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Greiner's Farewell to ASTRA

On 7 November 2008 the Honorable Nick Greiner resigned after 5 years as Chairman of the Australian Subscription Television and Radio Association. The Honorable Steve Bracks, former Premier of Victoria, has taken on that role. In this speech, given at a lunch which followed the ASTRA AGM, Mr Greiner gives a frank appraisal of television in Australia in 2008.

When Bill Ferris, Kim Williams and John Porter took me to lunch to ask me to consider becoming the Chairman of ASTRA some time in August 2003 I had had no prior involvement with the media other than as a consumer and some two decades back as a provider of content for political journalists.

I was fascinated at the challenge facing the STV industry to overcome a rocky start-up period which had seen huge investment, large operating losses and slower success in capturing the imaginations and the wallets of the public than would have been hoped for. There had been, of course, an accompanying range of aspiring media entrepreneurs who came and went.

I had an instinct that, partly because of the extent of the up-front investment and partly because the age of greater consumer power was at hand that subscription television might be on the brink of a golden age and I am pleased to say that, unrelated to my involvement, that has pretty much been the case.

In the last five years subscription television has demonstrated commercial and technical leadership of a high order. This can be judged in terms of customer take-up and satisfaction, a successful move to digital, a rapid increase in advertising revenues, innovation in content and time shifting and a decisive move to profitability.

The five years has been characterised by substantial alignment of strategic direc-

tion for Foxtel and Austar, the resolution of Optus' place in STV and great progress by the channels. While it would be invidious to single out individual channels, I think it is fair to say that from the largest to the smallest, and local to global, the period has been exemplified by good channel management and excellent stake-holder response.

I want to make a few now purposefully unguarded comments or observations about my experience as ASTRA Chairman thus, with some involvement in the overall debate. When I began, I deluded myself that one could lift the quality of media debate, especially as it related to the broad television market. Stupidly, I thought that the name of the game might be to expand the overall television market, for free-to-air and subscription to concentrate on what each did best and to co-operate in ways that provided win-win opportunities for viewers and indeed all the other stake-holders. Blind Freddy could see that the traditional FTA business model would be under threat and that more of the same from STV would not work either.

Sadly, I found that more than any industry in which I have been involved in the last twenty five years the zero sum game mentality prevailed between free-to-air, the long-term highly successful incumbents, and subscription television moving out of infant industry status into the role of the challenger.

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Inside This Issue:

Greiner's Farewell to ASTRA

Media and Communications in
Australian Families

The Future of the ABC and SBS

Getting the Act Together

A Difficult Cache to Solve -
Regulating Content in a Digital
World

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Contents

Greiner's Farewell to ASTRA

On 7 November 2008 the Honorable Nick Greiner resigned after 5 years as Chairman of the Australian Subscription Television and Radio Association. The Honorable Steve Bracks, former Premier of Victoria, has taken on that role. In this speech, given at a lunch which followed the ASTRA AGM, Mr Greiner gives a frank appraisal of television in Australia in 2008.

Media and Communications in Australian Families

Lesley Osborne and Sarah Jean discuss the results of recent research into media use among children and young people.

The Future of the ABC and SBS

Ian McGill and Peter Kim survey a discussion paper on future directions for the national broadcasters.

Getting the Act Together

Hamish Fraser and Michael Stojanovic outline the content of the new consolidated telecommunications industry code.

A Difficult Cache to Solve - Regulating Content in a Digital World

Valeska Bloch considers online content regulation.

I deluded myself that one could lift the quality of media debate, especially as it related to the broad television market.

The mentality amongst the free-to-air channels that the name of the game was primarily to defend the status quo, (as David Gynge put to me in his first incarnation at Channel 9 'I am a status quo man') unfortunately leads quite often to juvenile, vituperative public exchanges which do no credit to anyone and frankly denigrate the professionalism of everyone.

I am yet to meet the first politician, bureaucrat or advertiser who takes any notice of the periodic slanging matches. I am sure blame is not just on one side, but I can't help commenting that it does carry some of the flavour of the long-term heavy weight champion threatening to knock the new light weight champion out of the ring, and then being frustrated at lack of success.

In the five years there have, of course, been significant changes in shareholdings of two of the free-to-air networks, ongoing uncertainty regarding the third and a new majority owner at Austar. I would have hoped the end of mogul-mania might have produced a more balanced perspective on all sides and also amongst the media which generally has liked to see media policy through the prism of the moguls and their real or perceived interests.

It was of no surprise to me that politicians are fascinated with the sector, which obviously has such a significant impact on public life. Equally I am of the view that the

less involvement politicians have in seeking to micro-manage the industry, the better. I have been dazzled by successive Federal Governments making unnecessarily heavy weather of digital switch-over, multi-channeling, anti-siphoning, censorship and the rest.

Usually there have been very definitive, independent reviews by the Productivity Commission, the ACCC, academics and others and the correct public policy prescriptions are clear. Sadly, and generally for no good reason, these prescriptions which mostly involve the politicians butting out, have not been considered politically palatable by our representatives.

The picture for example of our political leaders sitting around the Cabinet table poised with their quills over an anti-siphoning list unique in the world for its scope and its anti-competitive characteristics is, in my view, simply sad.

Consider the content in which media regulation operates. We all know that the safe, predictable communications world of twenty years ago which culminated in the 1992 Broadcasting Services Act has been changed beyond recognition. No longer are Australia's national boundaries useful or relevant, nor for that matter are the boundaries between the internet, telephones and television.

Convergence and fundamental change are here. Let me quote from three different long-term independent industry observers. As Duncan Giles puts it 'as real convergence starts to occur, historical categorisations of products, services and industries in the tautological 'media and communications' sector become more and more confusing, irrelevant and misleading'.

Or Mark Armstrong on platform proliferation: 'In 1990 the new platforms for communications content were satellite broadcasting, cable TV and some wireless narrow casting services. Now a host of different platforms exist which do not fit comfortably with the old structure, including interactive games consoles, mobile phones with large screens, Wifi connected ipods, 3G phones, mp-3 players and the whole range

...correct public policy prescriptions are clear. Sadly, these prescriptions which mostly involve the politicians butting out, have not been considered politically palatable by our representatives.

...the very essence of that digital world is that it is fundamentally inconsistent with the analogue regulation which still prevails.

of streaming and down-loadable internet content.' and Philip Bell and UNSW looking at *'the future of the media world after television as we have known it for half a century'*. (my italics)

Also somewhat belatedly, Australia has followed the rest of the world in understanding that broadband infrastructure is an essential part of our economic and social future. Yet the very essence of that digital world is that it is fundamentally inconsistent with the analogue regulation which still prevails.

So if everyone understands the changes some here, some coming why does regulation not keep pace.

It's not really good enough as successive senior communications bureaucrats, regulators and Ministerial advisers have said to me over the last five years when agreeing with ASTRA's big picture views, in favour of a level playing field and letting a thousand flowers bloom, to simply shrug the shoulders and say 'you should know Nick it's just politics'.

Both the last Liberal Communications Minister Helen Coonan and the current Minister Stephen Conroy are engaged and informed, but find progress difficult in the whirlpool of national politics.

The Rudd Government should have no excuse for denying the public a well organised and led process leading to an integrated Communications Act appropriate for the twenty first century technology and twenty first century consumers.

The Coonan reform package was a welcome step forward but frankly it addressed twentieth century issues in an age of convergence and globalization and, of course in some respects notably use-it-or-lose it the Coonan package has not been implemented.

The Rudd Government, a self-proclaimed, evidence-based progressive government, should have no excuse for denying both the vested interests and the public interest a well organised and led process leading to an integrated Communications Act appropriate for the twenty first century technology and twenty first century consumers.

The time to start this is now, indeed already overdue.

On a macro level what David Epstein, then Kevin Rudd's Chief-of-Staff described as a thought bubble about the need to rewrite the Broadcasting Services Act after two decades should of course be taken up. I would hope that Minister Conroy and Shadow Minister Minchin or their Leaders will set the process of a far reaching debate leading to an over-arching, convergent Communications Act rather than focusing on pretending to personally protect the supporters of Chelsea or the Adelaide Crows or others whom the market will service appropriately anyway if given half a chance. The various important reviews scheduled for the next year or two would be infinitely more meaningful in the context of such a new overall approach rather than in their own silos as exercises in interest group management.

On a micro level I am amazed that as a nation we don't have the courage and intellectual integrity to say that the next generation of sporting rights should simply be a limited list of the real icons which frankly are always going to appear on free-to-air anyway and that beyond that list you simply let the codes, the broadcasters and the viewers sort it out. It does not require a leap of faith to believe that the owners of sporting rights and the broad-

casters actually do care about consumers. Their interests are obviously aligned. If one made this change, then by all means, in my view, let the free-to-air multi channel and show what they like, but the latter without the former would be an act of political bastardry and economic vandalism that is hopefully inconceivable.

The future for sporting rights can be seen in the arrangement between Channel 9 and Fox for the 2012 Olympics. Politicians should simply get out of over-regulating sport on television while in the real world viewers have moved on to myriad new, flexible, uncontrollable options.

Finally can I express my gratitude to all those with whom I have worked on the Board, Executive Committee and management of ASTRA over the last five years. In particular can I say that the subscription television industry is lucky to have people of the quality and dedication of Debra Richards, Ian Garland, Matthew Deaner and Veronica Weir.

ASTRA is now a more organized, more disciplined and better resourced than when I arrived. The credit is not mine, but yours and I wish you well for the future.

Nick Greiner was Premier and Treasurer of New South Wales from 1988-1992. Since his retirement from politics he has been heavily involved in the corporate world and holds office with numerous private and public organisations, including as a Trustee, Sydney Theatre Company Foundation and a Member of the Board of Governors, Committee for Economic Development of Australia (CEDA). Nick holds an Honours Degree in Economics from Sydney University and a Master of Business Administration with High Distinction from Harvard Business School. In the Queen's Birthday Honours List of 1994 he was awarded a Companion of the Order of Australia for public sector reform and management and services to the community.

Media and Communications in Australian Families

Lesley Osborne and Sarah Jean discuss the results of recent research into media use among children and young people.

In 2006-2007 the Australian Media and Communications Authority (ACMA) was funded to investigate the 'long-term psychological effect of the media on children, families and society'. This was an opportunity to review the current state of knowledge about the long term influences of various media on children and families, in a range of academic disciplines, including psychology, sociology and epidemiology, and to undertake a national survey of children's use of electronic media and communications. This primary research allows comparisons with 1995 data to provide a snapshot of changes in the family media environment since the mid nineties and in parents' attitudes towards and management of children's media and communications activities. Both studies are reported in *Media and Communications in Australian Families 2007 (MCAF)*.¹

Together they provide a foundation for understanding the place of media and communications in the lives of children and young people today, particularly the importance of digital media, which is an essential input to policy development in areas such as children's television, cybersafety and mobile content. The research has also been drawn on more widely as an accurate and up-to-date reference by industry, government and academia.

What does the research tell us?

Young people have a wide choice of media platforms and communications services and those choices continue to develop and expand. They are high users of these technologies, but at the same time they show different patterns of media use and interests in media activities depending on their age and gender, as illustrated in the research findings presented below.

The MCAF research comprised a nationally representative study of 751 Australian families, including a telephone survey with parents and time-use diaries completed by 1,003 young people aged 8-17 years. The study was conducted by Urbis for ACMA between March and June 2007.

Technology-rich family households

In mid-2007, most Australian families with young people aged 8-17 years had access to a wide array of electronic media and communications technologies at home. Few

family households were without access to mainstream technologies such as television, computers, DVD players, mobile phones, and the internet. Other technologies such as video games devices, portable music players, broadband internet, subscription television, and DVD recorders were also adopted by families to varying degrees.

Ninety-one per cent of families in the study had an internet connection, and 76 per cent had broadband internet. This was considerably higher than the levels of internet and broadband penetration across all Australian households.²

The box below shows the penetration of electronic media and communications equipment in Australian family households.

Penetration of electronic media and communications equipment in family households, 2007

About 90%+ of homes		Between 48% and 83% of homes		Less than 33% of homes	
Television	99%	Any games device	83%	Digital free TV	32%
Computer/laptop	98%	Game console	77%	Subscription TV	32%
DVD player	97%	Portable MP3/4 player	76%	Portable DVD player	27%
Mobile phone	97%	Broadband internet	76%	DVD recorder	23%
Internet	91%	Mobile phone (advanced)	56%	Portable MP4 player	17%
VCR	89%	Hand-held games device	48%	Hard-drive recorder	13%

Source: Parent survey (n=751)

Media use by young people

Young people in the study completed a detailed three-day time-use diary to record their daily activities. The results show that electronic media and communications activities play a substantial part in the day-to-day lives of 8-17 year olds.

Both boys and girls aged 8-17 years spent about half of their aggregate discretionary time³ in activities such as watching television, using the internet, playing video or computer games, listening to music, watching DVDs, and using a mobile phone (an average four hours and 49 minutes per day on these activities for 8-17 year olds). The time remaining involved them in other non-electronic media activities, which remain very popular, particularly with younger children. In company children prefer physical activities, hanging out/veging out, and general activities involving toys, pets and musical instruments. Media is more important as a

solo pursuit, especially television, listening to recorded music and gaming.

How young people spent their discretionary time was strongly related to their age. Fifteen-17 year olds spent a greater proportion of this time using electronic media and communications activities (56 per cent) compared with 12-14 year olds (51 per cent), and 8-11 year olds (41 per cent). In general, the proportion of time spent involved with electronic media and communications activities increased with age, and non-media activities decreased with age.

Boys and girls showed significantly different preferences for certain individual media activities. These were reflected in their different levels of participation and the amount of time they spent doing certain activities.

In order of priority, boys spent most of their discretionary time watching television (an average of one hour and 58 minutes per day), followed by playing video or computer games (55 minutes), using the internet (42 minutes), listening to music (30 minutes), watching DVDs (24 minutes), and using a mobile phone (13 minutes).

Girls spent most of their discretionary time also watching television (an average of one hour and fifty minutes per day), followed by using the internet (53 minutes), listening to music (40 minutes), and playing video or computer games, watching DVDs, and using a mobile phone (23-24 minutes each).

Girls were significantly more likely to participate in social activities than boys. These activities included using a mobile phone to text and talk, and online messaging, visiting social networking sites, and emailing. More boys than girls played video or computer games, including games against other players online (Figure 1).

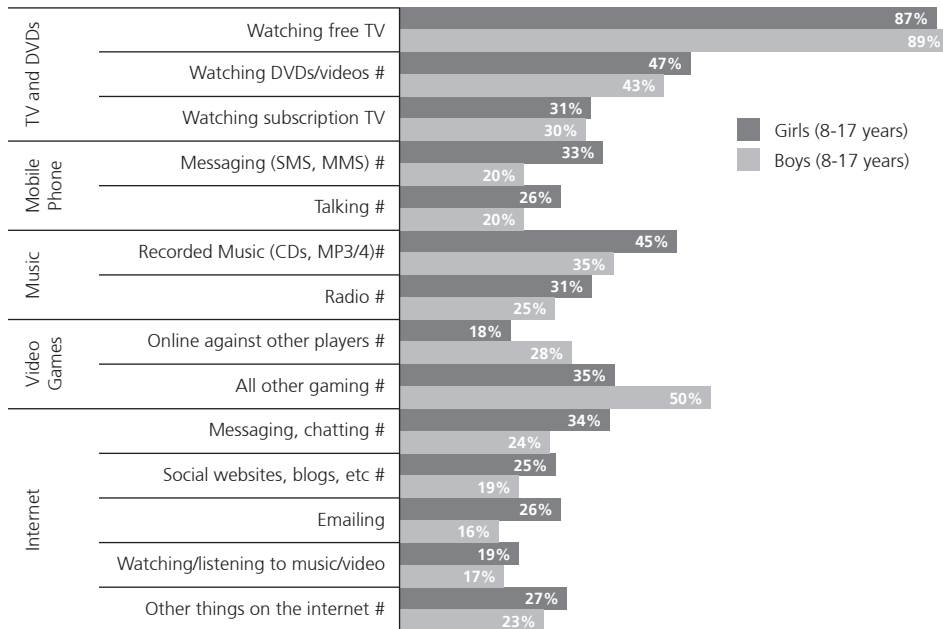


Figure 1: Proportion of young people whose diaries showed each activity by gender, 2007

Source: Diary (n= 1,003 young people; n=522 boys; n=478 girls)

denotes significant gender difference at p<0.05

Watching television

More young people watched television (94 per cent) than participated in any other electronic media activity in the study. Television viewing was also the most time consuming activity (an average of one hour and 54 minutes per day).

Boys watched an average 20 minutes less television per day in 2007 than they did in 1995 (an average 2 hours 18 minutes for boys—ABA 1996; one hour 58 minutes in 2007). Girls maintained their level of television viewing since 1995 (one hour and 52 minutes per day in 1995; one hour 50 minutes in 2007).

The amount of time spent watching television was largely consistent across the different age groups with 8-11 year olds spending an average 1 hour and 54 minutes per day watching free-to-air and subscription television, and 12-14 year olds and 15-17 year olds spending 1 hour and 55 minutes. However, 8-11 year olds watched more subscription television (an average 31 minutes per day) compared with the two older age groups (25 minutes for 12-14 year olds, 21 minutes for 15-17 year olds).

Use of mobile phones

Parents reported that just over half of young people in the study (54 per cent) had their own mobile phone. More girls (63 per cent) than boys (46 per cent) had their own mobile and ownership was highest amongst teenage girls. For 15-17 year olds, 99 per cent of girls compared with 80 per cent of boys had their own mobile phone. Girls were also more likely to be mobile phone owners in the younger age groups. Eighty-one per cent of girls and 70 per cent of boys aged 12-14 years, and 22 per cent of girls and 15

per cent of boys aged 8-11 years owned a mobile phone.

Reflecting higher mobile phone ownership, girls spent significantly more time per day using a mobile phone than boys (an average 23 minutes girls, 13 minutes boys) (Figure 2).

Mobile phone use also increased with age from 16 per cent of eight year olds to 90 per cent of 17 year olds. Average time spent using a mobile phone reflected this with 8-11 year olds using a mobile for an average of three minutes per day, those aged 12-14 years for 19 minutes, and 15-17 year olds for 43 minutes.

Findings indicate that starting high school may be the time for acquiring a mobile phone; 82 per cent of 8-11 year olds did not own a mobile compared with 25 per cent for 12-14 years, and 10 per cent for 15-17 years.

Use of the internet

Seventy-four per cent of 8-17 year olds recorded time spent on internet activities over the three diary days of the study. Young people spent an average of one hour and 17 minutes per day using the internet.⁴

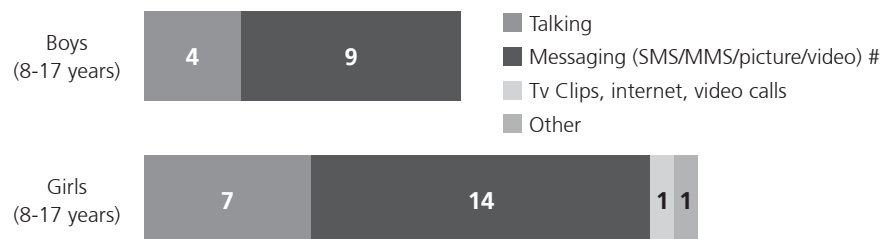


Figure 2: Average time spent per day using a mobile phone by gender, 2007

Source: Diary: (n=522 boys; n=478 girls)

denotes significant gender difference at p<0.05

Time spent online increased significantly with age from an average 30 minutes per day for 8-11 year olds, to one hour and 32 minutes for 12-14 year olds, and two hours and 24 minutes for 15-17 year olds (Figure 3). Gender did not influence the overall amount of time that young people spent online.

Boys and girls allocated their online time differently between individual activities. Girls spent significantly more time per day than boys engaged in online communications activities as a group of activities (an average 38 minutes girls, 28 minutes boys). Online communications activities include messaging or chatting, using social websites, and emailing.

Boys spent significantly more time than girls playing games against other players online (an average 22 minutes per day for boys, 8 minutes girls).

Activities alone and with others, and at home and away

Children and young people largely spend their internet time alone (72 per cent). The remainder of the time it is a joint activity, more often with other young people than adults. Television is almost opposite to the internet in this regard – 65 per cent of time spent watching television/DVDs is spent watching with other people, who are just as likely to be adults as other young people.

Children and young people reported that they are at home for three-quarters or more of the time they spend on the internet, watching television/DVDs and playing video/computer games. The remaining time they spend on these activities takes place at friend's houses, school and elsewhere outside of their family home. Within the home, internet time was evenly divided between communal spaces (48%) and private spaces (52% – a bedroom or another private room).

Social networking and authoring of web content by young people

Engagement with online social networking services was an important communication and creative activity evident in the study. A majority of internet time for young people aged 8-17 years (64 per cent, or an average 49 minutes per day) was spent visiting social networking websites, and doing other

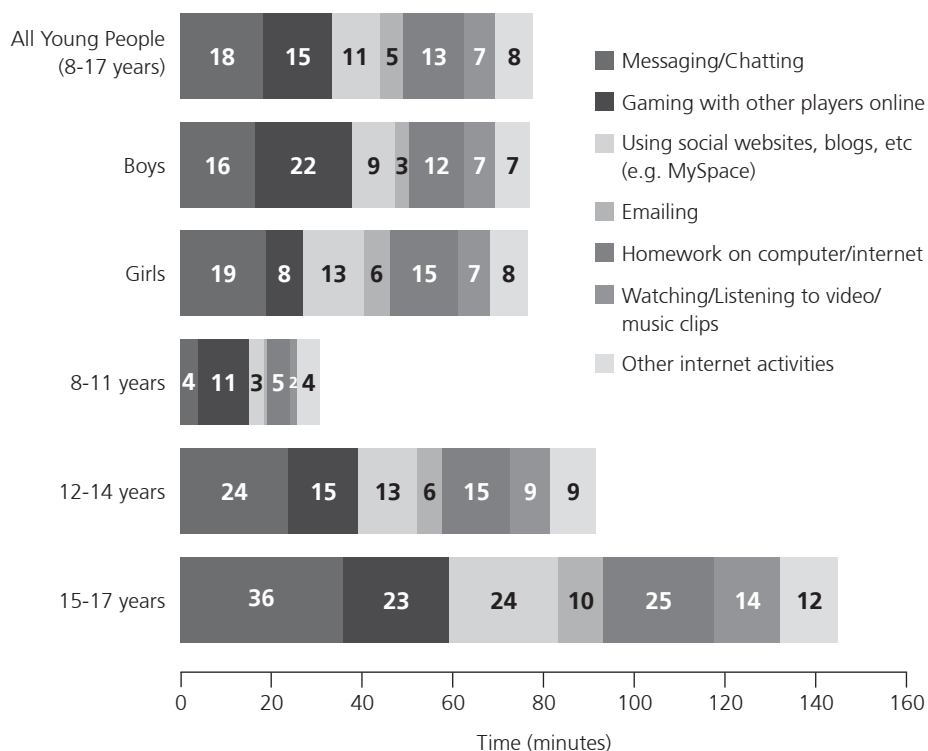


Figure 3: Average time spent per day on internet activities by young people, by age and gender, 2007

Source: Diary (n=1,003 young people)

online communications activities. This comprised messaging or chatting (18 minutes), gaming online against other players (15 minutes), using social websites (11 minutes) and emailing (five minutes).

These kinds of activities were more significant for older teens. During the three diary days, almost half of those aged 15-17 years messaged or chatted online (48 per cent), followed by visiting social networking sites (44 per cent), emailing (37 per cent), and playing games against other players online (37 per cent).

Authoring of web content

Forty-two per cent of 8-17 year olds had their own material online at the time of the study, including 39 per cent who had either a personal profile on a user-generated social networking website like MySpace (34 per cent), their own website (13 per cent) and/or a stand-alone blog (7 per cent) (Figure 4).

More girls aged 8-17 years (47 per cent), than boys (38 per cent) had authored their own material to post online. Girls were also more likely to have a profile on a social networking website (41 per cent girls, 27 per cent boys).

Participation in social networking and online authorship was also strongly associated with age. Online authorship increased steadily from three per cent at eight years of age, up to 72 per cent at 14 years where it then stabilised. Similarly, having a profile on a social networking website was rare among primary-school aged children, ranging from

one per cent of eight year olds to 28 per cent of 12 year olds. Among young people of high-school age this increased markedly from 46 per cent of 13 year olds up to 66 per cent of 17 year olds having a social networking profile.

Overall, teenage girls were the most likely sub-group to be involved in online authorship. Eighty per cent of 14-17 year old girls had some form of online authorship and 72 per cent had a profile on a user-generated social networking service.

Among 14-17 year old boys, 65 per cent had authored web content and 52 per cent had a profile on a social networking website.

Parents' see benefits in media and communications

The majority of parents feel that their children receive some or many benefits from participating in electronic media and communications activities (Figure 5). This is particularly the case with the internet where 53 per cent of parents identify many benefits for their child.

Despite the fact that the internet causes more parents concern than other media and communication activities, its educational benefits, in areas of researching, homework, skills development and media literacy, made it the clear leader in perceived benefits. Television and mobile phones were also valued for educational benefits, and security and parental peace of mind, respectively.

Conclusions

Media and Communications in Australian Families 2007 provides a wealth of information about the way children and young people spend their time and the role of media and communications technologies in their lives. Comparisons with 1995 paint a picture of both continuity and change within a technology rich environment for young people. Children still like to engage in non-media related activities, especially younger children, and non-media activities take up half of children's discretionary time, as they did in 1995. At the same time, some media activities have also maintained or increased in significance.

Television maintains its dominance as the most time consuming activity for children and young people, albeit at slightly lower levels than in 1995. Its importance as an experience shared with families and friends,

Table 1: Activities at home and away, 2007

	Internet**	TV/DVDs	Gaming*	Mobiles	Music/radio
Total minutes	23,385	103,650	29,655	13,425	26,325
At home	private room ¹	52%	32%	51%	
	shared room ²	48%	65%	42%	49%
	subtotal	76%	78%	80%	
Outside the home	22%	24%	20%	51%	46%

NOTE: This table should be read column by column. For example, of 103,650 sampled minutes spent watching television or DVDs, 32% of this time was spent behind closed doors at home, 65% was spent in shared spaces at home and 22% outside the home. These percentages add to more than 100%, as 'location' categories were not exclusive (to allow young people to move between spaces in the one time block).

1 Own bedroom, brother/sister's bedroom or other private room

2 Communal/ shared space at home, e.g. living room

* Includes online gaming against other players. **Excludes online gaming against other players.

Source: Diary

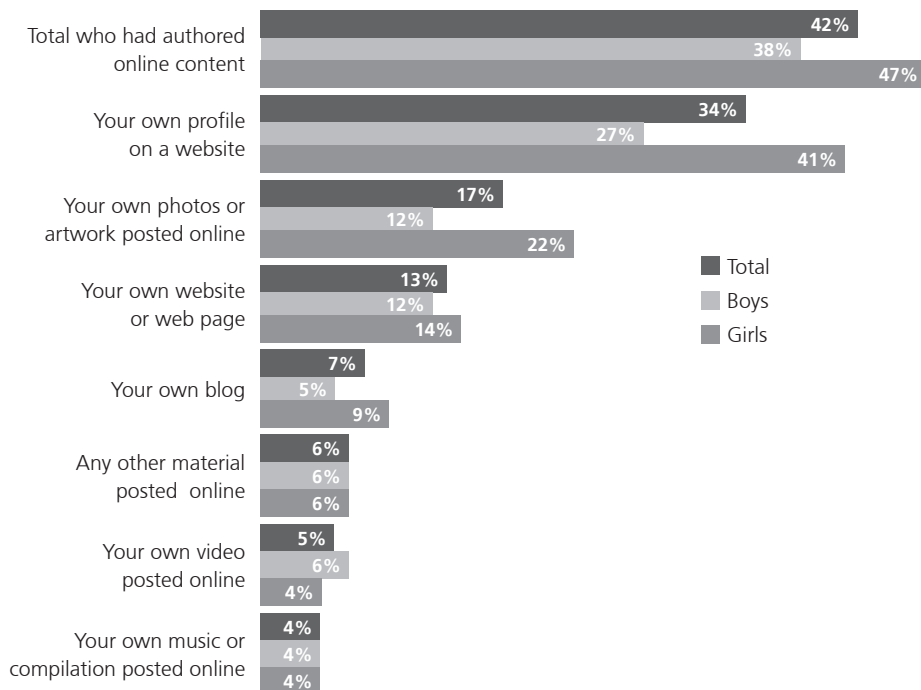


Figure 4: Participation by young people in authoring of web content by gender, 2007

Q: Do you currently have ...? (fill in as many circles as you need)

Source: Day 4 diary question (n=1,055 young people)

points to its continuing contribution to social interaction and shared cultural experience. The specific destination for children provided by children's multi-channels are reflected in higher levels of television viewing by children in subscription homes, especially by younger children, although, overall, children spend more time watching free-to-air television than any other activity.

The new insight from this research is the increasing engagement of children with converged digital media. Many of the technologies now used by young people – the internet, email, instant messaging, social

networking, video sharing, and portable music players – were not present in the home a decade ago. With older teenagers, time spent online closely matches television viewing. This engagement is likely to increase, given parents' positive orientation towards the learning and educational benefits of the internet and the high adoption of broadband in households with school age children. This is despite the difficulty experienced by some parents in managing their children's internet use.

Evidence about the importance of online communications to young people, and in

particular teenagers' participation in social networking, online gaming and messaging/chatting has highlighted the range of potential risks specifically associated with these activities. Ensuring that children and young people have a positive experience online, will be increasingly important for parents, educators and policy makers in the future. *Media and Communications in Australian Families 2007* has provided ACMA with a foundation for further research into the role of the internet in the lives of young people. ACMA has already built on the data about internet use to design qualitative research on young people and social networking which will inform targeted communications about online safety.

Lesley Osborne, Manager, Strategic Research, ACMA, and Sarah Jean, Research Officer, Strategic Research, ACMA.

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Endnotes

1 *Media and Communications in Australian Families 2007* was published in December 2007 and is available on the ACMA website at www.acma.gov.au/mediareports

2 The Australian Bureau of Statistics (2007) reported that 64 per cent of occupied private dwellings in Australia had the internet. Forty-three per cent had a broadband connection.

3 **Aggregate discretionary time** is calculated by adding the time spent on individual leisure activities together. It includes double or triple counting of time periods during which multiple activities may have been undertaken. Aggregate discretionary time includes time spent doing homework.

4 Average amount of time spent using the internet per day includes doing homework on the computer or internet, and is averaged across all young people in the sample whether or not they used the internet.

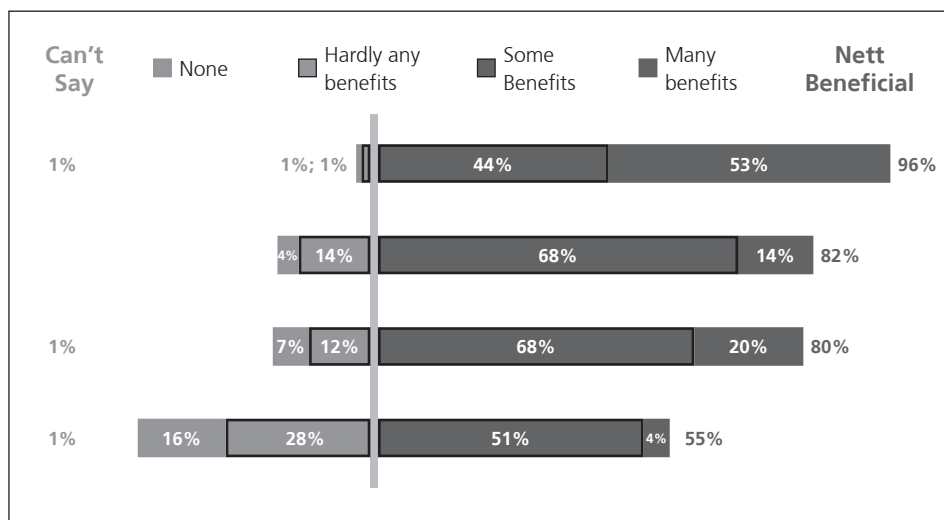


Figure 5: Perceived Benefit From Child's Use Of Media/Communications, 2007 (N=Valid Sample Only)

Q: '...can you tell me how BENEFICIAL you feel each of the following is for your child The first one [...] - would you say that s/he gets 'many' benefits from this, 'some benefits', 'hardly any' or 'none'.

The Future of the ABC and SBS

Ian McGill and Peter Kim survey a discussion paper on future directions for the national broadcasters.

The Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) (the **national broadcasters**) are set for an overhaul in the areas of governance, and potentially strategy and operations. A discussion paper released on 16 October 2008, *ABC and SBS: Towards a Digital Future* (the **paper**), invites the public to come forward with their ideas for the future of the national broadcasters.¹ The public submissions are designed to inform crucial policy and funding decisions ahead of the next three-year funding round starting 1 July 2009.

The paper follows on the heels of talks held by the 'Creative stream' at the Australia 2020 Summit in April 2008 (the **2020 Summit**), and it was released at the same time the Government announced changes, effective immediately, to de-politicise the national broadcasters' boards to 'restore independence.'² Interestingly, the paper only briefly mentions these changes, although it is perhaps the area likely to generate the most public interest. The main changes include:

The suggestion which is likely to raise some public interest is the possible merger of certain ABC and SBS operations.

- advertised board vacancies;
- a selection panel established at arms-length from the Government;
- banning of former politicians and senior political staffers;
- bi-partisan conferral on the appointment of the ABC Chair; and
- reinstatement of the ABC staff-elected director.

The paper is organised into seven sections and it covers a lot of ground. Generally, it discusses what the ABC and SBS have done or are doing in response to the changing media environment. It raises issues and questions but does not offer any recommendations; rather, on some issues it raises suggestions or options for consideration. The suggestion which is likely to raise some public interest is the possible merger of certain ABC and SBS operations.

We have until 12 December to let the Government know what we think the ABC and SBS should look like going forward.

The motivation: a changing media environment

The underlying driver or motivation for the paper is the need to consider the impact of emerging technologies and trends in media and broadcasting, in the way the national broadcasters develop programming, deliver and transmit services and interact with audiences. The Minister has stated that 'the right decisions [need to be made] now if national broadcasting is to thrive in a digital, online, global media environment.'³

The paper acknowledges that there is still much debate about the extent and speed of projected changes and that no one really knows 'what the media and broadcasting industry might look like in just over a decade's time.'⁴ Current trends and areas of change include:⁵

Digital television. The full conversion of television to digital by December 2013 which will mean the end of analogue and digital simulcasting.

Digital radio. The commencement of digital radio by 1 July 2009 as a supplement to AM and FM radio.

Changing audience viewing and listening habits. There is increasing competition for individuals' time from new digital media players (such as MP3 and iPods) and delivery platforms like the internet. There is also a trend to time-shifting through the use of various devices to record television programs.

Broadband. Expanding the reach and take up of broadband is a Government policy priority.

Subscription television. An increasing number of households are subscribing to subscription television services which operate on fully digital platforms.

The issues and questions

Generally, notwithstanding their different mandates, the ABC and SBS face similar issues as the technological march to a digital environment continues.

The paper's three main themes which underpin most issues or questions are: the national broadcasters' roles, cost pressures, and the need for efficient and effective service delivery.

The role of national broadcasting

The paper suggests that the national broadcasters' charters may require amendment, given that their objectives and the regulations which give them effect were made in an analogue broadcasting environment. For example, both charters are couched in terms of broadcasting even though both the ABC and SBS are increasingly providing more online services.⁶

Cost pressures

The paper also points out that, although access costs for viewers in relation to information technology equipment and broadband costs are expected to decrease over time, as are some of the national broadcasters' production and operating costs, there are a number of cost considerations. These include the following:

- Any increase in the number of digital channels or High Definition programming will increase costs associated with production or commissioning of new Australian content.⁷
- The national broadcasters face additional infrastructure and service provision costs. The costs of providing bandwidth-intensive content increases with demand; as more content is downloaded simultaneously, there is a need for more servers and bandwidth.⁸
- The increasing uptake of digital technology is changing the mix of the national broadcasters' asset bases. Plant equipment and computer software is starting to make up a higher proportion of their assets. As these assets have relatively short useful lives, there will be higher depreciation expenses and increasing rates of capital reinvestment.⁹

Efficient and effective service delivery

To address these cost pressures, the paper suggests some cost saving initiatives and alternative funding options so as to maximise the national broadcasters' efficiency and effectiveness in service delivery. These suggestions include:¹⁰

- **Property rationalisation.** The ABC has substantial property holdings and

capacity, and in recent years has sold off some of its property assets in Perth and Sydney.

- **Merger.** There might be scope for merging the national broadcasters' procurement and management of distribution and transmission services, and other functions such as legal and information technology. Another option raised is to pool or share transmission capacity between the ABC and SBS.
- **Additional funding sources.** Given existing and expected future funding requirements, consideration should be given to finding other ways to 'augment' funds. These could include pay-per-view for programs distributed online, charging for archival material accessed online, or open contracting for public interest content.

Other issues and questions canvassed include:

Harnessing new technologies to deliver services¹¹

- **Universality and localism objectives.** The technology chosen by the national broadcasters will affect how they deliver on these two objectives. Internet-based or other technologies may be more effective in delivering services to regional and remote areas. Also, due to cost pressures, there has been an industry-wide trend of sharing content from a central source, and so local communities may not be receiving relevant local content. Broadband might address local service issues in a more cost-effective manner.
- **Access to significant program archives.** Broadband platforms could allow greater exploitation of the national broadcasters' archive material.
- **Creativity and innovation.** Earlier adoption of emerging technologies could encourage innovation and risk-taking in production and creative sectors generally, but it may also expose the national broadcasters to 'changing consumer preferences or technologies that may fail to gain a critical mass or wide implementation.'

Informing and entertaining Australians¹²

- **Australian content.** If commercial television's appetite for providing Australian content fades because of, for example, any decline in television advertising revenue resulting from the growth of new and competing platforms, the national broadcasters might need to play a greater role in providing Australian content.

- **Children's programming.** There was support at the 2020 Summit for the national broadcasters to play a greater role in children's programming, for example, through a dedicated children's television channel.
- **News and current affairs.** Digital technology could improve the 'impact and value' of the national broadcasters' news content, for example, by maximising use of technology in news gathering and dissemination, and/or use of a dedicated news and public affairs channel.

The paper's three main themes which underpin most issues or questions are: the national broadcasters' roles, cost pressures, and the need for efficient and effective service delivery.

- **Comprehensiveness and program diversity.** As audiences time shift their viewing and listening habits to times that suit them, the national broadcasters' ability to fulfil their broad mandates will be tested as they decide how to use their limited resources, to produce programs across the content spectrum and different delivery platforms.

Education, skills and productivity¹³

- **Educational programming.** The national broadcasters must provide educational programs. A dedicated education channel has been suggested and this could be delivered online and/or on a digital television channel.
- **Training and staff skills development.** Existing industry skills shortages, especially in technical fields such as broadcast engineering and production, 'are expected to become more acute as the range of technologies and platforms used in broadcasting and media expands.' There may be potential for the national broadcasters' training arms to provide external training to the industry on a cost recovery basis.

Social inclusion and cultural diversity¹⁴

- **Multilingual programming.** As the number of language groups in Australia expand, SBS must work out how it serves these new groups without adversely impacting services to established groups. The online environment provides more options for delivering non-English language programming.
- **Migration trends.** There might be scope for using the national broadcasters to support public broadcasting or migration initiatives to address any skills shortages in Australia generally.

For example, this could be achieved by adding an English-language education program to target particular migrant groups or informing migrant groups overseas about Australian life and culture.

- **Indigenous programming.** The paper asks: is there scope for the Indigenous services of the national broadcasters (and National Indigenous Television launched in 2007) to be provided in more effective, efficient and integrated ways that make best use of available resources?

Presenting Australia to the world¹⁵

- **Overseas service.** The national broadcasters play a significant role in overseas broadcasting and there are calls for an expansion of these services.
- **Foreign policy objectives.** Given Australia's priority for Asia-Pacific engagement, and the national broadcasters' current and potential reach into that region, the paper asks: what is the appropriate relationship between Australia's foreign policy objectives and the national broadcasters' overseas broadcasting activities, bearing in mind the need to maintain editorial independence?

There is no timetable given for the Government's response to public comments, although there will need to be some clarity on policy direction before triennial funding decisions are made.

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Endnotes

1 http://www.dbcde.gov.au/__data/assets/pdf_file/0005/87674/0043002001_ABC-SBS_WEB.pdf (*Discussion paper*).

2 http://www.dbcde.gov.au/media_broadcasting/abc_and_sbs/abc_and_sbs_board_appointments.

3 Discussion paper at 1.

4 Discussion paper at 56.

5 Discussion paper at 8-10 and 53-57.

6 Discussion paper at 5-7 and 21.

7 Discussion paper at 9.

8 Discussion paper at 10.

9 Discussion paper at 37.

10 Discussion paper at 9-10 and 37-41.

11 Discussion paper at 8-13.

12 Discussion paper at 14-22.

13 Discussion paper at 23-26.

14 Discussion paper at 27-31.

15 Discussion paper at 32-36.

Getting the Act Together

Hamish Fraser and Michael Stojanovic outline the the new consolidated telecommunications industry code.

On 18 May 2008, the Australian Communications and Media Authority (**ACMA**) registered a new telecommunications industry code and accompanying guidelines. The new code is the 'Telecommunications Consumer Protection Code' (**TCPC**) and the accompanying guidelines are the 'Telecommunications Consumer Protections Guidelines' (**TCP Guidelines**).

The TCPC was developed and published by industry body the Communications Alliance Ltd and approved by ACMA.

The TCPC is relevant to all carriage service providers that supply services to customers and consumers...

The TCPC replaced the following (now out of date) industry codes:

- Customer Information on Prices, Terms and Conditions Industry Code;
- Credit Management Industry Code;
- Billing Industry Code;
- Customer Transfer Industry Code;
- Complaint Handling Industry Code; and
- Consumer Contracts Industry Code.

Legal status of the TCPC

The TCPC is an industry code for the purposes of the *Telecommunications Act 1997 (the Act)*, and is relevant to all carriage service providers that supply services to customers and consumers as defined in the TCPC (we discuss these definitions below). The TCPC generally refers to carriage service providers simply as 'Suppliers'.

Whilst compliance with the TCPC is technically voluntary, if a Supplier fails to comply with the TCPC, ACMA may issue a written direction to the Supplier ordering compliance. If the Supplier does not comply with ACMA's written direction, the Supplier will be in breach of section 121(2) of the Act, and may be liable for civil penalties to the Commonwealth of up to \$250,000 for a body corporate, or \$50,000 for any other person or entity (section 570(3) of the Act). Accordingly, for practical purposes, carriage service providers should consider compliance with the TCPC to be mandatory.

Legal status of the TCP Guidelines

The TCP Guidelines are arranged in a 'questions and answer' format, and seek to clarify certain aspects of the TCPC. In some instances, the TCP Guidelines use examples to demonstrate compliant and non-compliant conduct. While the TCP Guidelines are not themselves enforceable under the Act, carriage service providers can assume that both the ACMA and Federal Court will consider them persuasive in any dispute over the interpretation of the TCPC.

Arrangement of the TCPC

The TCPC is organised into ten chapters. The first two chapters deal with introductory issues and definitions and the last with administration and compliance. The remaining chapters align closely to the superseded codes, namely:

- Chapter 3. General Rules;
- Chapter 4. Customer Information of Prices, Terms and Conditions;
- Chapter 5. Consumer Contracts;
- Chapter 6. Billing;
- Chapter 7. Credit Management;
- Chapter 8. Customer Transfer; and
- Chapter 9. Complaints Handling.

Given the all encompassing nature of the TCPC, all carriage service providers and their advisors should review the new code to ensure that their processes and procedures are compliant with it.

It is worth noting that one of the principles of the TCPC's design was to try and preserve rights and obligations that existed under the superseded codes. Of course, as is discussed in a little more detail below, bringing together 6 other codes meant this has not always been strictly possible.

This article discusses a few of the more significant rules in the TCPC, including a number that experience suggests some Australian carriage service providers may want to review against their existing processes and procedures particularly carefully. Whilst many of the rules discussed in this article already existed in one form or another under the codes replaced by the TCPC, this presents a good opportunity for Suppliers to review their existing compliance regimes.

Definitions of 'Customer' and 'Consumer'

As noted above, the TCPC replaces 6 industry codes. One of the objectives of its creation was to ensure that residential and small business customers were afforded proper consumer protection, an area where the existing codes were in some respects inconsistent and unclear. One of the ways in which this inconsistency was perhaps most apparent was that each of the previous codes' used different definitions of a 'customer' and/or 'consumer'.

The new TCPC has dealt with this issue by adopting clear definitions, being 'Consumer' (used in connection with the 'Consumer Contract' sections of the TCPC) and 'Customer' (used elsewhere in the TCPC). Suppliers should take care when reading the TCPC to ensure they do not confuse one definition with the other.

Definition of 'Consumer'

Under the TCPC, a 'Consumer' means:

- person who acquires a Consumer Product for the primary purpose of personal or domestic use; or*
- business or non-profit organisation which at the time it enters into the Consumer Contract:*
 - does not have a genuine and reasonable opportunity to negotiate the terms of the Consumer Contract; and*
 - has or will have an annual spend with the Supplier [our emphasis] which is, or is estimated on rea-*

...carriage service providers should consider compliance with the TCPC to be mandatory.

sonable grounds by the Supplier to be, no greater than \$20,000,

- c. other than a person acquiring a Consumer Product for resale.

As noted above, a 'Supplier' under the TCPC means a carriage service provider.

For brevity, we have not reproduced the cross-referred definitions of 'Consumer Contract' and 'Consumer Product' in this article. Nevertheless, it should be clear enough that this definition casts the TCPC's net widely, including over any business spending up to \$20,000 with a single Supplier in a year. This has the potential to catch business that are significantly larger than the average 'Small Business' (eg. the ATO considers a small business will have an annual turnover of less than \$2M).

It is notable that, while this definition is similar in form to the definition of a 'consumer' under the *Trade Practices Act 1974 (TPA)*, it is not the same. Accordingly, in some circumstances (eg, with respect to warranties implied into contracts for the supply of services by the TPA), Suppliers may need to consider both the TCPC's definition and the TPA's.

Definition of 'Customer'

Under the TCPC, a 'Customer':

means a residential or small business customer who:

- a) is a party to a Contract; or
- b) is eligible under the criteria set by a Supplier to enter into a Contract to acquire a Telecommunications Product, other than for the purposes of resale.

Again, for brevity, we will not reproduce the cross-referred definitions of 'Contract' or 'Telecommunications Product' in this article. However, we note the distinction the TCPC accordingly draws between the terms 'Contract' and 'Telecommunications Product' (used in the definition of 'Customer') and 'Consumer Contract' and 'Consumer Product' (used in the definition of 'Consumer').

Suppliers should limit their use of legal terms...

While the definitions of 'Customer' and 'Consumer' would appear to cover much the same ground, Suppliers should be aware of the subtle differences between them. In particular, as noted above, the possibility that a relatively large organisation might fall within the definition of a 'Consumer' (because they spend less than \$20,000 per annum with a particular Supplier), while probably not falling within the

definition of a 'Customer' (because they are unlikely to be considered a 'residential or small business customer').

Conversely, truly big business buyers of telecommunications services may not be covered by the TCPC at all, whereas they may have been under some of the codes replaced by the TCPC. We discuss this further, below.

Other parts of the TCPC

As noted above, many parts of this new code are merely a merger of the old codes with no significant changes. However it is timely to review some of their more noteworthy aspects.

Rule 3.1 – Plain Language

Rule 3.1 states that:

3.1.1 A Supplier must communicate with its Customers in simple, plain language.

The TCP Guidelines clarify that any contract is a 'communication with a Customer', and accordingly must comply with this rule.

While the TCP Guidelines do not elaborate further, it is reasonable to assume that this rule is intended to stamp out the use of legal jargon and complex clauses in customer contracts. Suppliers should therefore limit their use of legal terms like 'indemnity', 'limitation of liability', 'to the extent permitted by law', 'consideration', 'waiver' and 'consequential loss'.

Suppliers should also be careful when 'importing' terms and conditions from overseas jurisdictions, particularly the United States, where use of arcane legal language in contracts remains common.

Words such as 'therefore', 'hereunder', 'hence', 'notwithstanding' and 'hereunto' should be avoided. As a general rule-of-thumb, any person writing terms and conditions should ask themselves the question, 'if I was explaining this concept to a friend, would I use that word?'. If the answer to the question is 'no', then 'plain language' is probably not being used.

Rules 4.1.2 to 4.1.4 – Disclaimers

As with the previous code (C521:2004), the TCPC substantially regulates the use of disclaimers. A Disclaimer is defined to mean '...words used in Advertising Material which qualify, disclaim or add to the principal message or to a specific offer'.

Rule 4.1.2 states that 'A Disclaimer must not be used to negate the principal messages of Advertising Material'.

Rule 4.1.3 states that 'Disclaimers must be clear and readily understandable, having regard to the type of Advertising Material, including the medium or format used and its intended audience.' The TCP Guidelines include specific instructions as to font

While the definitions of 'Customer' and 'Consumer' would appear to cover much the same ground, Suppliers should be aware of the subtle differences between them.

size for Disclaimers – for example, a font size the equivalent of 10 point Times New Roman must be used in advertising material of A4 size or greater.

Finally, rule 4.1.4 states that disclaimers must, in connection with written offers, be placed next to the offer or linked to a footnote by an asterisk or other symbol. In television and radio advertising, the disclaimer must form a visual or audio part of the advertisement.

Rule 4.2.4(a)(ii) to (iii) – Product descriptions and Fitness for intended use

Before entering into a contract with a customer, the Supplier must explain certain things to the Customer, or offer the Customer certain information. Rules 4.2.4 and 4.2.5 list these obligations.

Rule 4.2.4(a)(ii) requires a Supplier to 'sufficiently describe each Telecommunications Product'. This is a potentially onerous obligation, given the vast differences that members of the general public have in their knowledge of telecommunications products. The TCP Guidelines provide the following example of a 'sufficient description':

This is a high-speed internet service so that you can have faster access to the internet. The service permits you to use the telephone at the same time as you are on the internet.

While this description may well be sufficient for many Customers, it could be inappropriate for a particularly knowledgeable Customer with specific requirements (eg,

Simply 'signing up' a Customer to a product without discussing the Customer's requirements with them is unlikely to be acceptable.

who might require that the service provide specific upload or download speeds), or it could be inappropriate for a Customer with no knowledge of the relevant technologies (and for whom concepts such as 'high-speed' are likely to be meaningless).

Rule 4.2.4(a)(iii) goes further, and requires that, if a Customer has stated their purpose for wanting a telecommunications product, the Supplier inform the Customer of:

- a) *anything reasonably known about the performance and/or availability of the telecommunications product that might affect the telecommunications product's use for that purpose; and*
- b) *any other telecommunications products needed for its use.*

These rules place significant obligations on the Supplier to ensure that potential Customers know what they require of telecommunications products, and to ensure that the telecommunications product the Customer ends up purchasing will meet those requirements.

Accordingly, Suppliers should factor the time and resources that are likely to be required to meet these requirements into their business processes. Simply 'signing up' a Customer to a product without discussing the Customer's requirements with them is unlikely to be acceptable.

A significant change from the superseded code is that Chapter 4 is limited by the definition of Customer (as discussed above), and accordingly does not apply to big business contracts that fall outside the definition. In any event, the protection afforded by Chapter 4 to larger companies would be fairly limited in practice. However, as noted below with respect to Billing, the corresponding change in that chapter may be more significant.

Rule 5.1 – Unfair Terms

The general prohibition against terms in a Consumer Contract that are 'unfair' has been carried over to the TCPC from the previous 'Consumer Contracts Industry Code'. It is a broadly worded prohibition, expressed in rules 5.1.1 and 5.1.2:

5.1.1 Prohibition: *A term in a Consumer Contract must not be unfair.*

5.1.2 Meaning of unfair: *A term will be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under*

the Consumer Contract to the detriment of the Consumer.

Rule 5.1.3 then attempts to 'flesh out' a number of specific instances of unfair terms, including terms that:

- '...exclude or limit the Supplier's liability in a manner that is illegal, unclear or misleads the Consumer as to their legal rights' (5.1.3(d)(i));
- allow a Supplier to 'terminate for convenience' during a fixed contract period (5.1.3(d)(v));
- allow a Supplier to extend a fixed term contract without first '...obtaining the Consumer's express consent a reasonable time before the period expires' (5.1.3(d)(vii)); and
- require a Consumer to licence or assign intellectual property rights in relation to communications with other end-users (5.1.3(d)(xv)).

Rule 5.1.3(ix) – Unfair term – Unilateral variation by Supplier

Rule 5.1.3(ix) states that a term that allows a Supplier to unilaterally vary the '...characteristic of goods and services, including price, in a Consumer Contract with a Fixed Contract Period...' is unfair unless:

- a) *the Consumer is given notice in writing of the change at least 21 days in advance; and*
- b) *the Consumer is offered a right to terminate the Consumer Contract without charge (other than regular usage charges) at any time up to 42 days after notice of the change was given.*

Because this rule is so specific, all Suppliers should ensure that their Consumer Contracts reflect it (unless those contracts are more favourable to the Consumer).

Exceptions to unfair terms rule

Rules 5.1.4 and 5.1.5 specify a significant list of exceptions to the 'unfair terms' rule. Significant exceptions include:

- 'Terms as to price, features or their performance or operation, which are accurate in all material respects, are not relevant to the assessment of fairness' (5.1.4);
- 'appropriately suspend, restrict or terminate a service in accordance with an acceptable use policy [provided that the acceptable use policy also complies with chapter 5 of the TCPC]' (5.1.5(a)(vi));

- 'limit a Supplier's liability for failure to perform due to an event outside the Supplier's reasonable control' (5.1.5(b));
- 'require payment of a security bond if there are reasonable grounds to believe the Consumer is a credit risk' (5.1.5(f));
- 'permit the Supplier to vary the price of a content or premium service where the Supplier relies on a third party for the service and the third party increases its price to the Supplier...', provided the service was offered with a clear statement that the price may change, reasonable notice of the change is given, and the Consumer can elect not to use the Service without incurring additional charges (5.1.5(j));

Rule 5.1.5(k) – Exception to unfair terms rule – Changes by Supplier's supplier

Rule 5.1.5(k) is of particular importance to resale Suppliers:

where the Supplier acquires a carriage service from a third party (other than its related body corporate) for resale [the Supplier may] vary a term in the Consumer Contract because of an amendment to its contract with the third party, if it:

- (i) *issues prior Written Notice to the Consumer, explaining the variation and its effect; and*
- (ii) *offers the Consumer the right to terminate the Consumer Contract within 42 days of the date of the notice, without incurring charges [other than usage or network charges up to the date of termination, or outstanding installation or equipment charges]*

This of course means that Suppliers need to ensure that their contracts with third party suppliers contain similar rights to end the service.

Chapter 6 – Billing

Chapter 6 is extensive and prescriptive. It is substantially similar to the Billing Industry Code that it replaces (C542:2003) except perhaps importantly, it is now limited by the new definition of Customer and does not apply to bigger business contracts in the way the superseded code previously did.

It specifies a wide range of requirements for bills issued by Suppliers, including:

- the physical appearance of the bill, including required contents (Rule 6.3);
- that Customers, at their request, be supplied with sufficient information to verify the accuracy of bills (Rule 6.4);

- a requirement that bills generally be issued within 10 working days after the closure of a billing period (Rule 6.5.1);
- not delaying the charging of another supplier in the billing chain by more than 95 days (Rule 6.5.4(c));
- not bill for charges older than 190 days from the date the charge was incurred by the Customer (Rule 6.5.4(d));
- that Suppliers may not generally charge for supplying billing information, except in a range of specific circumstances (Rule 6.7.1).

Interestingly, as these rules now only apply to a Customer (as noted above), it is possible, for example, to back bill big business customers after 190 days unless otherwise specifically agreed. Care should be taken when advising purchasers of telecommunications services to ensure these key elements of the old code are now captured by the contract with the service supplier.

Chapter 7 – Credit Management

As with the billing chapter, chapter 7 of the TCPC is prescriptive. Much of the super-

they make reasonable attempts to ascertain whether Customers understand verbal advice given to them (eg, this may require the use of interpreters if a Customer does not speak English), ensure that attempts to inform are directed to the Customer, and ensure that the method used to contact a Customer is acceptable and reasonable, based on the Customer's usage history (eg, calling a local call user, sending an email to an internet user, or sending a text message to a mobile phone user).

Complaints – advising Customers of external avenues of recourse

The complaints handling processes in chapter 9 of the TCPC are reasonably straightforward and pragmatic. The rules relating to complaints are broadly the same as under the superseded code. An notable aspect of rules 9.2.9 and 9.4 is the obligation they place on Suppliers to inform a complainant Customer of their 'external avenues of recourse'. These rules relate to complaints deemed by the Supplier to be 'frivolous' (Rule 9.2.9) or where a Customer indicates dissatisfaction with the Supplier's resolution of their complain (Rule 9.4). The TCP Guidelines list a number of agencies

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The TCPC consolidates the consumer protection landscape for the telecommunications industry...

seded Credit Management Industry Code has been carried into the TCPC. Notable changes include the area of 'credit control tools':

- 'A Supplier must have credit control tools in place which the Supplier applies, without charge, for the purpose of managing a Customer's expenditure, where appropriate' (Rule 7.3.4); and
- 'A Supplier must make credit control tools available to Customers to assist them to manage expenditure' (Rule 7.3.5).

The TCP Guidelines list a number of examples of appropriate credit control tools, including call barring or restrictions, call charge advice during a premium service call, pre-paid services, hard caps (ie, pre-determined 'credit limits'), reduction of broadband internet speeds and independently notifying Customers once a particular spend level has been reached.

Suppliers are also obliged to comply with the credit management rules before they may refer a Customer to a debt collection agent, or list the customer with a credit reporting agency (Rule 7.4.2).

Suppliers must ensure that, before a service is restricted, suspended or disconnected,

that would qualify as 'external avenues of recourse', including the TIO, ACMA and Australian Direct Marketing Association.

Conclusion

Conveniently for Suppliers, because of the new TCPC, all the relevant regulatory aspects of dealing with customers (and consumers) are now in one place.

Whilst many of the rules in the TCPC remain the same as those that they replace from the 6 superseded codes, they are sometimes framed differently or have been written in a way that creates consistency across the board. Suppliers and their advisors should be aware of the TCPC and its application.

One of the most significant changes flowing from the TCPC is the narrowing of application of some chapters because of the single definition of 'Customer'; as a result, rules that previously applied to large businesses now may not. Advisers to businesses no longer covered by the TCPC should ensure that they are aware of the changes, and may need to advise their clients to adjust their contracts with suppliers accordingly.

The TCPC consolidates the consumer protection landscape for the telecommunications industry, and should ensure that the development of future regulation can occur in a more consistent and simpler way.

A Difficult Cache to Solve - Regulating Content in a Digital World

Valeska Bloch considers online content regulation.

Introduction

As an area of law that draws its impetus from community standards, the regulation of content in Australia has always been highly politicised and largely reactive. Australian politicians and shock jocks have been regularly outraged by the availability of online or interactive content deemed harmful or inappropriate for Australian youth. The live streaming of late night antics on the Big Brother website, the Henson photos on an art gallery website,

as a 'tool of low cost global connectivity' as the World Wide Web allowed people to post their digital content for other people to access and commercial web browsers enabled people to retrieve documents or web pages stored in web sites.⁴ The 21st century is seeing a revolution in the way content is accessed, with remote, wireless and mobile applications making it possible for people to access online content almost anywhere and almost all the time.

because 'opposition to these policies which are advanced on 'motherhood' grounds is portrayed as a dereliction of duty to children'.⁷

At its most basic, any discussion around online content regulation will centre on three fundamental questions: whether digital content should be regulated at all, whether it can be, and who should bear the responsibility for regulation. Each of these questions inform the other.⁸

...the Australian online content industry is now one of the most highly regulated in the world.

hidden 'adult' content in *Grand Theft Auto* (a video game) and pornographic user-generated content uploaded onto social networking sites, are just some of the issues that have occupied headlines. In almost every case, ensuing controversy has resulted in ad hoc amendments to Australia's broadcasting and classification regime. As a result, the Australian online content industry is now one of the most highly regulated in the world.

This paper examines the challenges posed by the digitisation of content, the internet and rapid technological change, and reviews the legal framework that currently effects online content regulation in Australia.

1. The digital environment

1.1 What is the digital environment?

The increased penetration of high bandwidth internet connection has caused a transformation of the traditional media sector and its established one-to-many broadcast model.¹ Not only is digital media blurring the distinction between point-to-point and broadcast communication, but next generation internet users are no longer relying on traditional gatekeepers to provide them with content. The emergence of real time social infrastructure is enabling 'producers' to enjoy a media lifestyle that is 'personal, participatory and pull driven' and to collaborate with peers and create and share media in profoundly new ways.² The dramatic uptake of social networking is a testament to the scope and effect of this transformation.³

The digitisation of content has resulted in drastic social changes. So has the means by which this content is distributed and accessed. The 1990s saw the internet emerge

1.2 The (perceived) need for content regulation in a digital world

The interactivity, anonymity and mobility that have made the digitisation of content and online communications so attractive and innovative are the same features perceived to pose risks to users, and in particular, children. ACMA has categorised these risks as follows: content risks, which include exposure to illegal or inappropriate content (such as child pornography or other harmful material); communication risks, which arise from online interaction with other users (such as cyberbullying and online stalking); and e-security risks, which arise when the means of access is compromised or personal information is released online (such as spam, viruses and online identity fraud).⁵

Although the policy concerns informing online content regulation vary across jurisdictions,⁶ the one commonality has been a desire to protect children from exposure to harmful or inappropriate content. It has been argued that in Australia, the 'symbolic and political value' of this rationale has been used to 'stifle debate and ensure greater cross party support than the problem actually justifies'

In the offline environment broadcasters or editors generally have a substantial degree of control over the content made available to the public and can be regulated accordingly. Online, a lot of content is user generated and identification of its source is difficult, particularly due to privacy regulations imposed on those gathering personal identification information (for example, internet service providers and content service providers). Further, a tension exists between the desire to protect children and the desire to encourage user-led innovation and preserve the free flow of information that has traditionally been associated with the internet. As discussed below, the ad hoc policy amendments that comprise the Australian regulatory framework have attempted to overcome these challenges. Not all attempts have been successful.

2. The Australian regulatory framework

2.1 The framework

The Australian regulatory framework for online content regulation is essentially a mosaic of incrementally introduced and often overlapping statutes, codes, standards, guidelines, determinations and supplementary enforcement powers administered by ACMA under the *Broadcasting Services Act (Cth) 1992 (BSA)*. As a co-regulatory regime, content regulation in Australia remains strongly dependent on industry input.⁹

Although the policy concerns informing online content regulation vary across jurisdictions, the one commonality has been a desire to protect children from exposure to harmful or inappropriate content.

2.2. Background to the legislative regime

The Australian online content regime commenced in 1999 with the introduction of the *Broadcasting Services Amendment (Online Services) Act 1999* (the **1999 amendments**) which created a Schedule 5 to the BSA. The aim of the regime was:

...to address the publication of illegal and offensive material online, while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy.¹⁰

Acknowledging that 'there are technical difficulties with blocking all illegal and offensive material that is hosted overseas', the Government nonetheless argued that 'it is not acceptable to make no attempt at all on the basis that it may be difficult'.¹¹ The result – despite staunch resistance from industry and suggestions that the proposed amendments would make Australia the 'global village idiot' or the 'dunce of the networked world'¹² – was a co-regulatory, complaint-based, take-down regime regulating internet content hosts and internet service providers that made available stored content over the internet.

In 2006, a highly publicised incident exposed a gap in the regulatory framework. Sexually explicit content unable to be shown on commercial television was nonetheless streamed live from the Big Brother website. As the framework established by the 1999 amendments did not extend to ephemeral content such as live streamed audiovisual services, the material on the website was not regulated.¹³ Public outrage ensued, followed by new calls for the overhaul of the legislation.

A Department of Communications, Information Technologies and the Arts review of the regulation of content delivered over convergent devices published in April 2006 (the **DCITA Convergence Report**) recommended that:

[r]egulation based on the level of control exercised by service providers rather than the communications delivery platform is likely to be more robust and adaptable in the face of new and innovative content services.¹⁴

As a corollary to this, the review recommended that 'telephone sex and premium rate services should be brought into the regulatory framework for convergent content'.¹⁵

The *Communications Legislation Amendment (Content Services) Act 2007* (the **Content**

Services Act or the **2007 amendments**) adopted this approach. It established a new regulatory framework for particular internet content delivered over various platforms by substantially repealing Schedule 5 to the BSA and introducing a new Schedule 7.

2.3 The online content regime

(a) The jurisdictional reach

One of the challenges faced by policy makers attempting to regulate online content, is that an overwhelming majority of prohibited online content is hosted outside Australia. Schedule 7 to the BSA regulates content service providers, specifically, live content service providers who provide access to live content; hosting service providers who provide stored content to the public; links service providers who provide access to content via links; and commercial content service providers who provide access to content for a fee. To fall within the Schedule 7 content regime, these service providers must have an 'Australian

vice provider has limited, if any, control over the data temporarily stored on those caching servers. Furthermore, in some cases the caching servers themselves are provided by third parties such as Akamai Technologies Inc, who enter into agreements with the hosting service providers to deliver the content over their secure content delivery network.

Although there is an exception in Schedule 7 for content stored on a transitory basis, it is unclear whether caching falls into this exception. A 'hosting service provider' is defined as such if it 'hosts stored content in Australia'. 'Stored content' is defined as:

...content kept on a data storage device. For this purpose, disregard any storage of content on a highly transitory basis as an integral function of the technology used in its transmission. Note: Momentary buffering (including momentary storage in a router in order to resolve a path for further transmission) is an

...even if caching servers do fall within the highly transitory exception, content service providers based overseas may still be indirectly affected by the Australian regulatory regime...

connection', that is, they must host content in Australia (this includes hosting a link in Australia which provides access to content that may or may not be hosted in Australia) or provide live content from a server in Australia.¹⁶

The Australian connection test appears to limit the jurisdictional reach of the Australian regulatory regime to content service providers that have servers located in Australia. However the operation of the test when viewed in light of the relevant definitions and the technical characteristics of content service provision, creates uncertainty as to the true scope envisaged by the Australian connection test. For example, many content service providers make content available to Australians from servers located overseas, but cache content on temporary storage areas ('caching servers') located in Australia. The purpose of these caching servers is to enable rapid access to frequently accessed digital data (in particular large files like video and graphics). The caching servers automatically overwrite data that is no longer frequently accessed, with more recent data that is. As such, the hosting ser-

vice provider has limited, if any, control over the data temporarily stored on those caching servers.

Whether content stored on caching servers is considered to be stored 'on a highly transitory basis as an integral function of the technology used in its transmission', is likely to be a technical and factual question and one with definite consequences. If the highly transitory exception does not apply, the relevant hosting service provider will be subject to the Schedule 7 regime. However, even if caching servers do fall within the highly transitory exception, content service providers based overseas may still be indirectly affected by the Australian regulatory regime for two reasons: First, Schedule 5 regulates internet service providers (**ISPs**) in relation to content hosted overseas. This means that if ISPs are required to prevent access to prohibited or potential prohibited content hosted overseas (either because they have received an access prevention notice from ACMA, or because they have been required to add the service to a filtering 'blacklist'), the content service provider providing that content will be indirectly affected. Second, mobile carriers that offer links to content (irrespective of whether the originating host is located in Australia) as part of a 'walled garden' service (provided that the walled garden is hosted in Australia) will be treated at the very least as a links service provider and will consequently be required to remove links to that content if a complaint to ACMA has been made and successfully investigated.

...user-generated content is more difficult to monitor, classify and regulate than traditional content...

Commercial content service providers have additional obligations...

(b) User generated content

In the current digital environment, user-generated content comprises the bulk of available content and even traditional media services have enabled interactivity as part of their content offerings. This transition has two major implications. The first is that user-generated content is more difficult to monitor, classify and regulate than traditional content broadcast over television or radio. The second is that user-generated content is harder to regulate because of the anonymity afforded by the internet. The online regulatory regime does not always deal with these challenges in a way that recognises that there are different types of content, some of which, for example user-generated and interactive content, are inherently resistant to traditional forms of content regulation.

Although the scope of online content regulation under the BSA changed with the introduction of the Content Services Act, for the most part it retained the co-regulatory, complaint based, take-down approach introduced by the 1999 amendments. This means that although content service providers (with the exception of commercial content service providers) are not obliged to actively monitor or review content, where a complaint is made to ACMA that they have provided access to prohibited or potential prohibited content,¹⁷ ACMA can issue the content service provider (provided they have an Australian connection) with a take down, link deletion or service cessation notice. Failure to comply with such a notice is a civil contravention and a criminal offence.¹⁸

This complaint-based take-down approach appears to recognise the burden that would be involved if content service providers were required to monitor the content that they make available. However, the fact that online content service providers must have a restricted access system in place if they wish to provide certain types of content¹⁹ makes it difficult for content service providers that make available user generated content. Commercial content service providers have additional obligations imposed on them, as they are required to employ trained content assessors to monitor the content that they make available. This requirement is tempered by the Code, which only requires assessment of content that the service provider 'acting reasonably considers to be substantially likely to be classified as prohibited or potential prohibited content'.²⁰

The formulation of Schedule 5 to the BSA also has implications for user-generated content. As amended by the Content Services Act, Schedule 5 now regulates internet content hosts (*ICHS*)²¹ and ISPs, although it does so only in relation to content hosted outside of Australia.

If the ACMA is satisfied that an ISP is hosting prohibited content or potential prohibited content, then ACMA must, in certain circumstances, refer the content to the police; and require the ISP to deal with the content in accordance with an industry code or industry standard, or in the absence of a code or standard, require the ISP to prevent end-users from accessing the content by issuing the ISP with a standard access prevention notice. ISPs may be exempt from these notices if ACMA has declared that a specified arrangement is a recognised alternative access-prevention arrangement, that is, if it is satisfied that the arrangement is likely to provide a reasonably effective means of preventing access to that content.²² Examples of such arrangements could include internet content filtering software or the use of a family-friendly filtered internet carriage service. If a content service provider provides prohibited or potential prohibited user-generated content, there is therefore a risk that an entire site could be blocked under the Schedule 5 regime.

2.4 Mobile

At present, there are approximately 3.3 billion mobile phone subscribers and 1.3 billion internet users worldwide and market penetration is increasing exponentially.²³ Technical convergence of platforms (as demonstrated by the advent of the *iPhone*, the *3 Skype Phone* and *Google Android*) has given content service providers the opportunity to leverage the market share enjoyed by mobile carriers and distribute their content to a far wider audience than was previously possible. Mobile carriers are now increasingly using content services (including more recently, killer apps like social networking, Presence and video) to sell connectivity. Broadband experts are predicting that in as little as two years the mobile phone network may replace the copper wire as the principal method by which people connect to the internet.²⁴

The high uptake of mobile phones by youth has increased concern about mobile content because it is more accessible by children and because 'mobile filters are not amenable to filtering at the device level'.²⁵ Furthermore, mobiles now have the capability to offer a range of content services including: mobile premium services like adult text message 'chat,' or video downloads ('mobile premium services'); mobile proprietary portal services ('walled garden services'); access to the open

internet ('mobile open internet services'); and mobile television or digital video broadcasting ('broadcast mobile television services').²⁶

The regulatory regime for mobile content is still in transition. Prior to 2007, these services were regulated (if at all) under separate platform-specific regulatory regimes.²⁷ However the integration of the premium mobile service regime into the BSA in 2007 was one of the most integral changes introduced by the 2007 amendments.²⁸

Although the approach taken by Schedule 7 is predominantly platform neutral, it makes specific reference to mobile premium services in order to clearly bring mobile phone based services within the online regulatory regime. In relation to the provision of mobile open internet services, the regime does not discriminate on the basis of the delivery platform. Content service providers are regulated in the same way, irrespective of whether their internet content has been accessed via a mobile handset or via a PC.

Mobile premium services are regarded in Schedule 7 as a subset of commercial content services.²⁹ As such, they are required to put in place restricted access systems if they make available content classified MA15+ or R18+ and they are also required to engage trained content assessors.³⁰ The IIA Content Services Code deals with the engagement of trained content assessors by commercial content service providers (including mobile premium services) and provides guidance for commercial content service providers as to when trained content assessors must assess relevant content for the purposes of categorising that content as RC, X18+, R18+ or MA15+ or (in the case of an eligible electronic publication) as RC or category 2 restricted. The Restricted Access Systems Declaration 2007 sets out age verification requirements for both commercial content services and restricted content made available by mobile handsets.³¹ In addition, the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 No. 1* still applies to premium mobile services, although as of 1 January 2008, it exists in a significantly pared back form.³²

Walled garden services are also caught by the 2007 amendments. If an Australian mobile carrier offers a content service as part of an 'on-deck' or walled garden service, the mobile carrier will at the very least be considered a links service provider with an Australian connection. If they provide this service for a fee, they will be a commercial content service provider and subject to obligations under the Code and the Restricted Access

Mobile premium services are regarded in Schedule 7 as a subset of commercial content services.

Systems Declaration 2007 as is the case with mobile premium services (see above). That mobile carrier can therefore be issued with a take-down, link-deletion or service-cessation notice from ACMA. Australian mobile carriers that enter into agreements with hosting service providers to enable those carriers to provide relevant content (or links to that content) 'on-deck', need to be aware that even if the hosting service provider does not satisfy the Australian connection test, the relevant content will still fall within the Schedule 7 regime if the 'walled garden' itself is hosted within Australia.

Although to date, broadcast mobile television services have not yet been successfully implemented in Australia, they would be regulated as a type of broadcasting service and subject to applicable licence conditions, self-regulatory codes and standards in accordance with the BSA.

The current state of mobile content regulation is a prime example of the difficulties associated with regulating technologies that are rapidly changing in a context where the regulation itself is in a state of flux.

Mobile carriers are now increasingly using content services to sell connectivity.

Conclusion

The digitisation of content, the internet and rapid technological change have fundamentally challenged the way in which online content regulation in Australia is conceived, implemented and enforced. Australian policy makers have made it clear that their ultimate goal in regulating online content is to ensure that society, and in particular children, are protected from exposure to content that is harmful or inappropriate. However providing adequate protection in a marketplace where so much content is produced by so many users and delivered via so many platforms, is becoming increasingly difficult. As an increasing number of parties begin to participate in the production and consumption of content, it seems that the greatest challenge and the most hopeful solution for online content regulation in Australia going forward, may well be to find ways to raise awareness of the inherent risks and to empower stakeholders to cooperate in order to overcome them.

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Endnotes

1 Tony Walker in Sharp, D & Salomon D, *User-led Innovation: A new framework for co-creating business and social value*, Smart Internet Technology CRC, January 2008, p9.

2 Sharp, D. 'User-led Media: The Future of Value Creation', presented at Smart Services – Smart Outcomes Forum, September 21 & 22 2006, Accessed at: <http://smartinternet.com.au/default.aspx?ArticleID=482> (podcast) on 1 June 2008.

3 Morgan Stanley, *Internet Trends*.

4 Friedman, T. *The World is Flat*, Penguin Books, Australia, 2006, p59.

5 Australian Communications and Media Authority, 'Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety: First annual report to the Minister for Broadband, Communications and the Digital Economy', February 2008, pp3, 12. Although each of these risks are to a certain extent interrelated, this article focuses on content risks.

6 In respect of political speech, Europe places an emphasis on eliminating hate websites, and China attempts to censor dissenting commentary. Conversely, the approach taken by the USA is informed by its constitutional protection of the freedom of speech.

7 Coroneos, P. 'Internet Content Policy and Regulation in Australia', Presented at the First International Forum on the Content Industry: Legal and Policy Framework for the Digital Content Industry collaboratively held by the East China University of Political Science and Law (<http://www.ecupl.edu.cn>) and the Queensland University of Technology (<http://www.qut.edu.au>) in Shanghai, People's Republic of China, May 2007.

8 These questions can also usefully be examined against four modalities of control in the digital environment – law, architecture, social norms and markets. See: Lessig, L. *Code and Other Laws of Cyberspace*, Basic Books, 1999, p71.

9 McGill, I and Bloch, V. 'Focus: internet content services regulation', 2007, Accessed at: <http://www.aar.com.au/pubs/cmt/focmtdc07.htm> on 10 September 2008.

10 The Senate, Broadcasting Services Amendment (Online Services) Bill 1999 Explanatory Memorandum, p1.

11 *ibid*.

12 Chalmers, R. 'Regulating the Net in Australia: Firing blanks or silver bullets?' in *Murdoch University Electronic Journal of Law*, vol.9 no.3, 2002, p3.

13 McGill, I and Bloch, V. 'Focus: internet content services regulation'.

14 Department of Communications, Information Technology and the Arts, *Review of the Regulation of Content Delivered Over Convergent Devices*, April 2006, pv.

15 *Ibid*, pvi.

16 Clause 3, Schedule 7, BSA.

17 Content (other than an eligible electronic publication, that is, text or images from newspapers, magazines or books) is prohibited content if: the content has been classified RC or X18+ by the Classification Board; the content has been classified R18+ by the Classification Board and access to the content is not subject to a restricted access system; the content has been classified MA15+ by the Classification Board, access to the content is not subject to a restricted access system, the content does not consist of text and/or one or more still visual images, and the content is provided by a commercial service (other than a news service or a current affairs service);

or the content has been classified MA15+ by the Classification Board, access to the content is not subject to a restricted access system, and the content is provided by a mobile premium service. Clause 20, 21, Schedule 7, BSA.

Content that consists of an eligible electronic publication is prohibited content if the content has been classified RC, Category 2 Restricted or Category 1 Restricted by the Classification Board. 18 Clauses 106, 107, Schedule 7, BSA.

19 That is, R18+ content generally, and R18+ and MA15+ content for mobile premium service providers and commercial content service providers.

20 Clause 8, Content Services Code. Note that under the BSA, an industry code or industry standard is required to be registered to give effect to certain content service provider obligations and in particular commercial content service provider obligations. The ACMA registered the Code on 16 July 2008, making it legally enforceable.

21 Internet content host is defined to mean a person who hosts or who proposes to host internet content in Australia.

22 Clause 40, Schedule 5, BSA.

23 Morgan Stanley, *Internet Trends*, March 18 2008, Accessed at: http://www.morganstanley.com/institutional/techresearch/internet_trends.html on 1 July 2008.

24 Times Online, 'Mobile to displace fixed line internet within two years', Accessed at: http://technology.timesonline.co.uk/tol/news/tech_and_web/article4112268.ece on 12 June 2008.

25 Coroneos, P. 'Internet Content Policy and Regulation in Australia', Presented at the First International Forum on the Content Industry: Legal and Policy Framework for the Digital Content Industry.

26 Goggin, G. 'Regulating Mobile Content: Convergences and citizenship' in *International Journal of Communications Law & Policy*, No. 12, 2008, p142.

27 MPSI MPSD Default Scheme.

28 In accordance with recommendations contained in the DCITA Convergence Report.

29 Mobile premium service means a *commercial content service* [own emphasis] where:

(a) a charge for the supply of the commercial content service is expected to be included in a bill sent by or on behalf of a mobile carriage service provider to the relevant customer; or

(b) a charge for the supply of the commercial content service is payable:

(i) in advance; or

(ii) in any other manner;

by the relevant customer to a mobile carriage service provider or a person acting on behalf of a mobile carriage service provider.

30 Clause 81, Schedule 7, BSA.

31 The Restricted Access Systems Declaration 2007 replaced both the Restricted Access Systems Declaration 1999 and the Mobile Premium Services Determination 2005 but only to the extent that it dealt with the restriction of access to content and content classification.

32 It now regulates chat services and provides for the implementation of self regulatory schemes. It is envisaged that these residual parts of the MPS Determination will ultimately be made into a Part 6 Code under the *Telecommunications Act (Cth) 1997*. The *Telecommunications Service Provider (Mobile Premium Services) Determination (No. 1) 2005* ('MPS Determination') which was introduced as an interim measure, covered mobile premium services, including both 'walled garden' services and premium rate SMS and MMS services.

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