>97</sup>

The Committee accepted that there was "a bargaining imbalance, or a perceived bargaining imbalance" in the negotiation and implementation of accreditation regimes and was concerned that the "burden" falls disproportionately to news agencies like AAP and Getty Images.<sup>98</sup> It also accepted that a code of practice under the TPA could resolve this and other disputes between major sporting event stakeholders.<sup>99</sup> However, the Committee believed it had seen sufficient evidence to suggest that accreditation and other issues could still be resolved by the parties without such intrusive measures.<sup>100</sup> It also noted that any movement toward a code of practice in the future would involve costs to the industry, require compliance with best practice regulation, (including dispute resolution alternatives and as co-regulation), and need to be developed by government in conjunction with industry.<sup>101</sup>

Even if the remarkable step of prescribing a code of practice is taken, none of the reforms contemplated, including a mandatory code of practice, will completely remove the need for stakeholders to work, at some level, co-operatively. Sporting and media organisations should, therefore, continue to direct their energies to adapting to and exploiting (either together or alone) new technologies to retain or attract fans, advertisers or rights-holders and litigating or otherwise determining what constitutes fair dealing in the digital and on-line context.

## Conclusion

Despite its limitations, sporting bodies may continue to rely on copyright or seek legislative reform of the Act to preserve and increase opportunities to generate revenue. Copyright should, however, only be part of a broader strategy. Legislation like the new *Major Sporting Events Act 2009* (Vic) in Victoria, aimed specifically to protect the commercial arrangements supporting major sporting events, is another option. In addition to consolidating provisions in respect of crowd management, ticketing and aerial ambush marketing, the Victorian Act offers additional commercial protections and practical benefits. It also creates a recognised and sound basis from which sports can launch future calls for reform to better protect their interests.

While it is not seriously doubted that fair dealing for news reporting applies to the online and mobile platforms, judicial determination of

fair dealing in the new technological environment is overdue. Even though it is hard, grubby and expensive<sup>102</sup> litigation on the scope of fair dealing with new media may create a precedent or framework for future industry practice. Legal proceedings may also establish a mandate for legislative intervention if they show that the current fair dealing provisions do not work as effectively as they did for the traditional media.<sup>103</sup>

Despite its potential to erode the value of exclusivity, proliferation of sporting content on new platforms may also serve sports' long-term interest. It facilitates wide-spread access and exposure of the sport and its commercial partners and offers additional opportunities to generate revenue.<sup>104</sup> The traditional distinction between the functions of the media and sporting bodies is a "bit messed up".<sup>105</sup> Sports should take advantage of the low barriers to enter the on-line media world and capitalise on the lack of rules in this space. Sports should also attack the digital environment and compete with organisations monetising their content by generating premium content or services.<sup>106</sup> As facilitators of some of the most popular events in Australia, sports do not need a free kick to stay in the game.

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95 See generally, *Trade Practices Act 1974* (Cth) ss 51AD, 51AE.

96 See comments above in Part II (C) that no further regulation is needed.

97 See eg, COMPS, above n 39, 18–20; Cricket Australia, *Submission*, above n 52, 14; Reuters Thomson, *Submission to the Inquiry* (April 2009) 1, 6–7; News Media Coalition *Submission to the Inquiry* (April 2009), 1, 7.

98 Report above n 4, [5.28].

99 See AAP, *Supplementary Submission to the Inquiry* (2009) 1, 4–6.

100 Report, above n 4, [4.42]

101 *Ibid* [4.41]

102 AFL, *Submission* above n 52, 8; AFL *Evidence to the Committee*, above n 49, 33.

103 News Limited, above n 85, 47.

104 See generally, SBS, above n 60, 39.

105 Evidence to the Committee, Parliament of Australia, Melbourne 29 April 2009, 35 (Kayte Davies, Lecturer in Journalism, Edith Cowan University).

106 Sports with exclusive or superior access to players and officials could arrange those persons to regularly appear on-line to talk to fans, and create a further forum for on-line advertising: IOC, *Evidence to the Committee*, above n 71, 57. Both sport and the media already benefit from the inclusion on each other's websites of links to the 'official' sport website 'or official' news provider: Fairfax, above n 32, 76.

## Communications & Media Law Association Incorporated

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

Issues of interest to CAMLA members include:

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

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

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

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

## Contributions & Comments

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

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

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## CAMLA Website

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

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