

Cold, Dead Hand? Broadcasting Regulation and the Emergence of the National Broadband Network

Luke Waterson and Nicholas Dowsley consider the position of next generation audio-visual media services under existing broadcasting laws.

Bernard Keane's recent article on Crikey "Alston's cold, dead hand still controls broadband"¹ caught our eye not just for the catchy (but macabre) title but for the issues it raises in what will become an increasingly important debate regarding the scope for existing broadcasting regulation to accommodate new services to be provided over the Government's proposed fibre-to-the-premises (FTTP) national broadband network (NBN).

To date, much of the commentary and discussion around the NBN has centred on changes to the existing telecommunications regulatory scheme which would apply in the interim period before the NBN is fully constructed. For example, the Government has released a Discussion Paper outlining potential changes to many key areas of the telecommunications regime including: enhanced separation arrangements for Telstra; strengthening the telecommunications access and anti-competitive conduct regimes; changes to the universal service obligation arrangements; and changes to consumer protection just to name a few.² Submissions on these proposals were due on 3 June and the Government's response is eagerly anticipated by the industry.

Chapter 5 of the Discussion Paper entitled The Bigger Picture flags a full scale review of the approach to regulation in light of the likely impact of the NBN in increasing the trend towards "convergence" (described as the use of different technology platforms to provide similar services). The review is intended to commence in 2011 so that it can take into account the practical impact of the NBN roll-out.

This review appears likely to be broad-ranging and would cover both telecommunications and communications regulation more generally i.e. media and broadcasting regulation. Although 2011 seems a long time off, the matters raised by Keane are a good starting point for developing the debate around these important public policy issues.

But first, a quick outline of the NBN itself and its potential implications for delivery of video services.

The NBN

As set out above, the NBN will be based on FTTP technology. While the Government's announced implementation study for the NBN will develop detail around specific network design and coverage issues, the important feature of an FTTP platform for current purposes is that it will support download speeds that enable the delivery of multiple video programs in high definition formats.

The NBN would be able to support both broadcast (one to many) and on-demand (point to point) delivery mechanisms. Whilst some of these services are already available to broadband consumers, the very high bandwidth characteristics of FTTP are likely to see an increase in "true" on-demand services. The Government has estimated that a 1GB movie would take

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The January 2009 edition of the Communications Law Bulletin included an article by Alex Farrar on amendments made to the Copyright Act affecting the use of multimedia in classrooms. Further to that piece, Simon Lake discusses the activities of Screenrights and available statutory licences for educational copying and communication of broadcast materials.

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1m20s to download at the theoretical speed of 100 Mbps.³ This can be contrasted with “near” video on demand services where, for example, the end user selects from a limited number of programs that have been broadcast to and stored on set top units attached to the network.

A catalyst for the Determination was legal uncertainty over whether “live” streaming services delivered over the Internet fell within the definition of “broadcasting service”.

Keane’s article raises a number of issues concerning the application of the existing regulatory regime in the Broadcasting Services Act 1992 (BSA) to NBN-delivered services. A discussion of some of the key issues is set out below.

Existing exception for Internet-delivered services

With some important exceptions, the BSA regulates “broadcasting services”. That definition is as follows:

broadcasting service means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

- (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or

- (b) a service that makes programs available on demand on a point to point basis, including a dial up service; or
- (c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.⁴

In 2000, the then Minister administering the BSA, Richard Alston, made a determination under paragraph (c) of the definition (**Determination**) excluding the following category of service from the definition:

a service that makes available television programs or radio programs using the Internet, other than a service that delivers programs or radio programs using the broadcasting services bands.⁵

A catalyst for the Determination was legal uncertainty over whether “live” streaming services delivered over the Internet fell within the definition of “broadcasting service”. Central to this issue was the scope of the exemption for “on demand” services in paragraph (b) of the definition. The Determination removed the need to resolve this issue in relation to services covered by the Determination (but it may remain an issue with NBN-delivered services and this is considered further below).

There are two key issues with the Determination. First, what does “using the Internet” mean? Secondly, what is the scope of the exception for services delivered using the broadcasting services bands.⁶ The first part of Keane’s article focuses on the second question. It concludes that the exception applies to programs delivered by existing free to air commercial services with the result that those broadcasters would be prevented from making those programs available over the Internet (thus the “dead hand” of Mr Alston).

As we see it, the exception in the Determination is not directed at program content but covers services which deliver content using

the Internet where the broadcasting services bands form part of the means of delivery. Accordingly, if a commercial broadcaster makes available, via the Internet, programs which happen to also be delivered using the broadcasting services bands (eg. an Internet "simulcast" of a broadcast program), the Internet-delivered service would still be covered by the Determination unless the broadcasting services bands were used as part of the Internet delivery platform. This view appears to us to be consistent with the explanatory statement released with the Determination, which stated that:

[t]he exclusion from the exemption for a service that delivers programs using the broadcasting services bands is necessary to prevent the exemption being exploited to deliver a defacto broadcasting service using those bands.⁷ [emphasis added]

However, the application of the Determination to services delivered over the NBN is still an important issue to consider. In this regard, the first question posed above: "What does 'using the Internet' mean?" is the key threshold issue.

The "Internet" is not defined for the purposes of the BSA. The Macquarie Dictionary simply defines the "Internet" as "the communications system created by the interconnecting networks of computers around the world".⁸

The Australian Communications and Media Authority (ACMA) recently defined the "Internet" in a 2008 report on content filtering as "a worldwide, publicly accessible series of interconnected computer networks".⁹ These definitions appear to emphasise the general public accessibility of the Internet as one of its chief characteristics.¹⁰

To add further complexity, the Determination was intended to cover those services that do not use the Internet as their entire means of delivery. The Report to Parliament which accompanied the introduction of the Determination contained the following statement:

The determination is intended to include a service that uses the Internet, even if part of the means of delivery of the service may not clearly be part of the Internet...For example, the determination will cover services that enable an end user to access material from the Internet using a wireless application protocol device such as a mobile phone, whether or not the wireless application protocol itself is part of the Internet.¹¹

The reference to "protocols" in this statement raises the issue whether a service is delivered "using the Internet" if it is delivered (in whole or part) using internet protocols. It is relatively well accepted that internet protocols are a key component of the Internet. However, caution is required in equating delivery of services using internet protocols with "using the Internet". Although an FTTP platform (and therefore the NBN) will deliver services using internet protocols (for example, Internet Protocol Television (IPTV)), it does not necessarily follow that a service provider providing an IPTV service would fall within the Determination. For example, it may be that a so-called "walled garden" IPTV service (where content is only accessible by a closed user group by means of the NBN and is not generally accessible via other platforms) would not be regarded as a service making available programs "using the Internet" even though the method of delivery uses internet protocols.

"On demand" exception

Even if services to be delivered over the NBN, like IPTV, are in some cases not excluded from the definition of "broadcasting service" by the Determination, they may still fall within the "on-demand" exception to the definition. As set out above, paragraph (b) of the definition excludes:

a service that makes programs available on demand on a point-to-point basis, including a dial-up service.

The Explanatory Memorandum to the Broadcasting Services Bill 1992 (EM) states that a "dial up service" includes a:

Although an FTTP platform will deliver services using internet protocols it does not necessarily follow that an IPTV service would fall within the Determination.

... 'video-on demand' service whereby a service provider transmits a video upon request to a person who has communicated that request to the service provider by dial-up through a public telecommunications network, or by some other means.¹²

By contrast, the EM gives the following explanation of where a service will not be a "point to point" service:

...each time a person receives or accesses a service, the person receives programs which are being provided according to time-tabling determined by the service provider, so that the program being received by the person is the same as that being received by any other person receiving the service at the same time.¹³

"True" on-demand services delivered via the NBN as outlined above are, perhaps not surprisingly, likely to be covered by this exception and therefore not regulated as a "broadcasting service". However, the position remains unclear in relation to "live" services, such as news or sports programs.

If the bandwidth of the NBN means that on-demand services become the prevalent type of video service delivered over the NBN, there is a policy question as to whether exemption from regulation as "broadcasting services" would be desirable. This in turn requires examination of the policy underlying the existence of the exemption. At a broad level, a key regulatory principle underlying the BSA is that different levels of regulatory control be applied across a range of services according to the degree of influence they are able to exert in shaping community views.¹⁴ If, for example, the exemption was originally put in place because the number of people accessing "on-demand" services was small, there may be scope for re-considering the exemption in light of the advent of the NBN and the likely increase in the number of these types of services. On the other hand, it may be that it is inherent in the nature of an on-demand service that it has a lesser degree of influence because it is only accessible by a person individually who chooses to access the service having some knowledge of the nature of the program to be received. The latter approach may sit uneasily with an on-demand news or current affairs service potentially accessible by 90% of all households that will eventually be connected to the NBN.

If no other amendments were made to the BSA (and assuming the Determination did not apply), the removal of the "on-demand" exception would see these services regulated according to matters such as the nature of the programs provided: for example their level of appeal to the general public, or whether they were provided on a free or subscription basis.¹⁵

Licence areas/media diversity tests

Another issue that Keane raises is the application of the current media diversity rules in the context of the NBN. The current regime applies to commercial television and radio broadcasting licensees and associated newspapers. The key restrictions are:

- **Commercial television:** a person must not control licences whose combined licence area populations exceed 75% of the population of Australia;¹⁶ and a person must not control more than one licence in the same licence area, with some exceptions.¹⁷
- **Commercial radio:** a person must not control more than 2 licences in the same licence area.¹⁸
- **The "4/5 rule":** any transactions involving commercial radio licensees, commercial television licensees and associated news-

papers (media operations) must not result in the minimum number of 'points' for metropolitan licence areas falling below five and the minimum number of 'points' for other licence areas falling below four.¹⁹ In essence, an independently controlled media operation (or group of them) counts as one point.

- **The "2-out-of-3 rule"**: prohibits transactions that result in a person controlling a commercial radio licence in an area, a commercial television licence where more than 50% of the population in that area is attributable to the licence area of the television licence, and a newspaper associated with that area.²⁰

The existing rules clearly work on a licence area basis. In essence, Keane argues that this regime is inadequate to cope with the advent

a threshold question to ask is whether NBN services should be regulated by these diversity rules at all

of services provided nationally over the NBN.

Assuming they are regulated as broadcasting services in the first place, a threshold question to ask is whether NBN services should be regulated by these diversity rules at all. For example, if the NBN-delivered services are provided on a subscription basis, then, consistent with the current treatment of subscription broadcasting services (such as those provided by FOXTEL and AUSTAR), the diversity rules would not apply. In 1992, when subscription services were introduced into the BSA, the then ownership and control rules were not generally applied to this type of service because:

it is considered they provide a discretionary service that consumers must pay to receive, and arguments about its ability to influence are therefore not considered as persuasive.²¹

In a similar vein to "on-demand" services referred to above, it may be that there is something inherently less influential about subscription based services which means they should not be included in the diversity rules regardless of the availability of the service. While it is true that the original decision not to strictly regulate subscription broadcasting services under the ownership and control rules was made when those services were just beginning to be provided, at the time the diversity rules were changed in 2006 to enact the current regime outlined above, the penetration rate of pay TV was reported to have increased to 26% however subscription broadcasting services remained excluded from the diversity regime.²² It remains to be seen whether this position will be maintained if subscription services delivered over the NBN become available to almost every home in Australia.

If it was considered that NBN-delivered services were potentially so influential as to warrant inclusion under the diversity rules, the question would arise as to the best way to include them in that regime. As the current rules are based on licence areas, unless a completely new regime is established, it would be necessary to link the NBN service to a particular licence area or areas. A mechanism for such a link currently exists in relation to newspapers. For example, under section 59 of the BSA, a newspaper is associated with a particular radio licence area if at least 50% of its circulation is within the licence area and that circulation is at least 2% of the total population of the licence area. It needs to be noted that "national" newspapers such as The Australian Financial Review and The Australian do not currently fit within this requirement due to the national spread of their circulation. If a similar rule is applied to NBN-delivered services, then they too may be unlikely to have 50% of their end-users located in a particular licence area.

It will be up to the Government to determine whether this type of approach is appropriate or whether alternative methods need to be considered.

Conclusion

In the second reading speech for the introduction of the Broadcasting Services Bill 1992, the then Minister, Senator Collins, stated that:

[t]he Bill incorporates objectives and policy guidelines. It sets out the categories of service, describing them by their nature rather than by their technical means of delivery—it should thus not need constant amendment as technical conditions change.²³

The NBN will potentially effect a momentous change in "technical conditions". It remains to be seen whether the BSA will undergo significant amendment to accommodate this development.

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How Will the National Broadband Network Alter the Communications Landscape of the Future?

Niranjan Arasaratnam, Andrew Ailwood and Nathan Stacey review some of the potential effects of the National Broadband Network on broadcasting.

Introduction

There has been a lot of debate surrounding the Rudd Government's proposed roll-out of a \$43 billion National Broadband Network (NBN). However one views the planned network, once built it will indisputably establish 'a whole new medium in every household.'¹ Internet speeds will be increased by around 100 fold, facilitating extremely bandwidth-heavy activities online, something which has not been commercially available before. How the medium will be exploited, however, remains to be seen. The way in which it alters the communications framework, businesses and the living room experience of Australians is likely to be gradual, rather than radical.² Nevertheless, change is certain and likely to be profound. Of great interest is how the NBN will alter television broadcasting, which has provided Australia with the dominant source of news and media for half a century. Even before the introduction of the NBN, free-to-air (FTA) television was losing its grip as the dominant medium due to fragmenting audiences and diminishing revenue. The realisation of the potential offered by very high bandwidth internet is, over time, likely to witness a dramatically different media experience: one moving away from linear, transient broadcasts to 'on demand', downloadable online content. This article also explores how that movement will affect the nature and regulation of online content.

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Framework of the NBN

In March 2007, the Labor Party, while in Federal Opposition, announced bold plans to build a very high speed broadband network, which became a key promise of its election platform.³ Labor justified the proposed infrastructure in economic terms, arguing that Australia required improved broadband facilities to assist productivity and international competitiveness.⁴ Since attaining power, the Rudd Government has cleverly turned the tables on Telstra, after Telstra tried to stymie the tender process for the NBN rollout.⁵

In addition to raising the spectre of substantially reducing Telstra's market power, the Government has revised the specifications of the NBN. Initially, the project was billed as a fibre-to-the-node (FTTN) network reaching 98% of the population (at a minimum speed of 12 mbps). The current specifications are for a fibre-to-the-premises (FTTP) network providing download speeds of 100 mbps, to be made available to 90% of the population.⁶ The total cost of the project has been revised upward by about ten fold as a result of the greater reach (and expense) of FTTP over FTTN broadband.⁷

This bandwidth will offer unprecedented download/upload capabilities, especially for household internet use. At 25 Mbps, a member of your household could make a high-definition video-conference call, while simultaneously someone else streams an IPTV⁸ program and a third person plays video games on the web.⁹ Having to choose between running different applications or functions at the same time, in much the same way as users once chose between using the phone or the internet with dial-up, will become something of the past. This capacity presents a raft of possibilities – and challenges – for the media and the regulatory landscape in which it operates.

1. What Will Happen to TV?

Watching news and entertainment online, on request, at a time convenient to the consumer is already a possibility. As these services increase in number and, more importantly, quality, habits will begin to change and the NBN is likely to act as a catalyst for this process. People are continually going online in the first instance for their news and entertainment,¹⁰ as traditional media struggles to deliver content with comparable speed. This is contributing to the ever-shrinking revenue of FTA networks,¹¹ as companies start advertising elsewhere and television airtime becomes less valuable.¹² Newspapers are also suffering revenue losses to online advertising, prompting a veteran UK columnist to describe the format as 'a dead duck'.¹³

Some doomsayers of FTA television are more zealous than others.

Broader availability of IPTV will do for television what [Voice over Internet Protocol (VOIP)] did for voice calls: remove the service premium and deliver a content service driven solely by competitive forces. Disintermediation will be the death of FTA [television], held off only by the speed of the NBN roll-out and the strength of incumbent broadcasters' long-established relationships with content providers.¹⁴

It is likely to take a while for the dynamics to change, but as the internet becomes a more profitable forum for advertising, online content providers will wrest power from the broadcasters. Online rights to content will surpass broadcasting rights. Indeed, why would sophisticated owners of content sell their rights at all?¹⁵ A recent article in Crikey gave the hypothetical example of the AFL outsourcing the filming and the production of games to be streamed directly to consumers through its website, where it could run its own advertising or subscriptions and vertically integrate its distribution model.¹⁶ Finally, as television and computer hardware appear to continually converge, this will further migrate audiences to broadband-delivered content.¹⁷

Some doomsayers of FTA television are more zealous than others.

So is the transition to digital television a misguided policy and should we start planning to bypass television entirely, if these gloomy predictions are to be believed? The current trends do not favour the traditional entertainment medium in the long term, but it is unlikely that television will die on the construction of the NBN. However, commercial broadcasters will be required to reinvent themselves – possibly by playing to their strengths for live news and events coverage,¹⁸ possibly in new, inventive ways. Another policy consideration is that the continued broadcasting of television might eventually come to be seen as an inefficient use of spectrum, which detracts from improving the quality of mobile and wireless services.¹⁹ Television is set to undergo major changes as it loses its mantle as the pre-eminent medium for news and entertainment in 21st century households.

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How Will Online Content and Habits Change?

The speed and capacity of the NBN will create a greatly improved multimedia experience – both for consumers and creators of content.

User-generated content (**UGC**) is online content produced by traditional end users or consumers. It can encompass anything from inane status updates on Facebook through to perceptive commentary appearing on a blog. With the NBN, users will be able to upload more and richer content.²⁰ This could see an improvement in the quality of UGC from largely amateur material to more professional grade content. As a result UGC, and sites on which it appears such as YouTube, will become more attractive for advertisers.²¹ Furthermore, information exchanged through UGC websites can be used to tailor advertisements to the audience, potentially making this advertising ‘space’ more valuable than television timeslots, where specific demographics are less easily targeted.²² Singapore has a growing appetite for UGC and is also in the process of implementing an NBN; this provides another case study to observe whether and to what extent increased bandwidth improves the quality of UGC.²³

Finally, it is interesting to look at some of the speculation on how the NBN will change people’s lifestyles and social habits. Mark Pesce argues that ‘lifestreaming’ (whereby a person documents their everyday goings-on through the internet) will become normal among the younger generation of internet users.²⁴ Andrew Ramadge and David Higgins retort that technological change does not necessarily bring about changes in social behaviour.²⁵ They cite how internet relay chat (an early, online form of short text messages) was all the rage in the late 80s and how, two decades on, Twitter is the new force as a ‘microblogging’ social networking

Regulating the appropriateness of content is probably the most visible and difficult challenge for authorities.

website, despite relying on basically the same premise of public conversation as the 20 year old technology it replaces. Certainly the consumption of rich content on mobile devices will increase. Content delivered to Wi-Fi hotspots by the NBN will provide for smoother YouTube clips on your iPhone or Blackberry – the reliance on mobiles as items of portable entertainment is therefore likely to grow.

The ability for people to ‘lifestream’ is, of course, not the same as them actually doing it. Such activities are not likely to occur

without an accompanying change in social values and behaviour.²⁶ Studies support the premise that a desire for privacy is still important for many users in determining the extent of their online social networking.²⁷ Accordingly, while changes in technology can be a source of dramatic social change (with the NBN being no exception), the change will almost certainly be gradual.

Issues around Regulation of Online Content

The explosion in the availability of online entertainment content poses significant challenges for regulators. Currently, online services which make programs available on demand on a point-to-point basis are expressly carved out of the definition of ‘broadcasting services’.²⁸ Further to this, a Ministerial Determination made in 2000 took internet streaming outside the ambit of the Broadcasting Services Act 1992 (Cth) (**BSA**). Many of the strict conditions placed on broadcasters in the provision of their services, therefore, simply do not apply to providers of online content, despite its ever increasing abundance as a source of audio visual entertainment.²⁹

while changes in technology can be a dramatic source of social change (with the NBN being no exception), the change will almost certainly be gradual.

Take for example the condition on Australian commercial broadcasters to show minimum amounts of Australian content.³⁰ The rationale for the condition is, essentially, to exploit broadcasting as a means of developing and reflecting Australian culture and identity.³¹ It is feared that without this sort of protectionism Australian television could become completely dominated by foreign programs. Buying Friends re-runs is cheaper than producing quality Australian drama and often the audience numbers will not be sufficiently greater to make the latter investment cost-effective.³² However, these content obligations do not apply in the online world and therefore more and more people are accessing content which is not as strictly regulated as television programming. Perhaps the Government could implement similar content obligations in respect of online content, but it seems almost futile given the plethora of material available over the internet, compared to the more limited offerings of broadcasting, restricted as it is by the scarce nature of spectrum.

In light of this, how will the online world be regulated? The task is much harder than in the broadcasting regime where a limited number of licensed operators can be closely monitored. Regulating the appropriateness of content is probably the most visible and difficult challenge for authorities. The Government continues to commit itself to a Cyber-Safety Plan to protect young audiences.³³ Early indications are that ISP filtering of illegal content is easily bypassed.

The Government has declared that it ‘intends to consider’ in 2011 whether the current regulatory framework is inappropriate for converging technologies and content supplied through them.³⁴ The response, it seems, is set to be reactive, not proactive. No doubt the NBN will only intensify the challenges faced in trying to regulate online content, as more and better content becomes available. The Government does not appear to favour the technologically neutral approach favoured by the European Union. Any opportunity for review of the regulatory system should extend to how copyright law is interacting with access to online content. A system of licensing content based on geography may have been fine for the golden era of terrestrial television, but in today’s world, where anyone can access online content from anywhere, it does not make sense. The frustrations of Australian internet users, geo-blocked from such sites as Hulu, will continue the pressure on government to review the outdated and inefficient regime currently in place.

Conclusion

The NBN presents a vast technological improvement on existing communications infrastructure. Changes to the communications framework, to platforms and programs, and to consumption and viewing habits are inevitable. However, our lives will not change 'without accompanying changes in cultural mores, government regulations and commercial practices.'³⁵ The Government ostensibly supports the concept that laws should try to keep pace with technology; despite adopting a 'wait and see' approach regarding the regulatory challenges imposed by converging platforms.³⁶ It is important that regulatory developments do not occur on an ad hoc basis. This approach will only lead to a 'patch work' communications regulatory structure. A technologically neutral approach should be the guiding principle as we move to a new communications and entertainment paradigm.

The changes may be slow to arrive, but this does not mean they will be insignificant – in fact, in the long term, the NBN is likely to generate a marked shift in the way we communicate and in our habits of consuming audio-visual content. Probably the most appreciable change will be the change to television; as people continue to migrate to the internet as a primary source of news and entertainment, the pressures on FTA broadcasting will continue, requiring significant restructuring of that industry. This then leaves open the daunting task of how, or even whether, the internet can be effectively regulated.

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25 Andrew Ramadge and David Higgins, 'A Media Centre in the Home' Weekend Australian, 18 April 2009, 21.

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29 Broadcasting Services Act 1992 (Cth) s6(1)(b) schedules 5, 7 apply to online services and content, including, among other things, classification of content for appropriateness for different audiences.

30 Broadcasting Services Act 1992 (Cth) s6(1)(b) s 42, sch 2 cl 7(1)(b). Broadcasting Services (Australian Content) Standard 2005 (Cth).

31 Broadcasting Services (Australian Content) Standard 2005 (Cth) s 4. The standard is available at the homepage of the Australian Communications and Media Authority <http://www.acma.gov.au/WEB/STANDARD/pc=PC_91809>.

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Mobile Premium Services - The New Regulatory Regime

Adrian Lawrence and Simone Brandon outline the new regime for the regulation of Mobile Premium Services, including an examination of the Mobile Premium Services Code, recently registered by ACMA.

On 18 May 2009, the Australian Communications and Media Authority (**ACMA**) announced a new set of regulatory measures in respect of Mobile Premium Services (**MPS**). The centrepiece of the regulatory strategy is the registration of the Mobile Premium Services Code (**Code**) under the co-regulatory provisions of the Telecommunications Act 1997 (Cth) (**Act**). The Code was developed by the telecommunications industry and facilitated by the Communications Alliance through a working committee comprising representatives from all relevant sectors of the mobile premium services industry and consumer groups. The Code, accompanied by the Mobile Premium Services Guideline (**Guideline**), places obligations on carriage service providers and content service providers in relation to the provision of mobile premium services and took effect from 1 July 2009.

The other measures announced by ACMA on 18 May 2009 were as follows:

- ACMA intends to create a new service provider determination to complement the Code, which will:
 - require mobile carriers to implement call barring mechanisms for MPS on their mobile networks on or before 1 July 2010, allowing consumers a choice to block such services should they so desire;
 - require all MPS content providers to become registered on an industry register to be established by Communications Alliance; and
 - provide rules for the deregistration content providers, meaning that “rogue operators” will be prevented from supplying services in the Australian MPS market; and
- a comprehensive framework for the monitoring of MPS services and compliance with the Code and service provider determination.

Background to the Code

The Code and Guideline supersede the Mobile Premium Services Industry Scheme (**Scheme**) which was registered by ACMA in 2006. The Scheme was made under the Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (**Determination**) and dealt with both consumer protection and content regulation issues in relation to MPS.

Following the 2008 commencement of the content services amendments to the Broadcasting Services Act 1992 (Cth) (**BSA**) and the consequent registration of the Internet Industry Code of Practice – Content Services Code under Schedule 7 of the BSA, those parts of the Determination and the Scheme dealing with content regulation issues became redundant.

Industry participants and regulators proposed that the remaining issues covered by the Scheme, dealing with consumer protection matters, could be dealt with by an industry code made under the Act, allowing for the repeal of the Determination (which repeal has now occurred pursuant to the Telecommunications Service Provider (Mobile Premium Services) Revocation Determination 2009).

The Code is the result of a substantive review of the operation of the Scheme, resulting in more stringent advertising rules, improved con-

sumer protections and complaints handling requirements, particularly in relation to subscription services.

Scope of the Code

The Code regulates the provision of MPS. This term incorporates premium SMS or MMS as well as proprietary network services (walled garden or portal content provided by mobile carriers). This article focuses primarily on the provisions that relate to premium messaging services, rather than proprietary network services, as this is the primary focus of the Code.

Communications Alliance will manage the on-going maintenance of the Code including maintaining a register of members, considering ongoing compliance issues, promoting the Code and conducting broad-based consumer and industry awareness-raising activities.

The centrepiece of the new regulatory strategy is the registration of the Mobile Premium Services Code

The Code establishes consumer protection and complaints-handling requirements for the MPS industry by setting requirements in relation to:

- information to be included in advertising and the display of fine print;
- the provision of cost information to customers prior to their use of a service;
- a “double opt-in” requirement for premium messaging services; and
- simplification of process to unsubscribe from subscription services and to opt-out of marketing messages.

The Code places obligations jointly or separately on carriage and content service providers. The arrangements recognise the respective roles of these parties in the service supply chain, placing obligations where they most appropriate.

Whilst the Scheme also contained requirements in relation to advertising, cost information, opting in and unsubscribe mechanisms, the Code strengthens these provisions by setting out stricter and clearer requirements in each case.

Key Code provisions

Advertising

The Code includes specific requirements for TV, print, online and radio advertising. Pricing information must be displayed accurately and within sufficient proximity to the premium messaging service number (**short code**), in the same orientation and direction as the short code, to make it obvious the pricing applies to that number.

For subscription services, the word “subscription” or “subscribe” must be displayed in a prominent and highly visible manner in the main body of the advertisement. Font size and display time requirements are also set out for different media. Information must not be “below the fold” for online pages, that is, it must be visible without the user having to scroll down the page.

the Code sets out stricter and clearer requirements in relation to advertising, cost information, opting in and unsubscribe mechanisms

Advertising cannot be placed in media which is primarily targeted at children under the age of fifteen. If the placement, content and context of an advertisement is such that it is likely to attract a significant number of minors to use that service, the advertisement must include a warning to the effect that those under eighteen years of age must seek permission of the account holder before using the service.

Double opt-in for subscription services

Throughout the Code, additional requirements are included in respect of processes for the provision of subscription messaging services, designed to ensure the customer is aware that they are entering into an ongoing transaction rather than receiving a single piece of content. Key to these requirements is the "double opt-in" process whereby a consumer who has made an initial request for a subscription service must receive and respond to a second opt-in message prior to the commencement of the service.

Further, customers who initiate a subscription service via a mobile, WAP, IVR or other mechanism must be sent a separate message to their mobile instructing them to opt-in to confirm the subscription by sending a text message to a particular short code. Customers must also be provided with specific pricing, helpline and unsubscribe information via SMS, in addition to the provision of this information in advertising.

Expenditure management

The ultimate expenditure management tool is the cessation of a service and the requirement for a universal 'stop' command remains in the Code: content service providers must allow customers to unsubscribe from services by sending the word 'stop' to a given number, preferably as a reply to the message containing the service. The existing requirement to provide \$30 expenditure notification messages has also been maintained, with additional clarification to ensure that the notification occurs for each incremental spend of \$30 within a calendar month.

In addition, a new website (www.19sms.com.au) has been developed in conjunction with Communications Alliance to provide a range of information about MPS to consumers. The website provides advice on how premium messaging services are obtained, how to manage expenditure and how to stop receiving a service.

a consumer who has made an initial request for a subscription service must receive and respond to a second opt-in message prior to the commencement of the service.

Post-subscription marketing

Where a customer unsubscribes from a messaging service, the provider may not send any further marketing messages unless the customer opts back in to receive marketing material. The MPS provider may invite customers to opt in for marketing in the unsubscribe confirmation message that is required to be sent.

Helpline and complaints

Content service providers must offer a local or free-call helpline so that customers can make complaints or opt out of a subscription service or receipt of marketing messages. The helpline must be staffed by 'live agents' from 9 to 5 on weekdays. Content service providers must also have a process for continuously analysing complaints to identify recur-

ring problems and trends so that they can seek to eliminate the underlying causes of complaints. Content service providers must respond to complaints within two business days of receipt. Carriers are also under an obligation to seek to resolve complaints that are not resolved by content service providers, or which are referred to the carrier by the Telecommunications Industry Ombudsman (TIO).

Guideline

The Code has been drafted to focus on defining desired outcomes via high level rules rather than prescribing detailed processes. A "how to" guide to assist in the implementation of those requirements as been developed as a companion document in the form of the Guideline. It provides clear, succinct rules and sufficient information on customer information and pricing messages, subscription services and advertising, combined with practical examples. As with the guideline that existed under the Scheme, the new Guideline is intended to become an industry benchmark document used for complaint resolution.

Moving forward

Under the Act, the TIO has the power to investigate, facilitate a resolution and give direction in relation to complaints regarding Code matters. ACMA can direct that a Code participant comply with the Code in the event of a contravention. In terms of advertising, the ACCC also has the power to take action in relation to misleading or deceptive claims under the Trade Practices Act 1974 (Cth) (TPA).

the new Guideline is intended to become an industry benchmark document used for complaint resolution

The key issue upon which the success of the Code and supplementary regulatory measures will rest, as was the case with the Scheme, is the level of compliance with the provisions of the Code. While the majority of industry participants have been compliant with the Scheme and will continue to comply with the Code, those who do not will only be encouraged to do so by some level of enforcement. During the life of the Scheme, no official action against non-compliant operators was brought by ACMA. In relation to the Code, however, ACMA has already indicated its intention to closely monitor and, where necessary, enforce the provisions of the Code, with ACMA chairman Chris Chapman promising "a rigorous monitoring regime" and noting the potential for penalties up to \$250,000 for non-compliance.

The ACCC has also recently become active in the MPS arena, including action under the TPA against a UK and a Bulgarian company, both of which were supplying MPS into Australia from offshore. In addition, carriers, under their contracts with aggregators and content service providers, are another mechanism for the enforcement of Code compliance, for example requiring MPS providers to refund customers where necessary and removing non-compliant services from their networks.

The Code is the outcome of a review of the Scheme and effectively forms the response to criticisms levied at the Scheme's perceived ineffectiveness. As with the Scheme, it is a result of collaboration between carriers, aggregators, content service providers and consumer groups, with increased engagement by regulators including the Minister. It is to be hoped that such close engagement can be maintained, to encourage and where necessary enforce compliance. In any event the Code will be reviewed in 12 months, ensuring that any issues will be revisited shortly.

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'It's A Jungle Out There': The Legal Implications of *Underbelly*

The banning of the broadcast of the real-life crime drama series, *Underbelly*, in Victoria in 2008 raises important issues about the impact of globalisation on the local administration of criminal justice. In this article David Rolph and Jacqueline Mowbray canvass the challenges presented by two significant globalising tendencies – internet technologies and human rights – through a case study of *Underbelly* and the related litigation.

Introduction

It is perhaps no overstatement to suggest that *Underbelly* has been a cultural phenomenon. Based on the best-selling non-fiction book, *Leadbelly*, by journalists, John Silvester and Andrew Rule (2004), this televisual dramatisation of Melbourne's notorious gangland wars became one of the highest rating television programmes of 2008, notwithstanding the fact that it was not screened in its entirety on television in one of the largest markets in Australia – the State of Victoria. *Underbelly* has generated opportunities not only for the authors and the actors involved but also the real-life participants – at least, those who have survived the gangland wars. The subsequent DVD release of *Underbelly* resulted in unprecedented pre-sale orders and promises to be one of the most successful Australian television programme DVDs. An *Underbelly* prequel began broadcasting in February 2009.

Underbelly and its impact on domestic and international legal processes highlight the challenges the administration of criminal justice confronts in a globalised world

However, it is not only the cultural impact of *Underbelly* that warrants attention. The actual and potential legal issues raised by *Underbelly* are important and worthy of serious analysis. It is submitted that *Underbelly* and its impact on domestic and international legal processes highlight the challenges the administration of criminal justice confronts in a globalised world. These challenges are twofold. The first is presented by internet technologies. Arguably, the banning of the broadcast of *Underbelly* on terrestrial television has been rendered ineffective not only by the possibility of 'hard copy' bootleg copies on video or DVD being circulated but also by the possibility of downloading digital copies from web servers located outside Victoria or, indeed, from outside Australia. The second challenge is presented by the growing importance of human rights, both domestically and internationally, and the accompanying trend towards internationalisation of the legal framework within which criminal justice issues are to be determined. The extradition from Greece to Australia of leading *Underbelly* figure Tony Mokbel, for example, gave rise to human rights claims before the Greek, European and Australian courts, which arguably complicated the process of bringing Mokbel to trial in Australia.

This article seeks to examine how these challenges manifested themselves in relation to *Underbelly*. The first part of the article explores the efficacy of established principles of contempt of court to prevent prejudice to criminal trials when internet technologies allow jurisdictional borders to be transcended so readily. The second part of the article analyses the way in which processes of globalisation, by bringing different legal systems into contact with one another, complicate the administration of justice in individual jurisdictions. In particular, it considers how the growth of human rights jurisprudence contributes to the internationalisation of the legal framework within which criminal justice issues play out.

Underbelly – Just the Facts

Underbelly was a thirteen-episode Australian drama series which screened nationally on the Nine Network from February 2008 (except in Victoria). The series charted the course of Melbourne's notorious 'gangland wars', commencing with the assaults by Alphonse Gangitano and Mark Moran in the Star Bar nightclub in 1995 and Alphonse Gangitano's murder in 1998 and culminating with the arrest of Carl Williams in 2004. Between these events, the series traces the complex connections and antagonisms between a range of Melbourne underworld figures, including the Morans, Carl and Roberta Williams, Lewis Caine, Mario Condello, Dino Dibra, Zarah Garde-Wilson, Mick Gatto, Graham Kinniburgh, Tony Mokbel and Andrew Veniamin. It also traces the efforts of Victoria Police's Purana Taskforce to put an end to the gangland killings.

Underbelly was a docudrama. It depicted a significant number of real people and it represented actual events. In doing so, it derived dialogue from transcripts of recorded conversations obtained by police through the use of listening devices. However, notwithstanding this factual basis, there were strong fictional elements to *Underbelly*. For instance, the central police officers, Steve Owen (played by Rodger Corser) and Jacqui James (played by Caroline Craig), were amalgams of a number of actual police officers on the Purana Taskforce. In addition, there was understandably the need for creative licence in depicting those events which were not recorded by police.¹ In this way, *Underbelly* blended factual and fictional elements.

While the blend of fact and fiction that was *Underbelly* played out on television, the 'real lives' of the characters depicted in the series continued to make headlines. In response to the publicity associated with *Underbelly*, Carl and Roberta Williams have become media celebrities, with Carl's Facebook page making news (and thousands of Facebook friends), while Roberta hosted an 'Underworld dinner' and did a bikini shoot for Zoo Weekly magazine.² Meanwhile, Tony Mokbel, who was arrested in Greece in June 2007, having skipped

The role of the media in relation to the Underbelly story extended beyond the screening of the series itself

bail while facing charges of cocaine smuggling, was challenging his extradition to Australia to face murder charges in relation to the deaths of Lewis Moran and Michael Marshall, together with additional charges of drug trafficking.³ Mokbel argued that for various reasons, including the publicity associated with *Underbelly*, he would not receive a fair trial in Australia. When this argument was rejected by the Greek Supreme Court in March 2008, and later confirmed by the Greek Justice Minister, Mokbel lodged an application with the European Court of Human Rights for orders preventing Greece from extraditing him to Australia. In May 2008, before his application to the European Court was determined, Mokbel was extradited amid still more media publicity, and the ongoing legal proceedings continue to attract media attention.⁴ The role of the media in relation to the *Underbelly* story thus extended beyond the screening of the series itself and into the coverage of the real life events associated

with it. In this way, the phenomenon that was Underbelly blurred the boundaries between fact and fiction in an extraordinary way, a fact that became important in the way judges treated the risk posed by the broadcast of Underbelly contemporaneously with the trials of persons portrayed therein.

Contempt of Court, Suppression Orders and Underbelly

Underbelly highlights the difficulties surrounding the making of effective suppression orders so as to prevent an apprehended contempt of court at a time when internet technologies have become pervasive. Only days before Underbelly was scheduled to screen in February 2008, the prosecution in a related criminal matter applied for a suppression order. It was feared that, if the broadcast were not stopped, the fair trial of A on the charge of the murder of B would be prejudiced.⁵ Both A and B, as well as A's involvement in B's murder, were depicted in Underbelly. Channel Nine undertook not to broadcast Episode 12, the episode in which B was murdered. The primary judge, King J, rejected this as insufficient, given that B featured throughout the other episodes and was given somewhat sympathetic treatment. Moreover, the depiction of B's murder tended to corroborate the version of events given by one of A's accomplices, X, who would be giving evidence for the Crown at A's trial (at [4]-[7]). King J granted the suppression order sought by the Crown (at [12]-[14]). Her Honour ordered that all thirteen episodes of Underbelly not be broadcast in Victoria and furthermore suppressed:

in Victoria any publication on the Internet of the series together with any publication on the Internet of the part of the site that shows the history, the interrelationship of the individuals between each other, the cast of characters and their associations.⁶

The latter part of this order was directed particularly at the official Underbelly website, which at that time contained a feature, 'Family Tree Site – Inside the Underbelly'.

Her Honour ordered that all thirteen episodes of Underbelly not be broadcast in Victoria

Following media reports that a South Melbourne hotel was playing a recording of Underbelly, made interstate, for its patrons,⁷ the DPP applied for a variation of the order. King J recast the relevant order in the following terms:

The transmission, publication, broadcasting or exhibiting of the production referred to as "Underbelly" be prohibited in the State of Victoria, until after the completion of the trial and verdict in the matter of R v [A].⁸

On appeal, the Victorian Court of Appeal found that King J had the jurisdiction to make the orders she did and was entitled to exercise her discretion to make the orders.⁹ Their Honours accepted that the primary judge had implicitly found that the broadcast of Underbelly would constitute sub judice contempt. They did not accept that King J had failed to consider the public interest in the broadcast of Underbelly, being 'information pertaining to the role of police in preventing and responding to organised crime'. Indeed, their Honours concluded that the public interest in the broadcast was limited (at [43]) because Underbelly was a docudrama, the primary purpose of which was entertainment (at [39]). Related to this, the Victorian Court of Appeal did not accept that the primary judge erred by balancing the commercial interests of the Nine Network in the broadcast of Underbelly against the public interest in the protection of the administration of criminal justice (at [43]). However, their Honours found that the terms of the orders made by King J were broader than were strictly necessary. In terms of the first order, as recast by King J, they held that it was only necessary to restrain the Nine Network from broadcasting Underbelly in Victoria (at [65]). Their Honours suggested that any person who broadcast Underbelly with knowledge of the order imposed upon the Nine Network might be held liable for contempt of court for deliberately frustrating a court order, notwithstanding the fact that he or she was not directly

bound by the order. In terms of the second order, their Honours held that an order directed only to the 'Family Tree website – Inside the Underbelly' was all that was strictly necessary (at [69]-[70]). The presence of potentially prejudicial material elsewhere on the internet could be dealt with, at least in part, by appropriate directions from the trial judge (at [70]-[73]).

In late May, A (Evangelos Goussis) was convicted of killing B (Lewis Moran).¹⁰ This meant that the ban on publication in Victoria lapsed. However, the prosecutions in the Victorian courts arising from the 'gangland wars' have not yet finished. For instance, as noted previously, Tony Mokbel has been extradited back to Australia from Greece to face charges of murder and drug trafficking. In addition, in early September 2008, X, an accused person in a pending criminal trial, applied to the Supreme Court of Victoria to restrain General Television Corporation Pty Ltd from broadcasting Underbelly in Victoria until his trials had been completed. Vickery J permitted the Nine Network to broadcast the first five episodes,¹¹ albeit in edited form, (at [14]) but found that the broadcast of Episode 6 would amount to a contempt of court (at [31]). Like the Victorian Court of Appeal in General Television Corporation v DPP,¹² Vickery J noted that, although only General Television was directly bound by the order, any publication by a person with knowledge of the order could amount to a contempt of court (at [46]-[47]). It may be some time before an unexpurgated version of Underbelly may be screened in Victoria in its entirety.

The suppression of Underbelly in Victoria raises a number of important issues relating to the protection of the administration of justice and the right of an accused person to a fair trial. The fact that Australia is a federation with eight different State and Territory criminal justice systems has long posed a problem for media outlets.

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This is particularly so given the existence of national newspapers and national radio and television networks. Media outlets have, for some time, needed to make arrangements to prevent publication or broadcast within a particular jurisdiction so as not to interfere with the administration of justice within that jurisdiction. Prominent criminal prosecutions, such as the Snowtown murders in South Australia and the prosecution of Bradley John Murdoch for the murder of Peter Falconio in the Northern Territory, required national media outlets to take steps to ensure the conduct of those trials were not jeopardised. The Australian newspaper had to modify editions circulating within each jurisdiction so as to comply with the suppression orders imposed and so as not to interfere with the administration of justice in each case.

The difficulties presented to the administration of the criminal justice system in relation to a complex, interconnected set of criminal prosecutions arising out of underworld crime by the proposed broadcast of a dramatisation of the events at issue in the trials are also not new. The restraint of the Australian Broadcasting Corporation's proposed screening of Blue Murder in New South Wales in 1995 provides a close analogue to Underbelly. Blue Murder was a dramatisation of the Sydney underworld in the 1970s and 1980s, particularly focusing on the interaction between police officer, Roger Rogerson, and criminal, Arthur 'Neddy' Smith. Blue Murder was only able to be shown in New South Wales in 2001 following the decision by the Director of Public Prosecutions not to prosecute Smith for the murder of drug dealer, Lewton Shu, at Waterfall in January 1983.¹³ Like Underbelly, Blue Murder was also a docudrama which, by virtue of its blending of factual and fictional elements, had the potential to interfere with pending criminal trials.¹⁴ However, people living in New South Wales who wanted to see Blue Murder were able to view

The fact that Australia is a federation with eight different State and Territory criminal justice systems has long posed a problem for media outlets.

it in the intervening six years. As journalist Stephen Gibbs observed, by the time *Blue Murder* was broadcast in New South Wales in 2001, the series had been 'already widely viewed on bootleg copies by police, lawyers, criminals and anyone else interested in such fare'.¹⁵ The controversy surrounding *Underbelly* unsurprisingly raised the memory of *Blue Murder*. It prompted a late night re-screening of *Blue Murder* on the Nine Network and the promotion of *Blue Murder*'s release on DVD. The *Daily Telegraph* even engaged Rogerson to review *Underbelly*.¹⁶

Whilst the challenges facing courts and the media are not new, their scale is novel. The crucial difference between the problems posed by *Blue Murder* in the late 1990s and those posed by *Underbelly* is the development of internet technologies. If people in New South Wales wanted to watch *Blue Murder* in 1995, they could have received a taped video copy from interstate family or friends or obtained one on the 'black market'.¹⁷ This would have taken some time and effort. If people in Victoria wanted to watch *Underbelly* in 2008, they could use these conventional means (although DVD, not video cassette was the preferred medium for distribution) but they had the easier, more convenient option of downloading it from a file-sharing website.¹⁸ Many of these file-sharing websites are not based in Australia. Two of the websites which experienced the most traffic, Mininova and Pirate Bay, are based in the Netherlands and Sweden respectively.¹⁹ These websites also made it possible for Victorians to view *Underbelly* only minutes after it had finished screening in New South Wales.²⁰ By mid-March 2008, Mininova hosted all thirteen episodes of *Underbelly*.²¹

The judgments in the litigation associated with *Underbelly* disclose differing attitudes towards the challenges posed by internet technologies to the established principles relating to the making of suppression orders and contempt of court. King J purported to ban publication on the internet in Victoria. In its terms, the order is inefficacious. It is not possible wholly to prohibit publication on the internet within one Australian jurisdiction. Websites hosted by servers in other parts of Australia or overseas are still accessible within Victoria, as other courts have acknowledged.

The difficulties relating to the restraint of publication on the internet are not new. For instance, an order in terms nearly identical to the one made by King J was sought in a defamation case in the Supreme Court of New South Wales, *Macquarie Bank Ltd v Berg*.²² In this case, Simpson J recognised that, in its terms, the order sought was ineffective because, once material was published on the internet, it was accessible by any person in any jurisdiction in the world, so long as he or she had 'the appropriate facilities' (at 44,792). Her Honour rejected a variation of the order limited to publication within New South Wales because, as her Honour noted, this limitation would be futile; there was no wholly effective means of excluding publication within a geographical area. The effect of making the order originally sought was characterised by Simpson J as purporting to 'restrain [the defendant] from publishing anywhere in the world via the medium of the internet' (at 44,792). Her Honour observed that the purpose of granting an injunction in New South Wales was to ensure compliance with the laws of New South Wales and to protect the plaintiff's rights under the laws of New South Wales (at 44,792). However, the making of the order sought would have the effect of superimposing the defamation laws of New South Wales on other jurisdictions which might take a markedly different view of the balance between the protection of reputation and freedom of expression (at 44,792). Consequently, in Simpson J's view, the making of such an order would exceed the proper limits of the use of the injunctive power of the Supreme Court of New South Wales (at 44,792). Crucial to Simpson J's decision was 'the nature of the internet itself' (at 44,792). Simpson J's reasoning in *Macquarie Bank Ltd v Berg* is directly applicable to the order made by King J and provides a compelling argument against the making of an order in such terms.

The Victorian Court of Appeal took a different view of the challenges posed by internet technologies to the effective operation of suppression orders and the principles of contempt of court but one which was equally problematic. Whilst King J purported to restrain the 'transmission, publication, broadcasting or exhibiting' of *Underbelly* by any person in Victoria, the Victorian Court of Appeal found that it was only necessary to prevent General Television from publishing *Underbelly* in Victoria. Their Honours expressed the view that other persons intentionally transmitting, publishing, broadcasting or exhibiting *Underbelly* in Victoria with knowledge of the order could nevertheless be held liable for contempt of court due to the deliberate frustration of the suppression order. Vickery J made a similar observation in *X v General Television Corporation Pty Ltd*.²³ However, the power of a State or Territory Supreme Court will not necessarily extend to conduct which occurs outside of that State or Territory. Just as the jurisdiction of a court in a given State or Territory to grant an injunction is for the purpose of ensuring compliance with the laws of that State or Territory and protecting a plaintiff's rights within that State or Territory, so too the jurisdiction of a court to issue a suppression order or to punish for contempt of court is intended to protect the administration of justice within that State and Territory; and just as it would exceed the proper limits of a court's power to grant an injunction to prohibit publication outside of that State or Territory, so too would it exceed the proper limits of a court's power to punish for contempt of court committed outside of that State or Territory.

This has been recently confirmed by the decision of Mandie J in

Whilst the challenges facing courts and the media are not new, their scale is novel. The crucial difference between the problems posed by Blue Murder in the late 1990s and those posed by Underbelly is the development of internet technologies.

R v Nationwide News Pty Ltd.²⁴ In this case, the Commonwealth Director of Public Prosecutions sought to have *Nationwide News* (the publisher of the *Daily Telegraph* newspaper) and *Queensland Newspapers* (the publisher of the *Courier-Mail* newspaper) punished for contempt of court in relation to breaches of non-publication orders made by the Magistrates' Court of Victoria, pursuant to the Magistrates' Court Act 1989 s 126, and the deliberate frustration of those orders (at [1]-[7]). The orders in question sought to protect the identity of a witness in a terrorism case. Significantly, the Commonwealth DPP did not rely upon the circulation of the newspapers within Victoria (at [8]). Mandie J noted the common law presumption that the criminal law proscribes conduct within the jurisdiction, with the consequence that the legislature is not taken to intend that criminal acts committed outside the jurisdiction are proscribed (at [63]). His Honour found that there was nothing in the relevant provision to displace the operation of this presumption (at [71]). The fact that the court was exercising federal jurisdiction did not alter his conclusion (at [74]). Consequently, the publications in New South Wales and Queensland did not constitute contempt of court in Victoria. The ability of a court in one jurisdiction to protect the administration of justice from being undermined by conduct in other jurisdictions is perhaps not as extensive as envisaged by the Victorian Court of Appeal in *General Television v DPP* and *Vickery J in X v General Television*.

One significant issue which remains unaddressed by *R v Nationwide News* is what constitutes publication for the purposes of contempt of court. In *R v Nationwide News*, the publication relied upon was publication within New South Wales and Queensland, presumably the circulation of the newspapers themselves. However, both the *Daily Telegraph* and the *Courier-Mail* have an internet portal. Is publication for the purposes of contempt of court to be treated the same as publication for the purposes of defamation, with the consequence

that publication occurs wherever a person receives contemptuous matter in comprehensible form?²⁵ If this is the case, the outcome of *R v Nationwide News* would likely have been different. Even though the websites of the Daily Telegraph and the Courier-Mail would have been directed towards their principal audiences in New South Wales and Queensland respectively, they would be accessible in Victoria and publication would occur in that jurisdiction. The conduct proscribed would therefore occur within Victoria and thus be subject to punishment. Adopting such a position would expand the scope of liability for contempt of court and challenge prevailing views about the territorial application of this body of law. Alternatively, is internet publication to be treated in the same way as 'hard copy' publication? If so, what is the principled basis for treating publication differently for the purposes of defamation and contempt of court?

The global nature of the internet presents real challenges to courts and the media in ensuring that effective suppression orders are made and enforced, that contempts of court are restrained and that the administration of justice is not undermined. With a history dating back to the twelfth century, the principles of contempt of court were clearly developed at a time when the scope for interference with the administration of justice from outside the jurisdiction was minimal.²⁶ Similarly, the common law principles relating to suppression orders and their statutory augmentation are territorially limited in their operation. Yet the global nature of internet technologies is

Is publication for the purposes of contempt of court to be treated the same as publication for the purposes of defamation, with the consequence that publication occurs wherever a person receives contemptuous matter in comprehensible form?

not respectful of territorial boundaries. Media commentators have pointed to the difficulties presented to established legal principles surrounding the right to a fair trial by internet technologies but have not offered practical solutions, other than departing from the principles of contempt of court as currently understood and applied.²⁷ Courts, legislatures and law reform bodies have not yet adequately engaged with this issue; although they have acknowledged the problem, they too have not proffered detailed, principled solutions.²⁸ The challenges presented by internet technologies to the administration of criminal justice in a globalised world are significant and are only likely to become more acute.

Extradition, Human Rights and the Internationalisation of Law

If the facts and circumstances surrounding Underbelly highlight the way in which processes of globalisation affect the practical administration of criminal justice, they also demonstrate how these processes affect the legal framework within which criminal justice systems operate. In particular, the various legal proceedings associated with Tony Mokbel's extradition from Greece to Australia suggest that, by bringing different legal systems into contact with each other, globalisation can complicate the administration of justice within individual jurisdictions.

In general terms, the legal history of the Mokbel extradition raises two key questions concerning the relationship between different legal systems in a globalised world. Firstly, to what extent could the European Court of Human Rights interfere with Australian criminal proceedings, by preventing Mokbel's extradition from Greece? And secondly, could the Australian courts find that Mokbel's extradition from Greece was an abuse of process as it occurred before his application to the European Court of Human Rights was heard? In other words, can the legal position in Greece (namely, Mokbel's right to apply to the European Court, and Greece's obligations to comply with decisions of that Court) affect Mokbel's rights under Australian law?

Media commentators have pointed to the difficulties presented to establish legal principles surrounding the right to a fair trial by internet technologies but have not offered practical solutions, other than departing from the principles of contempt of court as currently understood and applied.

Could the European Court of Human Rights prevent Mokbel's extradition from Greece?

Following the Greek authorities' decision to extradite him to Australia, Mokbel applied to the European Court of Human Rights for orders preventing the Greek authorities from returning him to Australia. This was on the basis that returning him to Australia would violate his human rights, as guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Greece is a party. In particular, Mokbel argued that his right to life and his right to freedom from torture and inhuman treatment could not be adequately protected in Australia.²⁹ There was also speculation that Mokbel would argue that he could not receive a fair trial in Australia, in part due to the publicity associated with Underbelly.³⁰

Mokbel was in fact extradited before his case was heard by the European Court. However, the case still raises interesting issues concerning the administration of criminal justice in the context of globalisation. In the first place, it highlights the way in which the Greek, European and Australian jurisdictions can simultaneously be engaged in relation to a particular criminal matter. More specifically, it demonstrates how these jurisdictions can potentially overlap, where human rights arising within a particular legal framework are claimed to have some form of extraterritorial effect. The particular issue here arises from the fact that Australia is not a party to the European Convention. Yet Mokbel's application asks the European Court to find that his extradition would be wrongful on the basis that his Convention rights would be violated in Australia. In this way, Mokbel is effectively asking the Court to give some form of extraterritorial effect to the rights enshrined in the Convention.

The question of whether the European Convention can be given extraterritorial effect in this way has been raised in a number of cases before the European Court. Perhaps the leading case on this point is *Soering v UK*,³¹ which concerned the question of whether the UK would be violating the Convention by extraditing a German national to the US, where he faced the risk of inhuman and degrading treatment or punishment, contrary to Article 3 of the Convention. While the UK argued that it could not be found liable for breaches of the Convention which may occur outside its jurisdiction, the Court found that:

the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country (at [91]).

The Court did accept that it could not be the case that 'a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention' (at [86]). Not every violation of every right will require a state to refuse to extradite. Nonetheless, the Court's finding that there are circumstances in which states should refuse extradition on the basis that the fugitive's Convention rights would be violated in the requesting state is significant, in that it extends the territorial scope of the Convention beyond those states who are parties to it.

The global nature of the internet presents real challenges to courts and the media in ensuring that effective suppression orders are made and enforced, that contempts of court are restrained and that the administration of justice is not undermined.

A similar tendency to extend the territorial scope of the Convention can be observed in other contexts also. Issues have arisen, for example, in relation to state parties' activities in foreign territories. Thus in its 2004 decision in *Issa v Turkey*³², the Court indicated that if Turkey exercised 'effective control' over areas in northern Iraq, then it would be liable for violations occurring in those areas, even though Iraq is outside the jurisdiction of the European Convention (at [69]). Similarly, in *R(AI-Skeini) v Secretary of State for Defence*,³³ the House of Lords, following the European jurisprudence, found that the Convention would apply in British-run military prisons in Iraq.

Mokbel's case is not, therefore, the first to raise issues of the extra-territorial effect of the European Convention. However, it does serve as a useful vehicle for exploring the implications of these issues, which are likely to assume increased significance in the context of globalisation. Mokbel's case, as we have seen, was based on the claim that Greece should not extradite him because his rights to life and freedom from torture, under Articles 2 and 3 of the Convention, would be violated in Australia. In the absence of further information as to how Mokbel pleaded this case, it is difficult to assess its prospects of success. However, in light of the existing jurisprudence of the European Court, it would seem unlikely that Mokbel would be able to demonstrate, to the Court's satisfaction, a 'real risk' that he would be deprived of these rights in Australia. More interesting, perhaps, is Mokbel's potential argument that his right to a fair trial would be violated in Australia, in particular due to the publicity associated with *Underbelly*. In making this argument, Mokbel could rely on the proposition, initially set out in *Soering v UK* and confirmed in subsequent cases,³⁴ 'that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country' (at [113]). Ultimately, however, it remains unlikely that Mokbel would be able to meet this test. The European jurisprudence indicates that this requirement of 'a flagrant denial of a fair trial' will be met only in the most extreme of circumstances, for example, where proceedings are conducted in the absence of both the accused and his or her defence lawyers.³⁵ Further, the European jurisprudence on the impact of pre-trial publicity on the right to a fair trial is equivocal. While the European Court and related institutions have accepted that adverse pre-trial publicity can affect the fairness of a trial,³⁶ there has been no decided case in which a state has been found to have violated the Convention on this basis.³⁷

However, while Mokbel's application may be unlikely to succeed, it usefully highlights a number of issues associated with the extraterritorial application of the human rights standards in the European Convention. In the first place, it raises the prospect of a blurring of jurisdictional boundaries, with more than one legal system involved in the same set of proceedings. Both the Australian courts and the European Court are involved in the Mokbel proceedings, and Mokbel will argue before both that his extradition and trial in Australia infringes his human rights. This raises fundamental questions and concerns for the administration of justice in individual jurisdictions. Human rights laws and standards not applicable within Australia could potentially have deprived Australian courts of the opportunity to try Mokbel: Australian legal proceedings could have been prevented or frustrated by a decision of the European Court preventing extradition. Of equal concern is the possibility of conflicting decisions as to whether Mokbel's treatment would meet basic human rights standards. If the European and Australian courts reach different conclusions on human rights issues, such as whether Mokbel would receive a fair trial in Australia, this could undermine confidence in

the ability of legal systems to respond to the challenges of globalisation. At the very least, it would complicate the legal framework within which the proceedings would play out.

A further complication arises from the fact that any decision by the European Court on the lawfulness of Mokbel's extradition would depend, in part, on the European Court's assessment of Australian law. In order to determine whether Mokbel would be deprived of certain human rights in Australia, the European Court is required to engage, to some extent, with the legal position in Australia, in order to assess the procedural and other safeguards afforded to Mokbel

by bringing different legal systems into contact with each other, globalisation can complicate the administration of justice within individual jurisdictions

under Australian law. Although the relevant test only requires the Court to consider facts and circumstances known to the extraditing state (Greece), this inherently involves some inquiry into the way in which human rights are protected in the requesting state (Australia). Australian law, then, is examined in European proceedings, which apply European standards to conditions in Australia. This not only raises the possibility of the fragmentation of criminal proceedings across different jurisdictions, but also the possibility of inconsistent interpretation and application of the same law. There is no guarantee that the European Court will interpret the legal and procedural requirements of Australian law in the same way as the Australian courts.

Finally, it is interesting to note that the European Court's willingness to give the European Convention a form of extraterritorial effect appears to be based on assumptions as to the importance and 'universality' of human rights. Thus in the *Soering* case, the Court justified its decision in part on the basis that:

In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (at [87]).

Similarly, in *Mamatkulov and Askarov v Turkey*,³⁸ the Court confirmed the existence of an obligation not to extradite to a country where a fugitive would face a violation of Convention rights, noting that to do so 'would hardly be compatible with the "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble [to the Convention] refers' (at [68]). The implicit assumption here is that human rights are universal, part of the 'common heritage' of mankind, and therefore liable to be given a broad application, beyond the territorial boundaries of a particular jurisdiction. In this way, human rights standards increase the scope for multiple jurisdictions to be engaged in respect of a single set of legal proceedings. Significantly, this suggests that concerns regarding the extraterritorial exercise of jurisdiction, as identified above, are likely to increase as discourses of human rights become more dominant both globally and within individual jurisdictions.³⁹

Could the Australian courts find that Mokbel's extradition was an abuse of process?

Of course, Mokbel was extradited from Greece before his case could be heard by the European Court, and so he was denied the opportunity to resist his extradition in that forum. Back in Australia, however, Mokbel's lawyers relied on this turn of events to argue that his extradition from Greece was an abuse of process, as it took place before his application to the European Court of Human Rights was heard. As a consequence, they argued, the relevant authorities should be restrained from prosecuting Mokbel.⁴⁰ This argument, like Mokbel's application to the European Court itself, suggests a blurring of jurisdictional boundaries in this case. Effectively Mokbel is asking the

Australian courts to find that his rights under the European Convention (namely, his right to apply to the European Court) give rise to obligations on the part of the Australian government. Even though Australia is not a party to the European Convention, and therefore cannot be found to be in breach of any obligation under that treaty by extraditing him, Mokbel is arguing that the treaty nonetheless creates rights which must be recognised and protected by Australian courts under Australian law. Once again, then, we see the globalisation of the legal framework within which issues of criminal justice must be decided: the Australian court is required to consider not only issues arising under Australian law, but also under European law.

Ultimately, the Victorian Supreme Court rejected Mokbel's application to restrain the relevant authorities from prosecuting him. The Court found that the continuation of criminal proceedings against Mokbel would not constitute an abuse of process, notwithstanding the fact that he was extradited from Greece prior to determination of his application to the European Court. In reaching this conclusion, the Court noted that 'Australia is not a party to, nor bound by, the European Convention' and that there was, consequently, 'nothing "shameful" or "unworthy" about the conduct of the Australian government' such as to constitute an abuse of process (at [60]). Although not mentioned in the judgment, this conclusion seems consistent with other decisions, which suggest that extradition while an appeal is pending does not, in and of itself, constitute an abuse of process.⁴¹

In spite of this conclusion, however, some of the Court's comments seem to leave open the possibility that, in another case, the blurring of jurisdictional boundaries for which Mokbel argued could take greater effect. It is clear that the issue of whether to stay or restrain

the European jurisprudence on the impact of pre-trial publicity on the right to a fair trial is equivocal

proceedings on the basis of an alleged abuse of process is a matter of discretion, to be determined by balancing 'the character of the conduct complained of by the accused on the one hand, and the public interest that accused persons, charged with serious criminal offences, be duly tried for those offences'.⁴² In confirming this principle, the Court leaves open the possibility that, in an appropriate case, the legal position in the extraditing state may be relevant to that balancing exercise. Thus the Court notes that, when considering the lawfulness of actions by Australian authorities in relation to extradition, it is not only the laws of Australia, but also those of the extraditing state, which must be considered (at [52]). Further, there are suggestions in the judgment that Mokbel's argument failed, in part, because he did not provide any evidence that his application to the European Court had merit, or prospects of success. Certainly, this point seems to have been put to the Court by the defence (at [20]) and not disputed by the Court in its judgment. Thus the Court notes that Mokbel relied 'solely, on the bare fact' (at [57]) that at the time at which he was extradited to Australia, he had made an application to the European Court. While acknowledging that it 'may not be appropriate to agitate, in this Court, the merits or otherwise of the plaintiff's application to the European Court'(at [57]), the Court nonetheless seems to suggest that the nature of Mokbel's case before the European Court, and perhaps its prospects of success, could be relevant to the exercise of the Court's discretion.

This again raises concerns about the role played by multiple jurisdictions in criminal proceedings, and the way in which this can complicate the administration of justice in individual jurisdictions. Concerns about fragmentation of proceedings, overlap of jurisdiction and inconsistency in application of the law might all arise in this context. In particular, to the extent that the nature of Mokbel's case before the European Court might be relevant to the exercise of an Australian court's discretion, for example, the Australian court would be required to consider European law, in order to form an opinion as to that case. This scenario becomes further confused when

There was speculation that Mokbel would argue that he could not receive a fair trial in Australia, in part due to the publicity associated with Underbelly

we recall that, in reaching its decision, the European Court would take account of procedural safeguards available to Mokbel under Australian law. It is therefore possible, theoretically, that in deciding whether to exercise its discretion, an Australian court would need to consider how the European Court would interpret the legal situation in Australia.

Conclusion

The legal history of Underbelly – the banning of the docudrama in Victoria, and the real life legal adventures of Mokbel and others depicted in the series – provides a useful vehicle for examining the challenges which globalisation creates for the administration of criminal justice. Throughout this article, we have used the Underbelly story as a lens through which to examine the twin impacts of internet technologies and human rights on the conduct of criminal proceedings.

The legal ban on the broadcast of Underbelly in Victoria, and the difficulties associated with framing and potentially enforcing this suppression order, highlight the impact which the 'global' medium of the internet has on local court proceedings. Since the internet allows for the simultaneous publication of material in multiple jurisdictions, it poses an inherent challenge to the ability of courts, whose jurisdiction is limited territorially, to suppress the publication of prejudicial material. In this sense, it complicates and challenges the administration of justice in individual jurisdictions.

At the same time, the Mokbel extradition and the various legal proceedings associated with it demonstrate how the administration of justice can be complicated when multiple jurisdictions are engaged in respect of a particular matter. Of course, extradition scenarios inherently involve the interaction of different jurisdictions. However, the Mokbel story serves to highlight one particular factor which is likely to increase the incidence of cases involving the interaction of different legal frameworks, namely, the growing importance of human rights. The desire to protect human rights, whether through particular human rights instruments, or as part of the court's inherent jurisdiction to prevent abuses of process, is accompanied by a trend to give such rights as broad an application as possible. As a result, the human rights standards of multiple jurisdictions may become engaged in respect of the same matter.

While our discussion has focused on Underbelly, the impact of internet technologies and human rights on legal proceedings clearly extends beyond the scope of the facts discussed in this article. These globalising tendencies affect the conduct of criminal proceedings generally, and are only likely to become more significant over time. In this way, globalisation, and the challenges – and opportunities – which it creates, are likely to assume increased importance for the administration of criminal justice in the future.

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(Endnotes)

1 See generally R v A [2008] VSC 73 at [3].

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3 Petrie A 'Greece Gives Mokbel Marching Orders' The Age, 8 May 2008.

4 See for example Hughes G 'Judge Rejects Tony Mokbel's Claim That Extradition from Greece Was Illegal' The Australian, 29 October 2008.

5 R v A [2008] VSC 73 at [1].

6 Ibid at [13].

7 Sharp A, Ziffer D, Butcher S and Miller N 'Pirate Underbelly Screening Exposed' The Age, 14 February 2008.

- 8 General Television Corporation Pty Ltd v DPP [2008] VSCA 49 at [64].
- 9 Ibid. at [35] per curiam.
- 10 Silvester J 'Moran Murderer Revealed as Two-Time Killer' The Sydney Morning Herald, 30 May 2008.
- 11 X v General Television Corporation Pty Ltd [2008] VSC 344 at [48].
- 12 [2008] VSCA 49.
- 13 Gibbs S 'TV Drama That's Been Blue Murder' The Sydney Morning Herald, 29 January 2000 ; Gibbs S 'ABC Can Finally Get Away with Blue Murder' The Sydney Morning Herald, 13 July 2001; Ackland R 2001 'How the ABC Got Away with Blue Murder' The Sydney Morning Herald, 3 August 2001.
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- 16 Rogerson R 'It's Bang on Target – Roger Rogerson Gives Underbelly Debut Four Stars' The Daily Telegraph, 14 February 2008.
- 17 Idato M 'Downloads Expose TV's Underbelly' The Sydney Morning Herald, 18 February 2008.
- 18 Dowsley A 'Black Market Hit Gives Nine a Bellyache' Herald-Sun, 22 February 2008; Idato above n 17; Moses A 'Web Pirates Sail around TV Ban' The Sydney Morning Herald, 13 February 2008; Singer J 'Hitting Jurors under the Belly' Herald-Sun, 31 March 2008.
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- 20 Cummings and Fenech above n 18; Miller N 'Internet May Render Censorship Futile' The Age, 13 February 2008; Moses above n 18; Rout and Meade above n 19.
- 21 Roberts B 'Nine Kicked in Belly Again' Herald-Sun, 17 March 2008.
- 22 (1999) A Def R 53-035.
- 23 [2008] VSC 344.
- 24 [2008] VSC 526.
- 25 See Dow Jones & Co. Inc. v Gutnick (2002) 210 CLR 575 at 600-01, 605-06 per Gleeson CJ, McHugh, Gummow and Hayne JJ.
- 26 Witham v Holloway (1995) 183 CLR 525 at 538 per McHugh J.
- 27 Ackland R 'Blindfolding Jurors an Idea Whose Time has Gone' The Sydney Morning Herald, 15 February 2008; Idato above n 17; Singer above n 18.
- 28 See, for example Spigelman J 'The Internet and a Right to a Fair Trial' The Judicial Review vol 7 pp 403-422; Bell V 'How To Preserve the Integrity of Jury Trials in a Mass Media Age' The Judicial Review vol 7 pp 311-328; Whealy A 'Contempt: Some Contemporary Thoughts' The Judicial Review vol 8 pp 441-471.
- 29 Mokbel v DPP (Vic) and Others [2008] VSC 433.
- 30 Bachelard M and Fyfe M 'Human Rights or a get-out-of-jail-free Card?' The Age, 11 May 2008.
- 31 (1989) 11 EHRR 439. This decision has been confirmed and applied in numerous other cases, including, most recently, the interesting House of Lords decision of EM v Secretary of State for the Home Department (House of Lords, 22 October 2008).
- 32 (2004) 41 EHRR 567 cf 7Vc` dk`VcY`Di] Zghk`7ZÅ † b `VcY`Di] Zgh11 BHRC 435 (European Court of Human Rights, 2001).
- 33 [2007] 3 WLR 33.
- 34 Mamatkulov and Askarov v Turkey (Judgment of the European Court of Human Rights, 4 February 2005); Ismoilov and Others v Russia (Judgment of the European Court of Human Rights, 24 April 2008).
- 35 Bader and Others v Sweden (Judgment of the European Court of Human Rights, 8 November 2005) cf Mamatkulov and Askarov v Turkey (Judgment of the European Court of Human Rights, 4 February 2005).
- 36 Loucaides L 'Questions of Fair Trial under the European Convention on Human Rights' Human Rights Law Review vol 3 no 1 pp 27-51 at 39.
- 37 Perhaps the closest the Court came to such a conclusion was in T and V v United Kingdom (Judgment of the European Court of Human Rights, 16 December 1999), which concerned the two ten-year-old boys who were convicted for the abduction and murder of two-year-old Jamie Bulger in the UK. In those cases, the Court found that the boys, who were tried in an adult court, were denied the right to a fair hearing as the way in which the trial was conducted was intimidating and prevented the defendants from participating effectively in the conduct of their defence. One of the factors which the Court took into account was the overwhelming pre-trial publicity and media attention, noting that 'in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition' (at [87]), which had not occurred in this case. However, this decision stops short of finding that the pre-trial publicity in itself gave rise to a violation of the right to a fair trial.
- 38 (Judgment of the European Court of Human Rights, 4 February 2005).
- 39 In making these comments, we do not seek to suggest that this is an undesirable development. Indeed, the harmonisation of global human rights standards which may result, and which seems to be contemplated by s 32(2) of the Charter of Human Rights and Responsibilities Act 2006 (Vic), for example, would be extremely positive. In this article, we simply note the challenges which these developments create for the administration of justice in individual jurisdictions.
- 40 Mokbel v DPP (Vic) and Others [2008] VSC 433.
- 41 See, for example, Nudd v Australian Federal Police [2008] QCA 60.
- 42 Mokbel v DPP (Vic) and Others [2008] VSC 433 at [54].

From Chalk and Talk to an Online World of Digital Resources

The January 2009 edition of the *Communications Law Bulletin* included an article by Alex Farrar on amendments made to the Copyright Act affecting the use of multimedia in classrooms. Further to that piece, Simon Lake discusses the activities of Screenrights and available statutory licences for educational copying and communication of broadcast materials.

Screenrights (initially known as the Audio-Visual Copyright Society) was established almost two decades ago to deal with what was then a new copyright challenge – the use of the video recorder in education. For the first time, teachers and academics could record programs to keep in the library as a resource and to use in education. The problem was a practical one. The law at the time required educators to obtain prior permission from each of the copyright owners, a task that was so difficult, teachers either didn't copy off air, or did so illegally.

After lobbying from educators and the film industry, the Copyright Act 1968 (Cth) (**Copyright Act**) was amended in 1990 to include Part VA, a statutory licence that allowed educational institutions to copy from television and radio, provided they agreed to pay equitable remuneration. Screenrights was declared the society to administer these provisions.

The rationale behind this licence was two-fold: to ensure access to the resources provided by television and radio, and to provide payment to

the Copyright Act was amended in 1990 to include Part VA, a statutory licence that allowed educational institutions to copy from television and radio

the people who make and invest in this work so that they will continue to produce programs for our students and teachers.

Since then, the film industry, the education sector, and the copyright landscape has changed dramatically. Video recorders are well and truly outmoded technology – they are large machines gathering dust in the corner. We have digital television, internet streaming, PVRs, retransmission of programs on pay television and mobile phones, electronic whiteboards and online resource centres providing television programs to our educators.

Despite the complexity of this landscape, Screenrights sees the copyright challenge as largely unchanged. How do we ensure access to copyright work while making sure that rightsholders are paid when their work is used? In most cases, this has involved working with both the creators and consumers of content for legislative change that achieves these aims in this new environment.

In the education sector, the change has been particularly dramatic. Teachers and academics are now using new content management systems such as Clickview for their audiovisual collections. Systems such as these let them store, access and play recorded material, and provide digital copies of programs to other schools with the same system. They can show programs to students on electronic whiteboards, and they can also obtain podcasts and vodcasts of their favourite programs from the Internet. In some cases, they are no longer even recording programs themselves. They can go to innovative resources centres, such as RMIT Publishing's Informat, that are making recordings of programs available online to academics across the country.

The Part VA statutory licence has embraced these changes remarkably well. Amendments have allowed for the downloading of certain broadcast material, and for making copied programs available to staff

and students online. This has ensured that the licence continues to achieve its two key aims in this new environment: access to copyright users and payment to rightsholders.

Screenrights has also recognised the importance of embracing new technologies to reach the people who are using our members' work. We established EnhanceTV (www.enhancetv.com.au) to let educators know about what's on television and how to use it. Members can subscribe to an online television guide alerting them to upcoming programs relevant to their nominated curriculum areas. They can also download study guides and, now that the site has become a licensed resource centre under Part VA of the Copyright Act, they can obtain copies of programs they forgot to record, or simply ask EnhanceTV to make recordings on their behalf. The service reaches more than 12,000 subscribers on a weekly basis and has recently also become a site where filmmakers and educators can talk to each other, exchanging information and resources to help them teach with television.

The Part VA statutory licence has embraced technical changes remarkably well.

These changes have not only ensured ready access to copyright material for teachers in a technological age, they are also providing a continued growth in copyright income for rightsholders. Last year, more than 45% of the programs copied were documentaries, with the income collected on behalf of these rightsholders helping to ensure that they continue to produce programs that educators want to use.

It's a challenging environment but it's an exciting one. There are not only more opportunities for audiences to enjoy the films and television our members produce, with effective copyright management, there is also a greater number of revenue streams for rightsholders.

Simon Lake is the Chief Executive of Screenrights. More information about Screenrights is available at www.screenrights.org.

Radio Frequency Identification and Data Protection: Privacy and Related Issues

Valerie Perumalla discusses RFID technology and how it fits with regulatory frameworks established by privacy and surveillance legislation.

Location based technologies such as Radio Frequency Identification (RFID) are said to pose new threats to security and privacy.¹ Location-based technologies have the potential to enhance the functioning of a range of business operations but there is a growing concern amongst policy makers that certain uses of RFID increase privacy related risks.

A 2006 report issued by the OECD's Directorate for Science, Technology and Industry has called for further discussion amongst policy makers on the future of RFID:

The window of opportunity is now, for policy makers, industry and consumers to understand and discuss forward-looking public policy issues associated with radio frequency identification technology and applications, as well as to review existing and proposed associated legislation.²

Similarly, numerous academics have suggested that location technologies have far outstripped both public awareness and legal and policy attention.³

There is no Australian legislation that directly addresses RFID technology, but where 'personal information' is concerned the Privacy Act 1988 (Cth) (Privacy Act) comes into effect regardless of the specific technology used for collecting that information. Certain uses of the technology may also be incidentally regulated. The Surveillance Devices Act 2007 (NSW) was developed primarily to regulate law enforcement agencies, but may restrict commercial uses of RFID where the technology conforms to the definition of a 'tracking device'.

Definition of RFID

RFID is used in a wide range of applications and the impact on personal privacy and data protection varies depending on the

specific system and its application. Inexpensive RFID tags used for basic object identification typically consist of a tiny electronic circuit attached to a small antenna that is capable of transmitting a unique serial number to a reader.⁴ More complex forms of RFID technology include contactless cards, used, for example, for access control, individual identification (passports and electronic ID cards), digital keys (vehicles or motels), or payment.⁵ RFID may be considered as one of a group of automatic identification and data capturing technologies which also includes bar codes, biometrics, magnetic stripes, optical character recognition, smart cards, voice recognition and similar technologies.⁶

The privacy risks of automatic identification and data capturing technologies are exacerbated when they are combined. For example, RFID may be combined with biometric technology to create an e-passport (RFID as part of a personal identification system or passport generally involves scanning and recording a biometrically unique feature of a person and encoding this data digitally on an RFID chip for later retrieval and analysis during an authentication process).⁷

Commercial applications of RFID

RFID has been used for many years in transport, access control, event ticketing and management, more recently in government identity cards and passports and extensively in manufacturing supply chains and in logistics for goods distribution.⁸ The most significant use of RFID technology in Australia is in supply chain and inventory management. The more advanced or high-end RFID systems can be interfaced with sensor networks, which can actively capture and record information about their surroundings.⁹ Such information includes the temperature; the composition of the atmosphere; exposure to chemicals; and quantities and measurements of materials.¹⁰ This information can be used to aid business processes such as quality assurance in manufacturing, climate control in horticulture, and the management of storage conditions for hazardous materials.¹¹

The Organisation for Economic Co-operation and Development (OECD) has identified eight fields of RFID application.¹² The most prominent applications are in the tracking, assembling and manufacturing of products within the supply chain.

Asset utilisation

Mobile assets are tagged for their use along the supply chain. Typical examples are RFID tagged containers which are used at different production stages. Companies rely on RFID technology in order to locate these assets and to monitor which departments use the assets how many times. The aim is to optimise processes and attain a more efficient use of capacity.

Asset monitoring and maintenance

Mostly fixed and high value assets are tagged to store information, e.g. for maintenance purposes. Examples include tagged machines where the maintenance history and information on replaces parts are stored in the tag.

Item flow control in processes

For item flow control, RFID tags are attached to items which are moving along the supply chain. Often information going beyond a simple ID number is stored on the tag to control production processes. This is, for example, the case in the automotive industry where production information is stored on the tag which can be attached to car bodies or smaller parts.

Inventory audit

A prominent application is the use of RFID for inventory audit. Examples include retailers, warehouses where pellets and sometimes cases are tagged to improve the speed and efficiency of stock taking.¹³

Australian legislation and RFID

The Australian Law Reform Commission (ALRC) conducted an inquiry last year on the extent to which the Privacy Act and related legislation continue to provide adequate protection of privacy in

Australia. The ALRC's report, *For Your Information: Australian Privacy Law and Practice*, expressed concerns about RFID technology use, in particular, the ability of agencies, organizations or persons to track individuals as they walk in places (airports, train stations, stores), and monitor consumer behaviour in stores.¹⁴

The ALRC also indicated that the potential for an RFID setup to be accessed by unauthorised users has led to technological developments that aim to prevent the unwanted scanning of RFID tags, such as 'blocker tags' which impair readers by simulating the signals of many different RFID tags.¹⁵ The ALRC took the view that it is not practical to encourage individuals to purchase and carry 'blocker tags'.¹⁶

Surveillance Technology and RFID

Certain uses of RFID may amount to surveillance. Surveillance involves the monitoring of a person, place or object to obtain certain information or to alter or control the behaviour of the subject of the surveillance.¹⁷

Surveillance technology has traditionally been used by law enforcement agencies to prevent or investigate crime and by media organisations pursuing news. The primary legislation regulating the use of surveillance devices in New South Wales is the Surveillance Devices Act 2007 (Cth) (**Surveillance Devices Act**).

Section 9 of the Surveillance Devices Act could affect RFID use. The section prohibits the installation, use and maintenance of tracking devices on a person, or an object that a person is in possession or in control of, without that person's consent. The section would not prevent the use of RFID technology to track objects within a supply chain. However, once a tracked object is sold to a customer and that object or a person in possession of that object is **capable** of being tracked by an RFID reader without his or her consent, section 9 of the Surveillance Devices Act would appear to be contravened.

Whether RFID conforms to the definition of a 'tracking device' depends on how RFID is used and if it is used in compliance with spectrum licensing arrangements set by the Australian Communications and Media Authority (ACMA). As observed by the Department of Communications, Information Technology and the Arts:

The spectrum licensing arrangements by ACMA for RFID equipment specify the power at which equipment can be used, and as a consequence the read range. This effectively prevents the tracking of tags and the objects or people carrying them over wide areas.¹⁸

Whether RFID conforms to the definition of a 'tracking device' depends on how RFID is used and if it is used in compliance with spectrum licensing arrangements set by the ACMA.

However, there are concerns that it is not possible to predict read ranges. A read range is the distance at which a reader device can effectively read information from an RFID tag. Depending on the power and technical specifications of the equipment being used, this can vary from a few centimetres or a few metres, to up to 100 metres.¹⁹ The effective read range of an RFID system is dependent on many factors, notably:

- Transmitting power generated by the reader.
- Environment (indoor/outdoor).
- Susceptibility to noise and interference from other radio devices.²⁰

As a result, read ranges have to be considered as approximate values.²¹

Certain uses of RFID may amount to surveillance.

The Privacy Act

The Privacy Act sets out 10 National Privacy Principles (NPPs) which regulate how businesses collect, handle, store, use and disclose personal information. The ALRC has indicated that the handling of personal information obtained by the use of surveillance devices is generally regulated by the Privacy Act, when the use of the device involves the collection of personal information for inclusion in a record.²²

'Personal Information' as defined by the Privacy Act means:

information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.²³

The key question raised by this definition is whether or not the identity of a person can be reasonably ascertained from the information transmitted, used or stored by an RFID tag. The monitoring of consumer behaviour itself, so long as a person cannot be identified from the information collected, is not affected by the Privacy Act. Further, the commercial applications of RFID discussed above are unlikely to involve the collection of personal information with the exception of e-passports. An RFID tag, in and of itself, is not sufficient to identify a person unless RFID technology is used to store and process personal data.

Traditional data protection legislation should be extended to specifically address RFID technology in order to keep up with the growing use of RFID technology in Australia

DCITA Guide to RFID

In 2006, the Department of Communication, Information Technology and the Arts issued a guide, Getting the Most Out of RFID, which was prepared in consultation with the RFID Association of Australia. The guide intended to give small to medium size enterprises practical advice on the benefits of RFID, and also outlined some of the issues that should be considered when adopting the technology. Relevantly, the paper called for small to medium-sized enterprises to put in place a privacy impact statement and noted a number of privacy principles suggested by Privacy Commissioners around the world in relation to RFID. These principles include:

- RFID tags should only be linked to personal information or used to profile customers if there is no other way of achieving the goal sought;
- Individuals should be personally informed if personal information is collected using RFID tags;
- Personal information collected using RFID tags should only be used for the specific purpose for which it is first collected, and destroyed after that purpose is achieved; and
- Individuals should be able to disable or destroy any RFID tag that they have in their possession.²⁴

Conclusion

While there is no specific privacy regulation of RFID systems by governments in Australia, there is general legislation applying to all forms of businesses including the commercial use of RFID.²⁵ Traditional data protection legislation should be extended to specifically address RFID technology in order to keep up with the growing use of RFID technology in Australia.

Valerie Perumalla is a student at UTS. This essay was highly commended in the 2009 CAMLA essay competition.

(Endnotes)

1 See Katherine Albrecht and Liz McIntyre Spychips: How Major Corporations and Government Plan to Track Your Every Move with RFID (2006).

2 OECD Radio-frequency Identification (RFID): Drivers, Challenges and Public Policy Considerations Doc DSTI/ICCP (2006) 5.

3 See Roger Clark and Marcus Wigan 'You Are Where You Have Been' in Katina Michael and M.G Michael (eds) Australia and the New Technologies: Towards Evidence Based Policy in Public Administration (2008) 155, 155.

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6 OECD Radio Frequency Identification: OECD Policy Guidance, A Focus on Information Security and Privacy Applications, Impacts and Country Initiatives OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, Korea (17-18 June 2008) 3.

7 J.M. Stanton, 'ICAO and the Biometric RFID Passport' in Colin Bennet and David Lyon (eds), Playing the Identity Card: Surveillance, Security and Identification in Global Perspective (2008) 250, 253.

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9 Department of Communications, Information Technology and the Arts Getting the Most out of RFID: A Guide for Small to Medium Sized Enterprises (2006) 6.

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12 OECD Radio Frequency Identification: OECD Policy Guidance, A Focus on Information Security and Privacy Applications, Impacts and Country Initiatives OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, Korea (17-18 June 2008) 97.

13 Ibid.

14 Australian Law Reform Commission For Your Information: Australian Privacy Law and Practice Report No 108 (2008) [9.41].

15 Ibid 9.42.

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17 Ibid 9.89.

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22 Australian Law Reform Commission For Your Information: Australian Privacy Law and Practice Report No 108 (2008) [9.94].

23 Privacy Act 1988 (Cth) s 6.

24 Department of Communication, Information Technology and the Arts Getting the Most out of RFID: A Guide for Small to Medium Sized Enterprises (2006) 21.

25 Ibid 20.

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