

## ISP Liability for Copyright Authorisation: The Trial Decision in *Roadshow Films v iiNet* Part One

This is Part One of a two part exploration of the contours of copyright authorisation liability as that liability relates to a case involving the Australian internet service provider iiNet and thirty-four film and television companies. In this part a primer on copyright authorisation liability is provided, together with an economic policy explanation for why such liability exists. In part two, to be published in the June edition of the Bulletin, a critique on the trial judge's decision in the case will be offered in light of this primer and policy exposition.

In late 2008 thirty-four film and television production companies initiated an action against the internet service provider (ISP) iiNet Ltd for the authorisation of acts of copyright infringement by users of iiNet subscribers' accounts (iiNet users).<sup>1</sup> The film company applicants were under the coordination of the Australian Federation Against Copyright Theft (AFACT). The action failed before Cowdroy J, who in *Roadshow Films v iiNet (Roadshow Films)* delivered a decision that has captured public attention and is currently the subject of appeal.<sup>2</sup> Part One of this article about the case will describe the relevant law, and the rationale for authorisation liability. Part Two – to be published in the June edition of the *Communication Law Bulletin* – will critically consider the position of iiNet and the trial judge's reasons.

### Authorisation liability in Anglo copyright law

#### Pre-1911 law

Prior to 1911, UK copyright statutes described exclusive rights in terms of doing a nominated act or 'causing' the act to be done.<sup>3</sup> Jurisprudence of the 19<sup>th</sup> and early 20<sup>th</sup> century gave a narrow interpretation of the circumstances in which a person might 'cause' an act to be done. No one could be considered to have 'caused' the doing of

<sup>1</sup> David Brennan and Kimberlee Weatherall, "ISPs and the authorisation of their customers' copyright exploitations" (2009) 20 *Australian Intellectual Property Journal* 6

<sup>2</sup> *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24.

<sup>3</sup> The *Dramatic Copyright Act 1833* provided in section 1: 'The author of any tragedy, comedy, play, opera, farce or other dramatic piece ... shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment ... any such production as aforesaid'.

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## Spectrum and Swiss Cheese: The Digital Dividend in Australia

The DBCDE Green Paper on the digital dividend was issued in January 2010. This paper looks at the background issues associated with delivering a digital dividend in Australia including what a digital dividend is, its value and some of the issues with delivering that value to the public purse.

## Premium SMS Regulation: A necessary reform or over-regulation stifling innovation?

The first week of March 2010 saw the Australian Communications and Media Authority (ACMA) announce the next wave of regulation for the premium SMS market, with the release of a Determination under the Telecommunications Act 1997 (Cth) and a Consultation Paper for a proposed second Determination. In this paper Hamish Fraser reviews the effects of recent regulation and discusses whether the premium SMS market is now being stifled by heavy-handed regulation.

## 'Won't Somebody Please Think of the Children': Would a Mandatory ISP-level Filter of Internet Content Raise Freedom of Communication Issues?

Chris Govey considers whether Federal Government plans to impose mandatory ISP-level filtering could conflict with the implied freedom of political communication in the Australian Constitution.

## *From the 1920s the case law began to reflect a broader indirect liability regime*

an act unless it was done by that person, the person's agent or servant. Thus, one case had found that the owner of a venue who had let it out for infringing musical performances was not 'causing' those performances even after the receipt of notice from copyright owners.<sup>4</sup> Another case had found that supplying copies of a film to cinemas for public exhibition was not 'causing' those public exhibitions.<sup>5</sup> In such cases the courts did not consider the defendants should be made responsible for what was done by those who put on the public entertainment, as the music performers and film cinemas were arm's length contracting parties, and were neither agent nor servant of the defendants. In the film case the trial judge, supported on appeal, provided this advice to the plaintiff copyright owner: "[the action] ought to have been brought, not against the defendants, but against the actual proprietors of the piratical performance impugned".<sup>6</sup> These sentiments were echoed 101 years later by the Cowdroy J in *Roadshow Films*.<sup>7</sup>

### The law from 1911-2001

Perhaps reflecting its assessment of this judicial advice, shortly after it was given the UK Parliament in the Copyright Act 1911

(which was essentially adopted by the Australian Copyright Act 1912) removed the 'causing' to be done expression that had been interpreted so narrowly by the courts. Substituted in its place was an exclusive rights structure which listed a bundle of acts, and added to them: "to authorize any such acts as aforesaid".<sup>8</sup> Also inserted at this time was more specific secondary liability for a person who "permits" a place of entertainment to be used for an infringing public performance unless that person was legitimately unaware the infringement.<sup>9</sup> From the 1920s the case law began to reflect the broader indirect liability regime enacted. Thus where a person had supplied a copy of a film to cinemas for public exhibition, liability was found for authorising the resultant exhibitions. The Court of Appeal stated: "it becomes fairly apparent that the object of introducing the word 'authorise' was to get rid of the effect of certain decisions".<sup>10</sup> In place of the old law, the Oxford Dictionary definition of "to sanction, approve, countenance" was adopted for authorisation, which was given a scope of operation that encompassed the supply of copies of the film by the defendant to theatres.<sup>11</sup> With the creation of the more specific liability for the grant of permission for the use of entertainment venues, that liability was often pleaded in conjunction with general authorisation liability. This led to a judicial harmonisation of the meanings given to the terms 'to permit' and 'to authorise'. In 1923 Bankes LJ stated in a case in which both were pleaded:

4 *Russell v Briant* (1849) 8 CB 836; 137 ER 737.

5 *Karno v Pathé Frères* (1909) 100 LT 260.

6 *Karno v Pathé Frères* (1909) 100 LT 260, 262 (Vaughan Williams J quoting from the reasons of trial judge Jelf J with approval).

7 [2010] FCA 24, at [445]: 'It is unfortunate that the outcome of the Court's finding is that the applicants will continue to have their copyright infringed. However, the fault lies with the applicants for choosing the wrong respondent. The current respondent does not stand in the way of the applicants pursuing those who have directly infringed their copyright'.

8 *Copyright Act 1911* (UK), section 1(2), adopted by the *Copyright Act 1912* (Cth).

9 *Copyright Act 1911* (UK), section 2(3), adopted by the *Copyright Act 1912* (Cth).

10 *Falcon v Famous Players* [1926] 2 KB 474, 491 (Bankes LJ).

11 *Ibid*.

*In order to succeed the [copyright owner] had to adduce evidence either of authority given by the appellant for the performance, or of permission to use the theatre for the performance, of these pieces. I agree with [counsel for the copyright owner] that the Court may infer an authorization or permission from acts which fall short of being direct and positive; I go so far as to say that indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of.<sup>12</sup>*

Thus, under the new legislative regime the Anglo-Australian judicial interpretation was that one could 'authorise' another's action in two broad settings. One was to explicitly grant approval to do an infringing act, such as by purporting to grant a licence to do the act.<sup>13</sup> The other was to implicitly suggest approval of the doing of an infringing act, such as by failing to take steps to prevent the doing of the act where one had power to prevent and ought to have known of its occurrence.<sup>14</sup> It is useful to compare these with the two principles of indirect liability that emerged over the course of the 20<sup>th</sup> century in US copyright law; contributory and vicarious infringement – both of which have a purely common law provenance. Contributory infringement requires an intentional inducement or encouragement of the direct infringement; vicarious infringement requires profit from direct infringement where a right is held (and not exercised) to stop or limit that direct infringement.<sup>15</sup> The explicit and implicit forms of authorisation liability identified early-on in Anglo-Australian jurisprudence find their counterparts in the US principles of contributory and vicarious infringement.

Throughout the middle part of the 20<sup>th</sup> century most authorisation cases involved an alleged authorisation of an infringing public performance. In the 1970s and 1980s the complexion of indirect liability case law changed insofar as the types of infringing activity alleged to have been authorised broadened to exercises of the reproduction right in private settings. This can be seen as a reflection of the altered technological environment as photocopying and magnetic tape recording technologies became more readily available to the public at large. Were suppliers who 'armed' the populace with products or services which could be used to infringe copyright liable for authorising the resulting infringement? In this period the highest appellate courts in Australia<sup>16</sup> and the UK<sup>17</sup> considered that issue, while the US Supreme Court<sup>18</sup> also considered the application of contributory and vicarious liability in that setting.

In two of the three cases the basic conclusion that the courts arrived at was the same; no liability. Each of those cases involved chattels in the field of magnetic tape recording technology, in which the courts were asked essentially: did the supply of the chattels to householders who were likely to use them to infringe by copying at home create indirect liability in the supplier? In the UK case there was found to be no express authorisation liability because suppliers did not expressly purport to grant a licence to copy.<sup>19</sup> The House of Lords also found that because suppliers had no control over the use of their chattels once they were sold, implicit authorisation liability could not exist.<sup>20</sup> In the US case there was no contributory infringement because the recording equipment was found to have a substantially non-infringing uses (which included recording for viewing at a more convenient time, found by the same court to fall within the scope of the US fair use exception), and thus its supply could not comprise encouragement to infringe.<sup>21</sup> The US Supreme Court also rejected the possibility of vicarious liability because the supplier was not in a position of control the use of the chattels post-supply.<sup>22</sup>

### ***the Oxford Dictionary definition of "to sanction, approve, countenance" was adopted for authorisation***

The one highest-court case which found liability in these three jurisdictions over this period was the Australian case of *The University of New South Wales v Moorhouse* (**Moorhouse**) which involved not merely the supply of chattels, but also the provision of a form of services to the direct infringer. In that case 'trap infringing copying' was undertaken in a university library, from a copy of book held in the library, on a coin-operated photocopier also situated in the library. The university, by the provision of the photocopier in the library and making available the book as a library holding, was said to have 'authorised' the subsequent trap copying. The High Court unanimously found this to be so. One judge (Gibbs J) emphasised in his reasoning a more control-based (vicarious infringement under US law) approach to justify liability: power to prevent the infringing act, objective knowledge, failure to take reasonable steps to prevent.<sup>23</sup> Two judges (Jacobs J with whom McTiernan ACJ agreed) emphasised a more approval-based (contributory infringement under US law) approach to justify liability: the conduct of the university effectively invited users to infringe.<sup>24</sup> The result was a victory for the copyright owner in the case, and the creation of a seemingly broad Australian authorisation principle.<sup>25</sup>

12 *Performing Right Society v Caryl Theatrical Syndicate* [1924] 1 KB 1, 9. To similar effect see Isaacs J's discussion in *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481, 489-492.

13 *Falcon v Famous Players* [1926] 2 KB 474, 499.

14 *Performing Right Society v Caryl Theatrical Syndicate* [1924] 1 KB 1, 9.

15 *MGM Studios v Grokster* 545 US 913, 930 (2005).

16 *The University of New South Wales v Moorhouse* (1975) CLR 1.

17 *CBS Songs v Amstrad* (1988) 11 IPR 1.

18 *Sony v Universal City Studios* 464 US 417 (1984).

19 *CBS Songs v Amstrad* (1988) 11 IPR 1, 10-11.

20 *CBS Songs v Amstrad* (1988) 11 IPR 1, 11-12.

21 *Sony v Universal City Studios* 464 US 417, 439-455 (1984).

22 *Sony v Universal City Studios* 464 US 417, 437-439 (1984).

23 *University of New South Wales v Moorhouse* (1975) CLR 1, 12-13.

24 *University of New South Wales v Moorhouse* (1975) CLR 1, 21.

25 However it also triggered a specific reform to the statute in 1980 to exclude such authorisation liability where a prescribed notice about copyright law is affixed in close proximity to a library photocopier: *Copyright Act 1968* (Cth), section 39A.

## Post-2001 law

### Authorisation liability

The salient factual distinction between US and UK cases on the one hand, and *Moorhouse* on the other, was that the alleged authoriser in *Moorhouse* remained in a service-provider relationship with the person doing the infringing acts said to be authorised at the very time of those acts were undertaken. In the US and UK cases the alleged authoriser was in no service relationship with the person doing the infringing acts said to be authorised because the chattels in each case had been alienated by the defendants. In short, at the relevant time of primary infringement the defendant had control over that act in *Moorhouse*, whereas in the US and UK cases the defendants had none. This critical role of control at the relevant time of primary infringement emerged strongly as an explicator of the result in *Moorhouse* in Australian jurisprudence over the 1980s and 1990s with a series of cases rejecting the possibility of authorisation liability in Australia after a defendant had alienated chattel property comprising a chattel capable of being used by the purchaser to infringe.<sup>26</sup> The centrality of control was reinforced in 2001 with a codification requiring courts to have regard to, in addition to any other matters, three particular matters: (i) the extent (if any) of the defendant's power to prevent the doing of the infringing act; (ii) the nature of any relationship existing between the defendant and the person who did the infringing act; (iii) whether the defendant took any reasonable steps to prevent or avoid the doing of the infringing act, including compliance with relevant industry codes.<sup>27</sup>

**one could 'authorise' another's action in two broad settings. One was to explicitly grant approval to do an infringing act...The other was to implicitly suggest approval ...such as by failing to take steps to prevent the act**

After the codification it was the first of those factors – the power to prevent, or control – which remained most critical. Prior to *Roadshow Films* there had been two Australian authorisation cases involving internet intermediaries: *Universal Music v Sharman License Holdings (Sharman)* and *Universal Music v Cooper (Cooper)*.<sup>28</sup> Cooper had assembled on his [mp3s4free.net](http://mp3s4free.net) webpage internet links resolving to mp3-format music files, being files uploaded by parties all around the world unrelated to Cooper and being files uploaded without the authority of rights holders. Visitors to Cooper's webpage were thus provided with a navigational means to copy those mp3 files. Hence 'mp3s4free' literally advertised that visitors to the website could use it to obtain copies of sound recordings and the works contained therein without the need for payment. In so obtaining, visitors would infringe copyright. Sharman had published the Kazaa peer-to-peer file-sharing software, and maintained some technical connection to

those using the resultant peer-to-peer file-sharing network so as to target advertising and apply certain filters. The network was notorious for the peer-to-peer distribution of content without rights holder authorisation. Whether Cooper or Sharman had the requisite control over the infringing activities of visitors to [mp3s4free.net](http://mp3s4free.net) and users of the Kazaa peer-to-peer network was the central question in both cases. Also defending an authorisation action in *Universal Music v Cooper* was Cooper's internet service provider E-Talk which had hosted the [mp3s4free.net](http://mp3s4free.net) webpage without requiring payment from Cooper, receiving instead in kind payment through advertising space on the webpage.

Were [mp3s4free.net](http://mp3s4free.net) and the Kazaa network more like alienated chattels or on-going services? All Federal Court judges considering the cases concluded there was the requisite control. Coming through both cases was an acceptance that the post-*Moorhouse* case law establishes a broad concept of what can amount to authorisation. While some control is always required, the question of the degree or nature of that control may vary according to the circumstances. While a high level control coupled with indifference or wilful blindness might comprise authorisation (such as in *Moorhouse* itself), in other cases (such as in *Cooper* and *Sharman*) marginal control would suffice if coupled with active encouragement. In the Full Court's consideration of *Cooper*, Branson J considered that arming or facilitation conduct alone could comprise the relevant control: 'a person's power to prevent the doing of an act comprised in a copyright includes the person's power not to facilitate the doing of that act by, for example, making available to the public a technical capacity calculated to lead to the doing of that act'.<sup>29</sup> Kenny J in *Cooper* made the same point: Cooper could have prevented the infringing acts by not establishing the links included on [mp3s4free.net](http://mp3s4free.net), and the fact that users could make online copies of the uploaded sound recordings by other means did not negate the authorisation of copying consequent upon using the links found on [mp3s4free.net](http://mp3s4free.net).<sup>30</sup> Also in *Cooper* E-Talk, the ISP both hosting [mp3s4free.net](http://mp3s4free.net) and placing advertising on the site, was also found liable in authorisation given its active participation with, and knowledge about, the website.<sup>31</sup>

### The 'mere use of facilities' exception

At the time of the 2001 codification an exception to authorisation liability was created which provided that a person who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright "merely because another person uses the facilities so provided to do something the right to do which is included in the copyright".<sup>32</sup> This mere use of facilities exception was explained in these terms in the Second Reading Speech:

*The amendments in the bill also respond to the concerns of carriers and carriage service providers, such as Internet service providers, about the uncertainty of the circumstances in which they could be liable for copyright infringements by their customers. The provisions in the bill limit and clarify*

26 *RCA Corporation v John Fairfax* (1981) 52 FLR 71, 79-81, and in particular *Australian Tape Manufacturers Association v Commonwealth* (1993) 25 IPR 1, 5.

27 *Copyright Act 1968*, sections 36(1A) and 101(1A).

28 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (Wilcox J); *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (Tamberlin J); *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

29 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, [41].

30 *Ibid* [148].

31 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [111]-[130].

32 *Copyright Act 1968* (Cth), sections 39B and 112E.

*the liability of carriers and Internet service providers in relation to both direct and authorisation liability. The amendments also overcome the 1997 High Court decision of APRA v Telstra in which Telstra, as a carrier, was held to be liable for the playing of music-on-hold by its subscribers to their clients, even though Telstra exercised no control in determining the content of the music played.*

Typically, the person responsible for determining the content of copyright material online would be a web site proprietor, not a carrier or Internet service provider. Under the amendments, therefore, carriers and Internet service providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material. The reforms provide that a carrier or Internet service provider will not be taken to have authorised an infringement of copyright merely through the provision of facilities on which the infringement occurs. Further, the bill provides an inclusive list of factors to assist in determining whether the authorisation of an infringement has occurred.<sup>33</sup>

Relevant to understanding the above passage is the High Court holding in *APRA v Telstra* (the so-called *Music on hold case*) and the effect of the insertion of section 22(6) into the Copyright Act 1968 (Cth) (the **Copyright Act**). In the *Music on hold case* liability was found in a then monopoly telecommunication company Telstra in respect of (*inter alia*) the transmission of on-hold music generated from the telephone systems of (typically business) customers of Telstra, in which Telstra merely supplied the transmission facilities such as telephony wiring and exchanges.<sup>34</sup> In that setting, liability was not argued-for in respect of authorisation, but rather for the primary exploitation of the then exclusive rights of broadcasting to the public and transmitting to subscribers to a diffusion service. At the time of the 2001 reforms, those two exclusive rights were replaced by a broad-based communication to the public right, and inserted into the Act to explain that right was a new section 22(6). It provided that in general a communication "is taken to have been made by the person responsible for determining the content of the communication".

Viewed in this light, the intention underlying the 'mere use of facilities' exception was to deal with situations where (for example) a company's liability might be said to arise purely from its ownership or control of telecommunication facilities used by a customer to infringe third-party copyright by communicating that subject matter. Section 22(6) and the mere use of facilities exception provided doubled-barrelled protection for the company in such a case. Section 22(6) made clear that the primary exploitation of copyright was undertaken by the customer and not the telecommunications company. The mere use of facilities exception made clear that – notwithstanding the centrality of control in authorisation law – allowing the customer to avail itself of the telecommunications facilities could not in and of itself comprise authorisation; more was required having regard to the newly codified factors.

Since enactment of the mere use of facilities exception, it has been unsuccessfully relied upon by defendants in the *KaZaa* and *Cooper* litigation. The reason for rejecting its application in both

cases was the same: the defendants' alleged authorisation arose from more than merely providing facilities insofar as they had either actual knowledge of or indeed encouraged the primary infringing acts. In those cases the interpretation of the provision was that once a defendant's alleged authorisation arose from defendant conduct beyond the 'mere use' of its facilities by primary infringers, the exception had no operation.<sup>35</sup> This construction of the provision seems faithful to the purpose underlying its enactment. Cooper's ISP E-Talk sought leave to appeal to the High Court in relation to the Full Federal Court's denial to it of the mere use of facilities exception. That application was unsuccessful. Having regard to the findings of fact about E-Talk's involvement in and knowledge of the [mp3s4free.net](#) website, the High Court leave panel (Gummow and Callinan JJ) considered E-Talk's prospects of success insufficient to warrant special leave.<sup>36</sup>

### ***Providing incentives for non-litigious, cooperative schemes between carriage service providers and rights holders to achieve such desiderata is the express reason for the safe-harbour.***

#### ***The safe-harbour***

In 2004 another round of copyright law reform was (rather hurriedly) enacted to comply with an array of obligations in the Australia-US Free Trade Agreement (AUSFTA). One aspect of those obligations was a requirement on Australia to enact a regime modelled on an aspect of US copyright law; the so-called safe-harbour.<sup>37</sup> As explained in the AUSFTA purposes of the regime were:

- (a) *to provide legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials, and*
- (b) *to place limitations upon the scope of remedies (and in particular monetary awards) available against service providers for copyright infringements that they did not control, initiate, or direct, and that take place through their systems or networks.*

The Australian regime is found in Part V, Division 2AA of the Copyright Act and has a complexity which descends to the realm of industry-specific regulation. For present purposes, for transmission and connection services of carriage service providers ('carriage service provider' is itself a complex definition inscribed from communications law, but includes commercial telecommunications companies and internet service providers) the regime limits civil remedies for a qualifying carriage service provider to two mandatory injunctions: an order that it takes reasonable steps to disable access to online locations outside Australia and an order that it terminates a specified customer account. To qualify for this limitation upon remedies the carriage service provider must (*inter alia*) "adopt and reasonably implement a policy that

33 House of Representatives, Chamber Hansard, Copyright Amendment (Digital Agenda) Bill 1999 Second Reading Speech, Daryl Williams MP, 2 September 1999, 9750.

34 *Telstra Corporation v Australasian Performing Right Association* (1997) 38 IPR 294.

35 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [399]; *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, [168]-[170].

36 *E-Talk Communications v Universal Music* [2007] HCATrans 313.

37 AUSFTA article 17.11(29).

provides for termination, in appropriate circumstances, of the accounts of repeat infringers".<sup>38</sup>

This conditional limitation upon remedies represented by the safe-harbour regime overlaps somewhat with the mere use of facilities exception, but is both broader and narrower than that exception. It is broader in so far as it applies to all the economic exclusive rights (not merely communication to the public) and to both primary and authorisation liability (not merely authorisation). It is narrower in so far as it applies only to carriage service providers as defined (rather than providers of communications facilities), it is simply a limitation upon liability (rather than an exception to liability), and it requires infringement-deterrence policies and action from the carriage service for it to qualify for the limitation (whereas the exception requires neither).

Prior to *Roadshow Films* the Australian safe-harbour regime had been pleaded in *Cooper* by Cooper's ISP, E-Talk which had hosted the [mp3s4free.net](http://mp3s4free.net) website. In that case the Australian regime was found not to have come into effect at the relevant time, and the matter was not explored on appeal. However the trial judge Tamberlin J observed in *obiter* that the attitude of internet service providers to the infringing acts of its customer was simply one of indifference, and that indifference falls 'far short' of demonstrating that it had adopted a policy to deter infringers.<sup>39</sup>

For reasons perhaps best explained by the tight time constraints placed by the Australian government upon the Commonwealth public service and interested circles in the 2004 law reform process, no obvious attention was paid to the relationship that the new safe-harbour regime has with the existing mere use of facilities exception. Arguably that issue has been resolved indirectly by the courts' purposive construction of the mere use exception. Assuming that construction is correct, it confines the exception to a narrow field of operation and elevates the importance of the safe-harbour to an ISP defending an authorisation action.

### **Economic policy justification for authorisation liability**

In concluding this part, it is useful to explore the economic aims which inform the creation of indirect liability in copyright. As explained in an *amicus* brief of economists to the US Supreme Court in *MGM v Grokster*, the creation of all indirect civil liability involves two stages of policy analysis.<sup>40</sup> The first is the identification of appropriate actors in whom liability might be created. The second is a cost-benefit assessment of whether such liability is preferable to direct liability alone. In the identification stage there are two categories of parties – categories which are not mutually exclusive – who are appropriate to be considered for indirect liability. One category is those indirectly involved in infringing conduct may be in a good position to deter that conduct; the other category is those who encourage or facilitate that conduct.<sup>41</sup> This division maps loosely to the two varieties of copyright defendants seen to exist in Anglo-Australian and US law: implicit control-based authorisers (vicarious infringement in the US) and explicit approval-based authorisers (contributory infringement in the US). If such actors exist, the policy analysis then moves to the second stage and becomes a cost-benefit question in deciding

whether indirect liability ought to be created and if so its scope. Weighing costs against benefits make taking into account several factors including: (i) whether it is plausible that direct liability alone would be effective; (ii) would the creation of indirect liability deter the infringing conduct at a lower cost than direct liability alone; (iii) would the creation of indirect liability assist the party incurring the liability in making efficient decision to avoid that liability; and (iv) would the creation of indirect liability interfere unreasonably with legitimate activity.<sup>42</sup>

In Australian law, the mere use of facilities exception can be seen to be particularly directed to the fourth factor. A particularly beneficial activity, the provision of communications facilities, should not be unduly inhibited by the creation of indirect copyright liability arising from mere provision. The more detailed safe-harbour provisions can be seen to be directed to not only the fourth factor, but also to factors two and three. This is because it not only protects carriage service providers from liability arising from their customers' infringing acts, but it does so by seeking to minimise the prevalence of those infringing acts in a way that imposes least litigation cost on all concerned. Providing incentives for non-litigious, cooperative schemes between carriage service providers and rights holders to achieve such desiderata is the express reason for the safe-harbour.

It is important to bear in mind that the policy choices spoken of here are directed to the proper scope of indirect liability and not to the underlying rights which determine direct liability. This distinction was well illustrated in an article by Lichtman and Posner in which they compare ISPs' indirect liability for their customers' copyright infringements, with ISPs' indirect liability for their customers' malicious distribution of computer viruses.<sup>43</sup> The authors make two observations. First, unlike 'demand' for internet access from distributors of computer viruses, the possibility of copyright infringement increases the average subscriber's willingness to pay for broadband internet services. Indeed they describe householders' casual internet piracy as "in many ways the killer app" that is driving the deployment of broadband to the home. Second the authors make the point that malicious distribution of computer viruses is almost universally condemned; the same could not be said about householders engaging in peer-to-peer online copyright infringement. Thus, the copyright dispute is in many ways more a dispute about the propriety of the underlying right, and not so much a dispute about the proper contours of indirect liability *per se*. The authors observe that many who oppose indirect liability for ISPs in the copyright setting also question copyright in more fundamental ways. Those who argue against the imposition of authorisation liability in copyright are really more concerned about the scope of copyright in colouring certain activities as a primary infringement. Although these points are not raised squarely in the *Roadshow Films* litigation, and might in a purely doctrinal sense be regarded as red herrings to the legal questions, they represent undeniable, unspoken *realpolitik* factors that should be kept in mind.

**David Brennan is an Associate Professor in the Faculty of Law at the University of Melbourne.**

38 *Copyright Act 1968* (Cth), section 116AH (1), Item 1.

39 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [107]. As will be explained in part two, the approach to the requirement by Tamberlin J was vastly different to that adopted by Cowdroy J in *Roadshow Films*.

40 Economists Kenneth J. Arrow, Ian Ayres, Gary Becker, William M. Landes, Steven Levitt, Douglas Lichtman, Kevin Murphy, Randal Picker, Andrew Rosenfield, and Steven Shavell filed a Brief of *Amici Curiae* in support of the petitioners in *MGM Studios v Grokster* 545 US 913, 930 (2005).

41 Arrow et al Brief of *Amici Curiae*, above n 40, 5-6.

42 Arrow et al Brief of *Amici Curiae*, above n 40, 6-7.

43 Doug Lichtman and Eric Posner, "Holding Internet Service Providers Accountable" (2006) 14 *Supreme Court Economic Review* 221, 258.

# Spectrum and Swiss Cheese: The Digital Dividend in Australia

The DBCDE Green Paper on the digital dividend was issued in January 2010. This paper looks at the background issues associated with delivering a digital dividend in Australia including what a digital dividend is, its value and some of the issues with delivering that value to the public purse.

## Introduction

In January 2010, the Department of Broadband Communications and the Digital Economy (DBCDE) issued a discussion paper entitled 'Digital Dividend Green Paper' (the **Green Paper**). The Green Paper describes the digital dividend as the spectrum which will become available as television moves from the simulcast of analog and digital services to digital only. This paper looks at some of the issues which make the digital dividend a challenge to broadcasters, other potential users of spectrum, regulators and the government.

Spectrum is a resource which is used (but not consumed) in the delivery of wireless services. Mobile phones, television, radio and taxi dispatch are examples of services which use spectrum. Spectrum can be thought of using a property analogy. A development site has value that means it might be used for a building but the value remains if the building is demolished and replaced by another. Spectrum is used for the delivery of services but can be re-allocated for a different use at a later point in time. Certain spectrum is more valuable for competing services than other parts of the spectrum (broadly, from 30 MHz to 3 GHz) and this is managed by the Australian Communications and Media Authority (ACMA) as a scarce resource in metropolitan areas. This part of the spectrum is used for broadcasting, mobile telecommunications and other high value services. The Green Paper also uses a property analogy for the scarce resource management by referring to the UHF spectrum used for analog television as 'waterfront property'.

The term 'Swiss Cheese' in the title of this paper reflects the history of the planning of television spectrum. Broadcasting spectrum needs to be planned so that legacy devices can be used to enjoy services in the same way as new ones. When UHF television was introduced in Australia and elsewhere, analog television receivers could not deal with a wanted service on one channel and an unwanted service on the adjacent channel. These receivers were adversely affected by interference on the wanted channel from distant transmitters. As a result, licence areas were planned with at least one but preferably two UHF channels between each wanted service and no co-channel interference from adjacent licence areas. As a result, the mapping of UHF channels in any licence area has many 'gaps' like the holes in a Swiss Cheese. In contrast, digital signals can use adjacent channels and are much less susceptible to co-channel interference.

*there may well need to be a bespoke legislative regime to deliver a digital dividend in Australia.*

This paper examines digital dividend issues by considering the approaches taken in other parts of the world to the digital dividend as well as the Australian issues associated with the 'restack' referred to in the Green Paper. In particular, the paper reviews some of the options under the *Radiocommunications Act 1992* (Cth) (**Radcoms Act**) which may well mean that there needs to be a bespoke legislative regime to deliver a digital dividend in Australia.

## The Digital Dividend

Many OECD countries have introduced digital television as a way to deliver broadcast services more efficiently. Unlike analog television which requires one channel to deliver one service, digital television can deliver more than one service on a single channel. In Australia, in metropolitan areas, each of the commercial television broadcasters delivers a high definition service and two standard definition services using a 7 MHz wide channel which would only support a single analog service.

*the expectation is that the spectrum made available by DSO will be re-allocated for new communications services including super-fast mobile broadband*

In common with all countries where digital television has been introduced, there is a period where both analog and digital services are delivered concurrently. Where the same service is delivered in each of analog and digital mode this concurrent broadcasting is known as simulcasting. At the end of the simulcasting period, when the vast majority of viewers have the equipment to watch digital services, the analog service can be switched off (typically referred to as digital switch over or DSO). After the DSO, the analog channels can be used for either other services or new broadcasting services.

In Australia and the USA, the incumbent broadcasters were provided with a loan channel for the period between the simulcast period after the launch of digital and the DSO. However, in other countries (such as the UK), the broadcasters provided services which were then broadcast by multiplex operators. This placed control of spectrum use in the hands of a group which was not itself delivering services (partly to reduce spectrum scarcity as a regulatory issue in broadcasting).

In most countries, the expectation is that the spectrum made available in DSO will be re-allocated for the delivery of what the Green Paper refers to as "new communications services including super-fast mobile broadband". The technology for

this service is expected to be 'long term evolution' (LTE) which is standardised by 3GPP, the same body which standardises the mobile telecommunications systems used in Australia. This re-allocation will normally be done using a price-based allocation (such as a spectrum auction) where the value of the spectrum will be paid to the relevant government.

### United States

The United States completed its DSO in June 2009. The country had planned that the digital dividend would be delivered as spectrum sold using a price-based allocation. The United States decided that the digital dividend would be made available as early as possible (that is, re-allocated on an encumbered basis). The United States achieved this by allocating the 'loan' channel, to the extent feasible, in the lower UHF channels away from the identified digital dividend spectrum. The United States identified a digital dividend of 108 MHz from 698 to 806 MHz. However, the Federal Communications Commission planned the spectrum auctions to deliver 84 MHz for purely commercial use and reserved some spectrum with a licence condition that the acquirer would need to provide public safety services, as well as commercial services, as a condition of the acquisition of that spectrum. In practice, the public safety obligation (and the associated deployment obligations) meant that the reserve for the spectrum that was subject to the licence condition was not met at the January 2008 auction. However, the rest of the auction raised nearly US \$19 billion with the two largest wireless telecommunications providers, Verizon and AT&T bidding US \$16 billion between them. The United States' auction was for paired spectrum and each of Verizon and AT&T have 12 MHz paired for their services.

The DSO occurred on 12 June 2009. This was a delay from the originally scheduled 17 February 2009 to allow for the distribution of vouchers under a scheme which gave terrestrial television only households the opportunity to have two digital set top boxes subsidised. Verizon plans to deliver high speed broadband service by the end of 2010 using USB dongles and expects to deliver handsets in 2011.

## Australia is proposing a 126 MHz digital dividend

### Europe

Australia has a different channel arrangement for UHF television compared with the United States (where television channels are 6 MHz wide) and Europe (where they are 8 MHz wide). The Europeans are standardising on a digital dividend of 72 MHz (790 MHz to 862 MHz). The European approach is to split this 72 MHz to permit a 1 MHz 'guard band' with the television channel at 782 – 790 MHz (channel 60) and to have 30 MHz paired available for post-DSO services and the balance of 11 MHz for broadcast wireless use known in the UK as 'program making and special effects' (PMSE). The major use of PMSE spectrum is by broadcasters for wireless microphones.

The European approach recognises that 30 MHz paired, even if there are shared networks, will not deliver the types of services that are expected to maximise the value of the spectrum. As a result, the digital dividend will include the auction of spectrum in the 2.6 GHz band. Broadly, LTE will likely use a combination of UHF and 2.6 GHz spectrum. The French regulator, ARCEP, has indicated that it will hold the auction processes for UHF and 2.6 GHz spectrum concurrently. This approach will be adopted by Germany (subject to operator litigation) and, as a consequence

of such litigation by a number of operators, in the United Kingdom. The Netherlands and Belgium are following the approach taken in Hong Kong and auctioning the 2.6 GHz band first.

### Asia

The harmonised digital dividend in Asia will be the same as in the United States. That is, 108 MHz between 698 MHz and 806 MHz. However, it is not clear that this lowest common denominator of digital dividend will be used in all countries. There are two issues that influence this. In many Asian countries (as in Australia), there is mobile telecommunications spectrum in both the 850 MHz band and the 900 MHz band. As a result of this, the spectrum between 806 MHz and 820 MHz may well be suitable for allocation as part of a digital dividend. The second issue is that in many countries, 698 MHz is in the middle of television channel 49. If the digital dividend were to include channel 49, then the digital dividend would start at 694 MHz. That is, although there is a harmonised 108 MHz digital dividend, it is likely that many countries will adopt 694 MHz – 820 MHz. As a practical matter a 126 MHz digital dividend is a more likely outcome.

### Australia

Australia, with its unique 7 MHz UHF channel plan and the use of both 850 MHz and 900 MHz for mobile telecommunications, is proposing a 126 MHz digital dividend in the Green Paper. This will encompass the spectrum from 694 MHz to 820 MHz or Australian television channels 52 to 69. Australia also has a second issue with the digital dividend which was not faced in Europe. This is that the 2.6 GHz band is used by broadcasters for electronic news gathering (ENG). As a result, both the spectrum clearances required for the delivery of LTE services adversely affect the commercial and national television broadcasters.

The Green Paper does not provide an indication of when an auction for the digital dividend spectrum might be held. However, if DSO occurs at the end of 2013 as is planned in Australia, then it may well be that the digital dividend spectrum will be used for non-broadcasting services from early in 2014. This would be consistent with managing spectrum as a scarce resource.

### The value of the digital dividend

A common technique used to be able to compare spectrum sold at auction on a global basis is to express the price paid in a currency by reference to the amount of spectrum auctioned and the population for which it is to be used. This is expressed as price per MHz per pop where per pop means *per capita* or per head of population. Although this is a rather crude basis for comparison, it is widely used. In the United States, the price per MHz per pop was \$US1.34 on average. In the UK, Ofcom has estimated that the value of the 72 MHz dividend is £2 - £3 billion or a mid-point price per MHz per pop of 56 pence. At March 2010 exchange rates, this would suggest that the Australian digital dividend might be worth in the vicinity of \$1 per MHz per pop or \$1.5 billion if only the mainland state capital cities were considered.

### The mechanics of delivering the digital dividend

In order to actually deliver the digital dividend, the UHF spectrum used for television broadcasting will need to be cleared and the services will need to be provided on a channel in the range 28 – 51. Although digital set top boxes sold in Australia have the capability to 're-scan' to find new or moved services, it is rare that this re-scan can occur without manual intervention from the viewer. There is a technical solution to avoid re-scan-

ning, if each of the television broadcasters carry digital information about the others. However, this has not been required in Australia and is unlikely to be implemented before the DSO. There is an opportunity for the ACMA to require the delivery of service information as an output of its inquiry into the use of parental lock-out in terrestrial television set top boxes, but this outcome is far from assured.

At the same time that the Green Paper was released for discussion, the ACMA issued a discussion paper entitled 'Review of the 2.5 GHz band and long-term arrangements for ENG'. This indicates that the ACMA is considering that 190 MHz of spectrum in the 2.6 GHz band may be made available to a price-based allocation (and likely for LTE services). However, in common with the Green Paper, the ACMA discussion paper was silent on timetable to allocation.

### **Broadcasting Services Bands**

One issue that Australia has in managing the digital dividend, and which is discussed in more detail below, is the fact that spectrum used for broadcasting services is managed in a manner which is distinct from other spectrum. Certain spectrum is designated as 'broadcasting services bands' (**BSB**) spectrum. This is used primarily for the delivery of broadcasting services. The BSB include the spectrum used for AM, FM and digital radio as well as the VHF and UHF spectrum used for television. The 2.6 GHz band is not in the BSB. The Australian approach to commercial, national and community broadcasting has been to 'staple' an apparatus licence (a form of spectrum use right) to the broadcasting services licence. As a result, the licence area plan (analog) and digital channel plan (digital) processes have been conducted from 1992 to 2005 by the Australian Broadcasting Authority (**ABA**) and more recently the ACMA in a fashion that is different from the approach taken in managing spectrum for other services. Spectrum for other services has been managed by the Spectrum Management Agency (1992 – 1997), the Australian Communications Authority (1997 – 2005) and the ACMA from 2005.

### **2.6 GHz spectrum**

As mentioned above, the 190 MHz of spectrum used by the broadcasters for ENG in the 2.6 GHz band and potentially forming part of the spectrum used for the deployment of LTE is not in the BSB. The issue with this spectrum is also made more complicated by the licence type. Broadly, there are three forms of spectrum use right in Australia. One is the spectrum licence, typically issued for 15 years and which is defined by the boundary conditions of operation. The second is the apparatus licence, typically issued for one year and which is technologically deterministic. The final type is the class licence which is also technologically deterministic but for which no licence fee is paid (and for which there is no claim in the case of interference). There is an option in respect of apparatus licences to pre-pay up to five years in advance. This option was exercised in February 2008 by a number of commercial broadcasters and the ABC so that the 2.6 GHz band is encumbered until February 2013.

### **The restack**

When the ABA planned the allocation of digital television channels in preparation for the launch of digital television in metropolitan areas in January 2001, it was not asked to consider the use of the BSB for services other than television. As a result, the planning for digital television was more concerned with ensuring the availability for new services (at the time, two channels of datacasting and subsequently Channel A and Channel B). The planning did not anticipate that channels 52 – 69 would not be

available for television in the future. As a result, Australia faces a 'restack'. In the restack, the digital services which currently use channels above channel 51 will need to be moved below channel 52. As a practical matter, this will require users to re-scan for services and it is likely that the new digital channel (below channel 52) and the old digital channel (above channel 51) will need to operate concurrently for a period of time in order for viewers to have time to conduct the re-scan. This concurrent operation will impose costs on the broadcasters (duplication of transmitters and electricity usage) and will require a significant public awareness campaign.

### **Why the restack is so limited elsewhere**

In contrast to Australia, the United States did not require a restack. The digital channel planning was conducted with the expectation that a digital dividend would be declared. Similarly, Ofcom had planned for a digital dividend in the UK and the only restack issue was that the UK had originally envisaged a smaller digital dividend (channels 63 – 68) than the European harmonised channel 61 to 69. Ofcom had reserved channel 69 for PMSE. The solution in the United Kingdom was to restack channels 61 and 62 to channel 39 and 40 (which had been previously cleared along with channel 38) and allocate channel 38 to PMSE. Most other European countries have also planned for the 72 MHz digital dividend in advance of digital channel allocation which makes the restack a particularly acute problem in Australia and a peripheral issue elsewhere.

*Australian digital dividend might be worth in the vicinity of \$1 per MHz per pop or \$1.5 billion*

### **Issues to be faced**

In order to be able to deliver the digital dividend, the ACMA will need to be able to clear the 126 MHz of spectrum of channels 52 to 69. In order to maximise the value of this spectrum, the 2.6 GHz band will likely need to be made available in a similar timeframe to the digital dividend spectrum. This latter issue is much less complex and spectrum has been re-allocated from apparatus licensed use to spectrum licensed with a price-based allocation on a number of occasions in the past (typically associated with spectrum now used for telecommunications services such as mobile phones).

One significant complexity of the digital dividend in Australia is the fact that the relevant spectrum lies in the BSB. The Green Paper asserts that the Minister "has authority ... to change the designation of spectrum that makes up the broadcasting services bands". It is not certain that the current legislative drafting delivers this authority to the Minister. This final section examines some of the issues which arise from the Radcoms Act.

### **BSB issues and s 31**

Section 31(1) of the Radcoms Act permits the Minister, after consulting the ACMA, to designate a part of the spectrum as being primarily for broadcasting purposes and refer it to the ACMA for planning. There are no express provisions which would permit the Minister to 'un-designate' BSB spectrum. This would not normally be an issue except that section 31(7) goes on to make clear that the designation is not a legislative instrument. That is, it is not clear that the Minister could un-designate the spectrum use.

An alternative approach might be for the ACMA to decide to manage the spectrum differently from BSB. Section 31(2) pro-

vides that the ACMA may make a written determination that licences, or specified kinds of licences, can be issued in specified circumstances in relation to that part of the spectrum, or in relation to a specified part or parts of that part of the spectrum. But this is conditioned by section 31(3):

*In making or varying a subsection (2) determination, the ACMA must:*

- (a) promote the objects, and have regard to the matters, described in section 23 of the Broadcasting Services Act 1992; and*
- (b) promote the object of this Act, to the extent this is not inconsistent with paragraph (a).*

That is, there is an unusual provision under which the objects of the *Broadcasting Services Act 1992* (Cth) 'trump' the objects of the Radcoms Act.

### **Digital Radio**

Perhaps the easiest re-designation of BSB would be to use the BSB for the delivery of a broadcasting service. This occurred when television channel 9A, which cannot be used for the delivery of television to receivers in Australia as it is 6 MHz wide rather than the usual 7 MHz, was planned for digital radio. This led to the amendments made to section 31 of the Radcoms Act in 2007 which created a bespoke BSB regime for digital radio. It created a new subsection, section 31(1A), which permitted the Minister to designate spectrum for digital radio. The same amendments assumed that an un-designation power was specifically required and this was provided as section 31(1C) of the Radcoms Act. However, this sub-section only permits the un-designation of digital radio spectrum. That is, the parliament did not create a greater un-designation authority for the Minister when it was able to do so during the digital radio amendments.

### **Spectrum licensing the digital dividend**

In order to maximise the value of licences at a price-based allocation, the certainty associated with 15 year spectrum licences will be expected by bidders for the right to use the digital dividend. This yields an additional problem for the current legislation.

There are two processes for converting spectrum to licensed spectrum. If the spectrum is encumbered, it is provided under section 153B of the Radcoms Act and under section 36 if the spectrum is unencumbered. Both of these approaches require the preparation of a marketing plan (under section 39 for unencumbered spectrum and section 39A for encumbered spectrum). However, section 39A requires that the spectrum is subject to a spectrum reallocation declaration. There is no mechanism for BSB to be subject to a spectrum reallocation declaration and there is no other express power to make plans for encumbered spectrum.

### **Conclusions**

The Australian digital dividend is likely to be 126 MHz and has the potential to raise about \$1.5 billion for the public purse. However, for historical spectrum planning reasons, Australia will be faced with a complex restack during which television broadcasters will need to deliver concurrent and identical services on two separate digital channels. This restack problem has not affected other countries to the extent that it will affect Australia.

The Green Paper issued by DBCDE assumes that the Minister has sufficient powers under the Radcoms Act to 'un-designate' spectrum which is currently planned for broadcasting away from the broadcasting services bands. It is not clear that this

power is available and the fact that the introduction of digital radio (using the BSB for a broadcasting service) required a bespoke legislative regime suggests that amendments to the Radcoms Act will be required to deliver the digital dividend.

The highest price in a price-based allocation of spectrum is likely to be obtained if the 2.6 GHz band is auctioned at the same time as the digital dividend. This causes broadcasters a double blow as 2.6 GHz is used for electronic news gathering and the digital dividend is used for broadcasting. Although the ACMA has been looking at 2.6 GHz for some years, it still permitted the commercial broadcasters and the ABC to acquire apparatus licences such that the 2.5 GHz spectrum will be encumbered until 2013.

***Rob Nicholls is a Consultant at Gilbert + Tobin and is currently completing a PhD in the politics of the regulation of broadcasting in Australia at UNSW. This paper expresses only the author's personal opinions.***

***Australia faces a 'restack'. As a practical matter, this will require users to re-scan for services and is likely to require a significant public awareness campaign***

# Premium SMS Regulation: A necessary reform or over-regulation stifling innovation?

The first week of March 2010 saw the Australian Communications and Media Authority (ACMA) announce the next wave of regulation for the premium SMS market, with the release of a Determination under the Telecommunications Act 1997 (Cth) and a Consultation Paper for a proposed second Determination. In this paper Hamish Fraser reviews the effects of recent regulation and discusses whether the premium SMS market is now being stifled by heavy-handed regulation.

## Background

### What is Premium SMS

In short, a premium SMS (or Multimedia Messaging Service), is an SMS sent or received by a mobile phone user, that costs more than a 'normal' SMS. The formal definition under the various regulations is more complicated, but not relevant for the purposes of this paper. Australians were introduced to the concept of premium SMS through participation in voting schemes associated with television programs such as *Big Brother* or *Australian Idol*, where the SMS 'vote' was charged at a higher rate than the user's regular SMS.

Since its introduction, the premium SMS market has developed and evolved quite significantly. Today premium SMS can be used to provide a variety of services (or access to them), as well as a method for paying for other goods or services received. Premium SMS has become, in effect, the entry level for mobile commerce (M-Commerce). M-Commerce via premium SMS can now be used to provide content such as wallpapers, music and ringtones. There can be no denying that, despite the many criticisms, it is well accepted and understood by many users. By way of example, in 2004, in the UK and Australia, a ringtone download of Crazy Frog's adaptation of the *Beverly Hills Cop* theme went to #1. Premium SMS can also be used to provide access to web site games, chat rooms, sporting results and other services.

The price for premium SMS can vary widely, ranging from 55c to \$10 (and there is no reason it cannot be higher).

### Subscription Services

One area of controversy that has dogged the premium SMS market has been the use of premium SMS as a payment mechanism for services on an ongoing basis, known as subscription services. Subscription services can arise when, for example, potential customers of a service are invited to enter a quiz, test their IQ, or perhaps receive free content, and in doing so agree to receive ongoing materials or join a club that has ongoing subscription charges.

Complaints about subscription services primarily centre around the following areas:

- (a) that the advertisements inviting participants to join are misleading;

- (b) that participants are often minors using perhaps a parent's phone; and
- (c) the high cost and ongoing nature of the services (linked also to the misleading concern in (a) above).

This paper argues, however, that the proposed regulation is not the appropriate mechanism to address these concerns and that the concerns about subscription premium SMS services are nothing more than a modern manifestation of some age old problems. However, it is appropriate first to complete the relevant background before examining the proposed regulation and its likely impact.

### Complaints

From December 2006 the Telecommunications Industry Ombudsman (TIO) began to record complaints relating to premium SMS services (previously logged with billing complaints) and that record has shown a steady increase in complaints since then. The diagram on page 12 only shows the increase throughout 2008 peaking in the 3<sup>rd</sup> quarter. This rise is consistent with earlier data showing complaints increasing steadily since 2006.

The decline from late 2008, prior to the introduction of the new MPS Code (discussed below) is consistent with the active campaign commenced by the Australian Competition and Consumer Commission (ACCC) in this market in 2008.

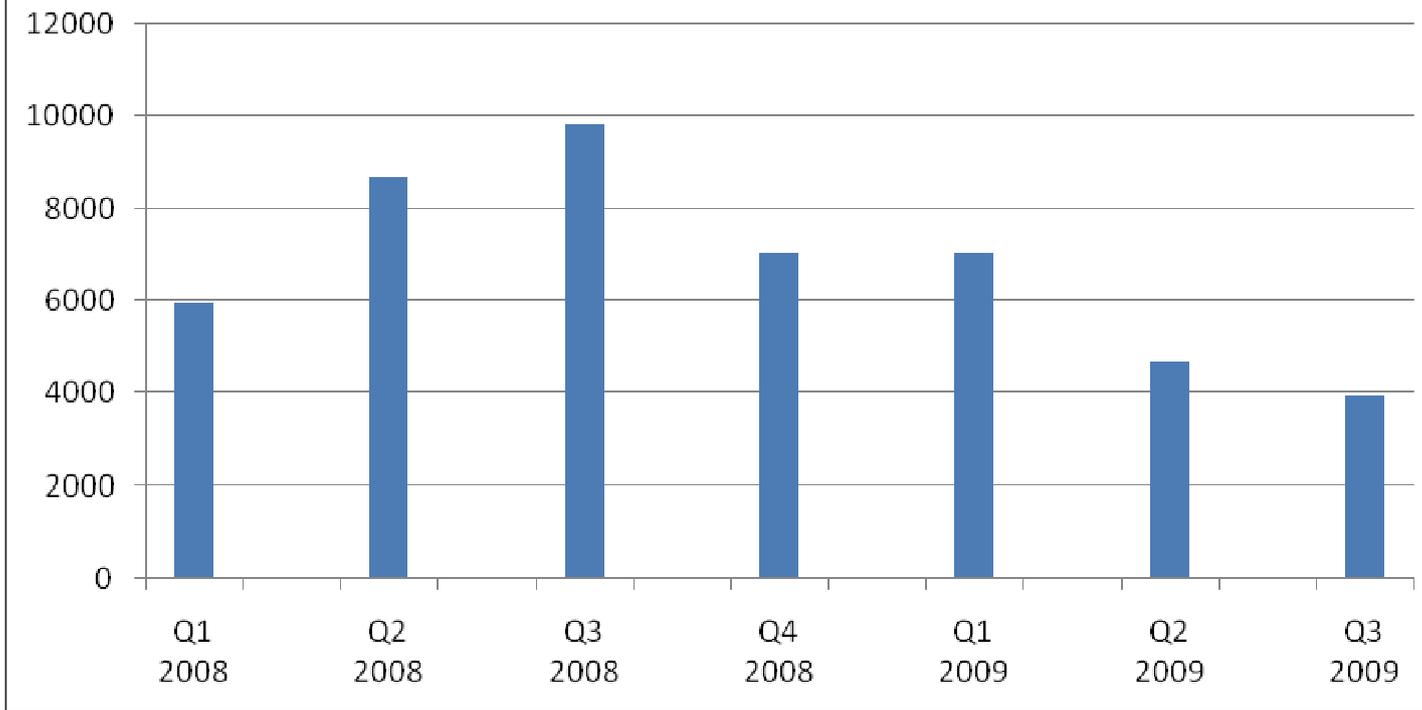
### ACCC and Minister's comments

The Chairman of the ACCC, Graham Samuel, has been a very vocal critic of the premium SMS market, and, in particular, subscription services and the advertising of them. Similarly Minister Conroy has, since the election of the Rudd Government in 2007, made it plain that he wants to see complaints about these services to the TIO reduced.

It is not the intention of this paper to criticise the ACCC or the Minister. It is without question that many of the subscription services were flagrantly misleading, and complaints about them were understandably high and justified. However it is important to distinguish between the problem, being largely misleading advertising, and the billing mechanism, premium SMS.

Premium SMS, as a billing mechanism has not been well understood. Until relatively recently, many people did not appreciate that by simply receiving an SMS, there could be an associated

## Quarterly PSMS Complaints to TIO



charge. So they allowed the service (and the premium SMS) to continue at least until they looked at their next bill. However, again, it is important to identify the real problem, perhaps a failure to appreciate the problem itself, and not blame the messenger.

### MPS Code

On 14 May 2009, ACMA registered a new industry code of practice, the Mobile Premium Services Code C637:2009 (**MPS Code**). The MPS Code came into effect on 1 July 2009 and regulates suppliers of premium services with regard to:

- appropriate advertising;
- information to be supplied;
- the manner in which they are supplied; and
- adequate complaints handling and ability to unsubscribe.

One of the key elements of the MPS Code is that subscription services must contain what is known as 'double opt in'. That is, when subscribing to a service, the user must be sent an SMS asking them to confirm they wish to proceed. This is intended to prevent any unintended subscriptions, and is likely to be the most significant tool to overcome the types of complaints identified above, particularly with respect to subscription services.

Further to the diagram above, the diagram on page 13 gives a month by month breakdown of complaints, showing a dramatic reduction since the introduction of the MPS Code, almost halving.

### March 2010 Reforms

The diagrams above suggest that the recent activity and, in particular, the MPS Code are working. Notwithstanding this apparent success in industry self-regulation, and following a consultation process in the latter part of 2009, the ACMA released in early March The *Telecommunications Service Provider (Mobile Premium Services) Determination (No. 1)* (**Determination No. 1**). At the same time the ACMA released a consultation paper for a proposed *Telecommunications Service Provider (Mobile Premium Services) Determination (No. 2.)* (**Consultation Paper**)

### Determination No. 1

Subsection 99(1) of the *Telecommunications Act 1997* (Cth) provides that the ACMA may make a written determination setting out rules for service providers in relation to the supply of specified carriage or specified content services. Carriage service providers and content service providers are service providers pursuant to section 86 of the Act, and, under section 101, service providers must comply with the service provider rules that apply to the provider.

The effect of Determination No. 1 is that consumers will have the option (after 1 July 2010) to request their carrier to bar all premium SMS services (at no cost to the consumer). There are also requirements that carriers notify their customers about the availability of barring within 30 days of the commencement of the operation of the Determination, within 5 days of a consumer becoming a customer, every 6 months for 3 years, and when a consumer complains about a PSMS service or associated charge.

### Proposed Determination No. 2

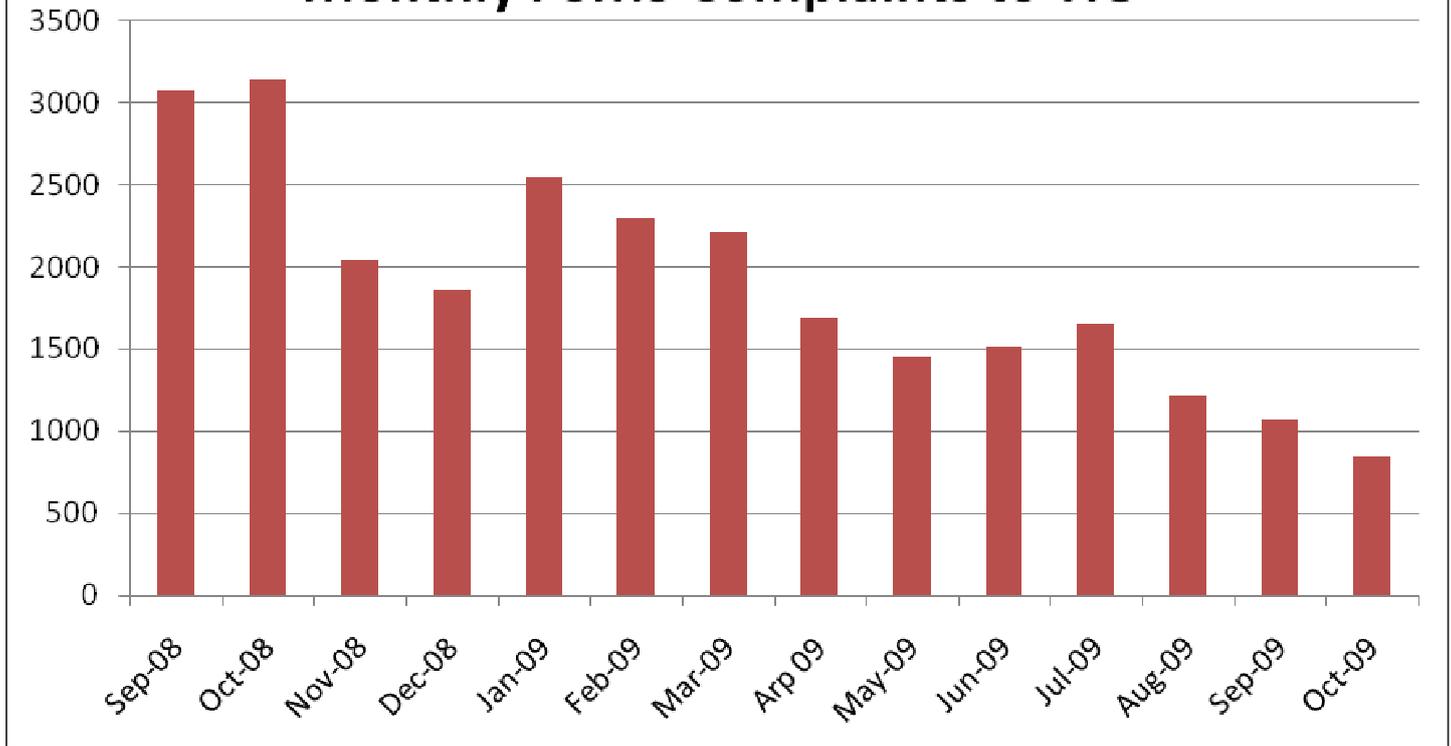
The Consultation Paper (submission for which closed on 9 April 2010) proposes a series of associated regulations to complement Determination No. 1. In particular it proposes two rules, referred to as:

1. The 'Do Not Contract' rule; and
2. The 'Do Not Bill' rule

The 'Do Not Contract' rule is a general prohibition that prevents aggregators and mobile carriage service providers (ie, carriers and aggregators) from entering into any contracts with content service providers who provide premium SMS/MMS services, unless those providers are registered in accordance with the MPS Code.

The 'Do Not Bill' rule provides a significant punitive power ACMA may exercise, which will prohibit mobile carriage service providers (ie, a carrier) from charging customers for any

## Monthly PSMS Complaints to TIO



premium SMS/MMS services received from a specified provider – effectively preventing such suppliers from receiving any Australian revenue, for a period of up to 3 years.

Provided these rules operate consistently with Determination No. 1, they provide complementary and logical industry based enforcement for the underlying regulation.

### Commentary

The author suggests that the approach in Determination No 1 is flawed and will be an unnecessary, technology-specific stifling of innovation. It incorrectly targets the mechanism rather than the offensive conduct, and will limit innovation and competition in this market.

There can be no denying that misleading conduct in any industry should be actively discouraged and new industries, particularly industries such as the burgeoning internet and mobile telecommunications industries, are susceptible to such conduct. However premium SMS services and the newer technologies are not alone when it comes to misleading advertising. *Reader's Digest* has operated a very successful subscription service since 1922, but was quite recently accused of misleading advertising in inducing people to subscribe. Other mail subscription services have been similarly susceptible to the short term gains from misleading advertising. The solution to mail subscription services has not been to bar mail services. Premium SMS is nothing more than a mechanism to allow payment from a mobile phone. To be sure, it is a relatively crude mechanism (for example each message from a given number is charged at a fixed cost), but it works and, like many payment mechanisms, is open to refinement and improvement over time.

Mobile handsets are increasingly powerful. Applications (apps) for iPhones (and other smartphones) are growing exponentially, and enable users to undertake many valuable transactions from banking to share trading to online movie and airline tickets. By comparison, premium SMS is at the lower end of the value scale. Further, the premium SMS market, like all of M-Commerce, is

only just starting to flourish. New premium SMS services that are far removed from the targeted subscription and ringtone style of services are being developed. Services that allow people to obtain real time traffic updates, directory assistance, delivery of high school results, reverse charge calling services, to name just a few have begun to thrive. It is possible to liken today's M-Commerce growth to the growth of E-Commerce in the 90's. In the 90's, the pornography industry drove internet payment and e-commerce adoption that we now use to buy everything from flowers to Christmas presents. Who doesn't do their banking online? A blanket bar on premium SMS will simply throttle these developing M-Commerce solutions and the author submits, risks stifling growth.

Whilst stamping out misleading advertising (in any form) is to be encouraged, it is suggested that the proposed barring of premium services is an over reaction to a problem with consequences far beyond its intention or need.

**Hamish Fraser is a Partner at Truman Hoyle Lawyers and represents a number of participants in the PSMS market.**

# ‘Won’t Somebody Please Think of the Children’: Would a Mandatory ISP-level Filter of Internet Content Raise Freedom of Communication Issues?

Chris Govey considers whether Federal Government plans to impose mandatory ISP-level filtering could conflict with the implied freedom of political communication in the Australian Constitution.

In May 2008, the Australian Federal Government committed \$125.8 million over four years to a range of cyber-safety measures, including a mandatory Internet service provider (ISP) level filter of unacceptable Internet content.<sup>1</sup> The Government intends to introduce legislative amendments to require all ISPs in Australia to filter certain overseas hosted material in 2010.<sup>2</sup>

The Government contends that an ISP-level filter would protect all Australians, particularly young children, from that “internet content which is not acceptable in any civilised society”.<sup>3</sup> The Government’s motivation for an ISP-level filter of the Internet is powerful, but does it justify censoring the Internet?

Senator the Hon Stephen Conroy, Australia’s Minister for Broadband, Communications and the Digital Economy,<sup>4</sup> has commented that, “while we acknowledge there are technical issues to be tested, the Government does not view this debate as an argument about freedom of speech”.<sup>5</sup> This paper examines Minister Conroy’s assertion through a discussion of:

1. the nature of the Internet;
2. the Government’s proposal; and
3. the constitutionally implied right to freedom of political communication in Australia, including the two limbs of the test applied by the High Court of Australia in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**):
  - (a) whether an ISP-level filter would effectively burden political communication; and

- (b) whether an ISP-level filter would be reasonably appropriate and adapted to serving a legitimate end.

The safety of Australian children in the online environment is extremely important. However, a mandatory ISP-level filter will not materially enhance online safety and could impede freedom of communication — and perhaps freedom of political communication — in Australia. Even if legislation implementing a mandatory ISP-level filter of the Internet is constitutionally valid, a discussion of the constitutional principles underpinning the implied right to freedom of political communication suggests that such a filter, as a matter of policy, would not be reasonably appropriate and adapted to the Government’s objective.

## 1. The nature of the Internet

One key benefit of the Internet is that it empowers individuals. It enables anyone with access to a computer and a connection to the Internet to communicate freely<sup>6</sup> on a global scale and to rally public opinion around a cause, be it personal, financial<sup>7</sup> or political.<sup>8</sup> There are innumerable examples of the Internet facilitating the discussion of government or political matters.<sup>9</sup>

The ability of the Internet to facilitate individuals’ communications recently prompted Bill Gates to comment that “[t]he role of the internet in every country has been very positive, letting people speak out in new ways”.<sup>10</sup> Similarly, the US Secretary of State, Hilary Clinton, commented on 21 January 2010 that:

*During his visit to China in November, for example, President Obama held a town hall meeting with an online component to highlight the importance of the internet. In response to a*

1 Department of Broadband Communications and the Digital Economy (DBCDE), *Cyber-safety plan*, [http://www.dbcde.gov.au/online\\_safety\\_and\\_security/cybersafety\\_plan](http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan), last accessed 19 March 2010.

2 DBCDE, *Internet Service Provider (ISP) filtering*, [http://www.dbcde.gov.au/funding\\_and\\_programs/cybersafety\\_plan/internet\\_service\\_provider\\_isp\\_filtering](http://www.dbcde.gov.au/funding_and_programs/cybersafety_plan/internet_service_provider_isp_filtering), last accessed 19 March 2010.

3 Minister Conroy, *Measures to improve safety of the internet for families*, <http://www.minister.dbcde.gov.au/media/speeches/2009/075>, last accessed 19 March 2010; see also DBCDE, *Cyber-safety plan*, above, note 1.

4 According to the British Internet Industry, Minister Conroy was the ‘Internet Villain of the Year 2009’: Adam Turner (13 July 2009), ‘Conroy named Internet Villain of the Year’, *The Sydney Morning Herald*, <http://www.smh.com.au/technology/technology-news/conroy-named-internet-villain-of-the-year-20090713-di8q.html>, last accessed 19 March 2010.

5 Minister Conroy (20 January 2009), *Address to ALIA Information Online Conference and Exhibition*, <http://www.minister.dbcde.gov.au/media/speeches/2009/001>, last accessed 19 March 2010.

6 The term ‘free’ is used in this context to mean uninhibited. However, such communication is often also free in a financial sense. Websites can be created and hosted for no or minimal additional cost.

7 Barack Obama reportedly raised half a billion dollars online in his campaign for the White House leading up to the 2008 US elections: Jose Antonio Vargas (20 November 2008), ‘Obama Raised Half a Billion Online’, *The Washington Post*, [http://voices.washingtonpost.com/44/2008/11/20/obama\\_raised\\_half\\_a\\_billion\\_on.html](http://voices.washingtonpost.com/44/2008/11/20/obama_raised_half_a_billion_on.html), last accessed 19 March 2010.

8 <http://www.alp.org.au/>.

9 For example, see <http://www.aph.gov.au/>, <http://domain.nationalforum.com.au/> and <http://www.theaustralian.com.au/politics>.

10 AFP (27 January 2010), ‘Gates weighs in on Google-China spat’, *The Australian*, <http://www.theaustralian.com.au/australian-it/gates-weighs-in-on-google-china-spat/story-e6frgaxk-1225823849258>, last accessed 19 March 2010.

question that was sent in over the internet, he defended the right of people to freely access information, and said that the more freely information flows, the stronger societies become. He spoke about how access to information helps citizens hold their own governments accountable, generates new ideas, encourages creativity and entrepreneurship.<sup>11</sup>

The Constitutional Council of France has gone so far as to characterise access to the Internet as akin to a 'human right'.<sup>12</sup>

Web 2.0 — that is, the world wide web today, comprising significant volumes of user-generated content — particularly empowers individuals. Not only has Web 2.0 exponentially increased the quantity and diversity of available Internet content; it also enables individuals to verify the information they find online against any number of independent sources and to publish effortlessly their own opinions.

Critically, the power of the Internet to facilitate free discussion of government or political matters is directly correlated with Internet users' ability to verify, trust and comment freely on the information they find online. If users' ability to gain access or contribute to information in relation to particular topics is curtailed, or if users' perceptions of the accuracy or completeness of the information they access are negatively impacted, the value of the Internet as a medium for political communication will deteriorate.

The Internet is extraordinary because it is essentially limitless. Any attempt to impose unreasonable limits on Internet content risks undermining the nature of the Internet. As Australian Labor Party Senator Kate Lundy expressed on 16 February 2010: "[t]he bottom line is that for many people a (generally silently applied) mandatory filter with a secret blacklist would always be concerning regardless of the filter scope."<sup>13</sup>

## 2. The Government's proposal

Accompanying the many opportunities provided by the Internet are the gritty back-alleys to the information superhighway. It is not disputed that some content may be harmful and undesirable and should be subject to reasonably appropriate and adapted regulation.

In Australia today, Internet content which is 'prohibited content' or 'potential prohibited content' is subject to regulation under Schedule 7 to the *Broadcasting Services Act 1992 (Cth)* (**Broadcasting Services Act**).<sup>14</sup> In general,<sup>15</sup> prohibited content is content that has been classified by the Classification Board:<sup>16</sup>

- Refused Classification (**RC**);
- X 18+;

## The Government intends to introduce legislative amendments to require all ISPs in Australia to filter certain overseas hosted material

- R 18+, and which is not subject to a restricted access system (that is, a system to verify the age of the user); or
- MA 15+, and which is not subject to a restricted access system, and which is provided on payment of a fee or by means of a mobile premium service.<sup>17</sup>

In general, if content has not been classified, but there is a substantial likelihood that content would be prohibited content if it were classified, then the content is potential prohibited content.<sup>18</sup>

Currently, if a website hosted in Australia hosts, streams or links to prohibited content or potential prohibited content, the Australian Communications and Media Authority (**ACMA**) may issue a take-down notice to the owner of the website requiring they remove or restrict access to that website.<sup>19</sup> Prohibited content hosted outside of Australia is added to an 'ACMA blacklist', which is provided to accredited PC filter vendors so they can distribute software that filters content against the blacklist.<sup>20</sup> An ISP-level filter would enable the ACMA itself to take direct action in relation to Internet content hosted overseas.

The precise details of the Government's proposed ISP-level filter are unknown. The Government has announced however, in the context of consulting on options to increase the transparency of the content which it will filter, that it will introduce legislation some time in 2010:

- enabling the creation of an 'RC content list'; and
- requiring all ISPs to filter the RC content list.<sup>21</sup>

The Government proposes that the existing take-down notice arrangements for Australian-hosted prohibited content and potential prohibited content will remain in place.<sup>22</sup> It is not clear whether Australian-hosted content will therefore not be filtered.

At this stage it appears that the proposed RC content list will be a list of websites that are either:

- the subject of a complaint to the ACMA and:
  - classified as RC content by the Classification Board; or
  - assessed against the guidelines of the National Classification Scheme to be RC content by trained officers within the ACMA;<sup>23</sup> or

11 Hilary Clinton (21 January 2010), *Remarks on Internet Freedom*, <http://www.state.gov/secretary/rm/2010/01/135519.htm>, last accessed 19 March 2010.

12 See the comment made by Justice Cowdroy in *Roadshow Films Pty Ltd v iiNet Limited* (No 3) [2010] FCA 24, at [411].

13 Senator Kate Lundy (16 February 2010), *My thoughts on the Safer Internet Group statement*, <http://www.katelundy.com.au/2010/02/16/my-thoughts-on-the-safer-internet-group-statement/>, last accessed 19 March 2010.

14 It is worth noting that Schedule 7 of the Broadcasting Services Act is expressed to not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication: see clause 121 of that Schedule.

15 Eligible electronic publications are treated slightly differently; see clause 11 of Schedule 7 of the Broadcasting Services Act.

16 Classified in accordance with the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*, the National Classification Code and any classification guidelines, including the Guidelines for the Classification of Publications 2005, made in accordance with section 12 of the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

17 Clause 20 of Schedule 7 of the Broadcasting Services Act.

18 Clause 21 of Schedule 7 of the Broadcasting Services Act.

19 Part 3 of Schedule 7 to the Broadcasting Services Act.

20 DBCDE (December 2009), *Measures to increase accountability and transparency for Refused Classification material*, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0020/123833/TransparencyAccountabilityPaper.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0020/123833/TransparencyAccountabilityPaper.pdf), last accessed 19 March 2010 (**Consultation Paper**), page 3.

21 DBCDE, Consultation Paper, December 2009, page 3.

22 DBCDE, Consultation Paper, December 2009, page 3.

23 DBCDE, Consultation Paper, December 2009, page 2.

- added through arrangements with 'highly credible overseas agencies'.<sup>24</sup>

Content which might be classified as RC and therefore added to an RC content list includes:

- publications, films or computer games that advocate the doing of a terrorist act;<sup>25</sup>
- publications, films or computer games that:
  - depict, express or otherwise deal with (and publications that describe) matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified;
  - describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
  - promote, incite or instruct in matters of crime or violence;<sup>26</sup>
- computer games that are unsuitable for a minor to see or play.<sup>27</sup>

Clearly, the RC content list will go beyond the explicit content with which the Government is most concerned. There have been significant calls from the Internet industry for the scope of the filter to be reduced from RC content to child pornography.<sup>28</sup> Senator Lundy has echoed the Internet industry's concerns.<sup>29</sup> The content that is ultimately subject to the Government's proposed ISP-level filter will depend on the substance of the legislation passed by the Australian Parliament.

### 3. Freedom of political communication

There is no general right to freedom of communication under current Australian law.<sup>30</sup> However, an implied freedom of communication about government or political matters has been identified in the Australian Constitution.<sup>31</sup> This section discusses the Government's proposal to introduce an ISP-level filter of Internet content in the light of the principles enunciated by the High Court of Australia in such cases as *Lange*.

The purpose of this discussion is not merely to suggest that the Government's proposal might be unconstitutional; it is to highlight the freedom of communication issues inherent in the Government's proposal. These issues deserve to be debated and not dismissed as irrelevant.<sup>32</sup> Even if the Government's proposal is constitutionally valid, there remains the possibility that it raises such significant freedom of communication and technical issues that, as a matter of policy, it should not be implemented.

Minister Conroy has himself commented that "[f]reedom of speech is fundamentally important in a democratic society".<sup>33</sup> Indeed, freedom of communication is so fundamental to Australia's constitutional democracy that the High Court of Australia has determined that the combined operation of sections 7, 24, 64 and 128 of the Australian Constitution prevents Australian legislatures from unduly burdening communications about government or political matters.<sup>34</sup> This is because:

*Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively...*

*Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.*<sup>35</sup>

Communications concerning political or government matters remain central to Australia's system of government today. Following the unanimous judgment of the High Court of Australia in *Lange*, a law of a State or Federal Parliament or a Territory legislature will be invalid if it:

- effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and
- is not reasonably appropriate and adapted to serve a legitimate end [in a manner]<sup>36</sup> which is compatible with the

24 DBCDE, Consultation Paper, December 2009, page 3.

25 Section 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). The concept of publications, films or computer games that advocate the doing of a terrorist act is potentially broad. Advocating a terrorist act includes directly or indirectly counselling or urging the doing of a terrorist act; directly or indirectly providing instruction on the doing of a terrorist act; or directly praising the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person to engage in a terrorist act. A terrorist act is defined in clause 100.1 of the Schedule to the *Criminal Code Act 1995* (Cth) and includes, for example, a threat of action where would seriously interfere with an electronic system with the intention of advancing a political, religious or ideological cause and intimidating the public or a section of the public.

26 National Classification Code: available at ComLaw <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200508203?OpenDocument>, last accessed 20 March 2010.

27 National Classification Code. On a related point, the The Minister for Home Affairs is currently consulting with the Australian public as to whether the Australian National Classification Scheme should include an R18+ classification for computer games: Australian Attorney-General's Department, *An R18+ Classification for Computer Games – Public Consultation*, <http://www.ag.gov.au/gamesclassification>. Approximately 55,000 submissions have been received: Fran Foo (4 March 2010), 'Games rating call gets 55,000 submissions', *The Australian*, <http://www.theaustralian.com.au/australian-it/games-classification-call-gets-55000-submissions/story-e6frgax-1225837084356>, last accessed 19 March 2010. An R18+ classification for games would see computer games that are unsuitable for a minor to see or play moved from an RC classification to an R18+ classification.

28 The Australian Library and Information Association, Google, Inspire Foundation and Yahoo! (February 2010), *Core Principles for Effective Action for a Safer Internet*, <http://www.alia.org.au/internetfiltering/core.principles.html>, last accessed 20 March 2010.

29 Senator Kate Lundy, Above, note 14.

30 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 133 per Mason CJ, at 149 per Brennan J, at 182-183 per Dawson J. See also the National Human Rights Consultation's recommendation that Australia adopt a Human Rights Act including a freedom of expression: *National Human Rights Consultation Report*, recommendation 25: [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultation-ReportDownloads](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultation-ReportDownloads), last accessed 19 March 2010.

31 See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

32 Cf, for example, Senator Conroy (20 January 2009), *Address to ALIA Information Online Conference and Exhibition*, <http://www.minister.dbcde.gov.au/media/speeches/2009/001>, last accessed 19 March 2010.

33 Senator Conroy (20 January 2009), *Address to ALIA Information Online Conference and Exhibition*, <http://www.minister.dbcde.gov.au/media/speeches/2009/001>, last accessed 19 March 2010.

34 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

36 The insertion of the phrase 'in a manner' in the test formulated in *Lange* was supported by the majority of judges in *Coleman v Power* (2004) 220 CLR 1 at [92]-[96], [196]; followed, for example, in *McClure v Mayor And Councillors of City of Stirling [No 2]*, [2008] WASC 286 at 78.

maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people.<sup>37</sup>

The following parts of this paper apply the two limbs of this test to a hypothetical law passed in furtherance of the Government's proposal to introduce an ISP-level filter of Internet content.

### Would an ISP-level filter effectively burden political communication?

Communications about government or political matters include, for example:

*discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices. Barendt states that:*

*"political speech" refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.*<sup>38</sup>

In determining whether political communication is burdened by a particular law, the authorities draw a distinction between those laws which expressly restrict communications about government or political matters and those with respect to some other subject and whose effect on political communications is unrelated to their nature as political communications.<sup>39</sup> Similarly, a distinction is drawn between restrictions on communications which target ideas or information about government or political matters and those which restrict a particular activity or mode of communication by which such ideas or information are transmitted.<sup>40</sup> In both distinctions, the first mentioned restriction is more likely to burden communications about government or political matters.

The Government's proposed ISP-level filter is intended to protect children from exposure to RC content.<sup>41</sup> Obviously, such content is unlikely to be content about government or political matters.<sup>42</sup> The Government does not intend to filter communications about government or political matters. It is clear, therefore, that a law implementing the Government's proposal could only be a law of the second kind; one which impacts only incidentally on communications about government or political matters. Of itself, preventing communication of RC content to minors can not burden communications about government or political matters.

This does not mean that a law implementing an ISP-level filter could not effectively burden communications about government or political matters. In *Lange*, for example, the High Court held that although:

*[t]he law of defamation does not contain any rule that prohibits an elector from communicating with other electors concerning government or political matters... in so far as the law of defamation requires electors and others to pay damages for the publication of communications concerning those matters or leads to the grant of injunctions against such publications, it effectively burdens the freedom of communication about those matters.*<sup>43</sup>

### once an ISP-level filter has been established, there must be the potential for 'scope creep'.

That is, even though the law of defamation does not expressly burden communications about government or political matters, it was held in *Lange* that the law of defamation could nonetheless effectively burden such communications. Similarly, in *Coleman v Power* (2004) 220 CLR 1, the Attorney-General of Queensland conceded in argument that, in some cases, the impugned law could burden communications about government or political matters because the law could "apply whether or not the prohibited language relates to matters of governmental or political interest so that... its practical operation and effect may, in some cases, burden communication about government or political matters".<sup>44</sup>

It is possible that a law implementing an ISP-level filter could, in its operation and effect, burden political communications. The question of whether a law burdens a communication about government or political matters imposes a relatively low threshold. It may be that a law which imposes only a 'light' burden on political communication is more likely to be reasonably appropriate and adapted to serve a legitimate end;<sup>45</sup> however, this does not prevent the first limb of the test in *Lange* being met.

In the circumstances of the Government's proposal, a law implementing an ISP-level filter might burden communications about government or political matters in four ways. First, there is a risk that communications about government or political matters — such as content hosted on an individual's political blog, the importance of which is discussed in Part 1 of this paper — could be inadvertently filtered and therefore directly burdened. From this perspective, any ISP-level filter at all, regardless of the scope of the deliberately filtered content, would be objectionable.

The *Sydney Morning Herald* has reported that only about half of the sites on the precursor to the RC content list, the ACMA blacklist, are links to the Government's stated target-content, child pornography. The rest of the sites on the ACMA blacklist are reportedly "online poker sites, YouTube links... Wikipedia entries, euthanasia sites, websites of fringe religions such as satanic sites, fetish sites, Christian sites, the website of a tour operator and even a Queensland dentist".<sup>46</sup> Some of these topics are clearly political. No matter which technology is used, if it is possible for content which is not prohibited content or potential

37 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-568.

38 *Theophanous v The Herald & Weekly Times Limited* (1993) 182 CLR 104 at 124 (footnotes omitted); see also *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 at 231.

39 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 at 169.

40 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 at 143.

41 DBCDE, *Cyber-safety plan*, [http://www.dbcde.gov.au/online\\_safety\\_and\\_security/cybersafety\\_plan](http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan), last accessed 15 July 2009.

42 Note, however, that the definition of RC content is broader than the explicit content to which the Government's proposal is directed: see discussion in Part 1 of this paper above.

43 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

44 *Coleman v Power* (2004) 220 CLR 1 at 120.

45 *Coleman v Power* (2004) 220 CLR 1 at 120.

46 Asher Moses (19 March 2009), 'Leaked Australian Blacklist reveals banned sites', *The Sydney Morning Herald*.

prohibited content to find its way on to the ACMA blacklist then it will likely also be possible for content pertaining to government or political matters to find its way on to an RC content list.

In addition, the Government's *ISP Content Filtering Pilot Report*<sup>47</sup> indicates that during a test of whether certain filtering technologies could block material in addition to that on a prescribed list, the filters blocked up to 3.37 per cent of content on an innocuous content list (that is, content which should not be blocked by a filter).<sup>48</sup> The innocuous content test list expressly included 'Government' content.<sup>49</sup> There is clearly potential for political communications to be inadvertently blocked by an ISP-level filter.

### ***there are some technical obstacles inherent in the introduction of an ISP-level filter which will be difficult to overcome.***

Second, once an ISP-level filter has been established, there must be the potential for 'scope creep'.<sup>50</sup> An ISP-level filter might be deliberately used in the future to block communications about government or political matters. Indeed, the very fact that the Government's pilot tested whether a filter could accurately block material not on a specified list indicates that the Government might be considering expanding the scope of its proposed filter. Regardless of the purpose to which an ISP-level filter is initially directed, it is possible that future governments will expand on that purpose, either through regulations or legislative amendment. This is not to suggest that there exists in Australia some grand conspiracy to filter government or political content at some point in the future; it is merely to point out that it would be relatively easy, once an ISP-level filter is in place and tolerated by Australian society, to expand the scope of the filter to material beyond that originally contemplated. Communications about government or political matters might therefore be directly burdened in the future. Of course, deliberate filtering of political communications could of itself only give rise to a constitutional claim at the time such filtering was introduced.

The risk of deliberate filtering does, however, immediately contribute to the third way in which a law implementing an ISP-level filter might burden political communications. That is, the risk that communications about government or political matters could be inadvertently or deliberately filtered (now or at an unknown point in the future) of itself effectively burdens other Internet-based communications about government or political matters, even if such communications are not themselves filtered. This argument is closely linked to the nature of the Internet, as outlined in this paper. As discussed, if individuals' ability to gain access or contribute to political communications is curtailed, or if individuals' perceptions of the accuracy or completeness of the political communications they access are negatively impacted, the value of the Internet as a medium for political communication in general will deteriorate. It is not to the point that society has effectively engaged in political communication without the

Internet in the past; the fact is that today the unimpeded flow of online information contributes to the discussion in Australia of such things as the conduct, policies or fitness for office of government of those seeking public office. Such discussion might be effectively burdened by the change in attitude to online communication, including online communication about government or political matters, inherent in the introduction of an ISP-level filter of Internet content. This is particularly the case insofar as the introduction of an ISP-level filter of Internet content must be accompanied by general unease at the concept of the Government sifting through all online communications and blocking those which it considers undesirable.

The fourth reason that a law implementing an ISP-level filter might burden political communications is that communications about what amounts to prohibited content may also be communications about government or political matters. As is clear from the public comments made by politicians regarding abortion, euthanasia, and Bill Henson's photography, the question of what material should be available for viewing by the public is often a deeply political issue. The Government's proposal to maintain the strict confidentiality of its RC content list would effectively burden communications about the composition of the RC content list; potentially communications made by or about candidates for political office. The ACMA has in the past threatened to impose \$11,000-a-day fines on individuals who own websites that publish hyperlinks to a leaked copy of the ACMA blacklist.<sup>51</sup> So long as the RC content list is not public, it will be difficult to know what information individuals are being prevented from viewing.

The Government's consultation on six proposed measures to increase the accountability and the transparency of the material that would be filtered under its proposal,<sup>52</sup> goes some, but not all, of the way to addressing this concern. It is likely that, at least taken in isolation, a law maintaining the confidentiality of the RC content list will be reasonably appropriate and adapted the legitimate purpose of preventing the dissemination of RC content.

Nonetheless, given the low threshold that needs to be met to satisfy the first limb of the test in *Lange*, it seems possible that a law implementing an ISP-level filter of Internet content might impose some effective burden on communications about government or political matters. The existence and extent of that burden is likely to turn on the precise drafting of the impugned law. In particular, if the publisher of online political communications is easily able to overturn an incorrect decision to filter their content, the burden imposed by an ISP-level filter is likely to be extremely light. As the next part of this paper demonstrates, however, even a 'light' burden on communications about government or political matters is unlikely to be justifiable in the context of a mandatory ISP-level filter of Internet content.

### **Would an ISP-level filter be reasonably appropriate and adapted to serving a legitimate end?**

The Government's stated motivation for imposing an ISP-level filter is to protect children from exposure to RC content.<sup>53</sup> One related purpose appears to be to restrict the dissemination of child pornography. Such purposes are consistent with the objects

47 On 15 December 2009, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, released the results of the Government's pilot trial of ISP-level filter technologies: Enex Pty Ltd (October 2009), *Internet Service Provider (ISP) Content Filtering Pilot Report*, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0004/123862/Enex\\_Testlab\\_report\\_into\\_ISP-level\\_filtering\\_-\\_Full\\_report\\_-\\_Low\\_res.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0004/123862/Enex_Testlab_report_into_ISP-level_filtering_-_Full_report_-_Low_res.pdf), last accessed 19 March 2010 (***ISP Content Filtering Pilot Report***).

48 Enex, *ISP Content Filtering Pilot Report*, page 13.

49 Enex, *ISP Content Filtering Pilot Report*, page 13.

50 See Alana Maurushat and Renee Watt (April 2009), 'Australia's internet filtering proposal in the international context', *Internet Law Bulletin*, page 18.

51 Asher Moses (17 March 2009), 'Banned hyperlinks could cost you \$11,000 a day', *The Sydney Morning Herald*.

52 DBCDE, Consultation Paper. The DBCDE published the 174 public submissions in response to the Consultation Paper on 23 May 2010, after this paper was written: [http://www.dbcde.gov.au/online\\_safety\\_and\\_security/cybersafety\\_plan/transparency\\_measures/submissions](http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan/transparency_measures/submissions).

53 DBCDE, *Cyber-safety plan*, [http://www.dbcde.gov.au/online\\_safety\\_and\\_security/cybersafety\\_plan](http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan), last accessed 19 March 2010.

of the Broadcasting Services Act, which is intended, among other things:

- to restrict access to certain Internet content that is likely to cause offence to a reasonable adult; and
- to protect children from exposure to Internet content that is unsuitable for children.<sup>54</sup>

While these are certainly legitimate purposes for legislation, a mandatory ISP-level filter would not be a reasonably appropriate and adapted means to serving this end. As Kirby J expresses the test: the means selected are not proportional to the intended aim.<sup>55</sup> This is for three main reasons.

First, a mandatory ISP-level filter would provide no better protection to minors than the currently available, non-government-owned, optional content filters. Such filters were available for free to members of the public under the Howard Government.<sup>56</sup> To the extent there is concern that technologically uninformed parents might neglect to implement such an optional filter on the family computer, Senator Lundy's suggestion that subscribers to ISPs be obliged to determine whether or not their account is subject to an optional filter is supremely reasonable.<sup>57</sup> Such 'mandatory optional' filtering could have the additional benefit of being better tailored to each household's particular requirements. In this way, families, as well as individuals with low tolerance for offensive material, would be protected from inadvertent or inquisitive exposure to RC content.<sup>58</sup> Communications about government or political matters among the balance of Australia's population could then continue without potential impediment. In essence, the Government's proposal goes considerably further than what is needed to achieve its aim.<sup>59</sup>

Second, the typical means by which illegal content is disseminated online would not be impacted by the types of ISP-level filter proposed by the Government, mandatory or optional. An ISP-level filter of certain uniform resource locators (**URLs**) would not be able to keep up with the ever-changing online environment and would have no impact on online transmissions made, for example, via:

- peer-to-peer systems (for example, BitTorrent);
- encrypted channels;
- chatrooms;
- Usenet groups; and
- instant messaging programs.<sup>60</sup>

During the pilot of filtering technologies commission by the Government, the tested filters only blocked between 8.1 per cent and 16.2 per cent of attempts to circumvent the filter and access black-listed URLs.<sup>61</sup> Determined distributors of child pornography will remain the exclusive jurisdiction of targeted police operations.

Third, a mandatory ISP-level filter must confront certain technical obstacles. Enex Pty Ltd (**Enex**), the authors of the *ISP Content Filtering Pilot Report*, comments, in the context of testing the filters' ability to block content not on a specific list, that:

*Enex considers it unlikely that any filter vendor would achieve 100 percent blocking of the URLs inappropriate for children without significant over-blocking of the innocuous URLs because the content on different commercial lists varies and there is a high rate at which new content is created on the internet. Enex has also noted, through previous testing, that the higher the accuracy the higher the over-blocking.*<sup>62</sup>

In addition, some impact on performance (that is upload/download speed) was seen during the performance degradation tests, although this impact was generally within the stated +/- 10 per cent margin for error.<sup>63</sup> One of the four ISPs involved in the testing, using a particular technical setup, experienced a 'noticeable' (> 20 per cent) impact on file uploads and a 'minimal' (10 per cent to 20 per cent) impact on file downloads when filtering the ACMA blacklist only. Significantly more performance degradation was evident for all ISPs when the ACMA blacklist as well as additional content was filtered. Given the Government's separate emphasis on the need for fast broadband in Australia,<sup>64</sup> significant performance degradation is difficult to justify.

Due to the potential for performance degradation when filtering high traffic volume sites, Minister Conroy has been exploring the option of using deep packet filtering to regulate content hosted on such websites as YouTube; a feat which would not be technically practical with an ISP-level filter.<sup>65</sup> Such approaches are beyond the scope of this paper and raise their own freedom of communication issues. Suffice to say, it is apparent that there are some technical obstacles inherent in the introduction of an ISP-level filter which will be difficult to overcome.

#### 4. Conclusion

It is clear that a mandatory ISP-level filter of Internet content would raise significant freedom of communication — and perhaps freedom of political communication — issues if implemented in Australia. Even if legislation implementing a mandatory ISP-level filter of Internet content is not an effective burden to communications about government or political matters, and is therefore constitutionally valid, it is clear that such a filter would not, as a matter of policy, be reasonably appropriate and adapted to the Government's stated policy objective. The portion of the Government's \$125.8 million cyber-safety budget allotted to studying and implementing a mandatory ISP-level filter would be better spent on optional filters, educating Australians on cyber-safety and enforcing existing laws in an online environment.

**Chris Govey is a Lawyer at Allens Arthur Robinson in Sydney.**

54 Section 3 of the Broadcasting Services Act.

55 *Coleman v Power* (2004) 220 CLR 1 at 82.

56 Fran Foo (5 August 2008), 'Net censorship to cost users', *The Australian*, <http://www.theaustralian.com.au/australian-it/net-censorship-to-cost-users/story-e6frgamf-1111117107910>, last accessed 19 March 2010.

57 Senator Kate Lundy, above, note 14.

58 It should be noted that the Internet is generally an interactive tool; it is generally difficult to access material inadvertently. Individuals with low tolerance thresholds should not click on obviously offensive links.

59 Cf the High Court's comments about the law of defamation in NSW: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575.

60 See Alana Maurushat and Renee Watt (April 2009), 'Australia's internet filtering proposal in the international context', *Internet Law Bulletin*, page 19.

61 Enex, *ISP Content Filtering Pilot Report*, page 25.

62 Enex, *ISP Content Filtering Pilot Report*, page 13.

63 Enex, *ISP Content Filtering Pilot Report*, page 21.

64 DBCDE, *National Broadband Network: 21st century broadband*, [http://www.dbcde.gov.au/broadband/national\\_broadband\\_network](http://www.dbcde.gov.au/broadband/national_broadband_network), last accessed 19 March 2010.

65 Ry Crozier (8 February 2010), 'Conroy meets with Google for YouTube filtering', *ITNews for Australian Business*, <http://www.itnews.com.au/News/166677,conroy-meets-with-google-for-youtube-filtering.aspx>, last accessed 19 March 2010.

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### **Matt Vitins**

C/- Allens Arthur Robinson  
Deutsche Bank Place  
Corner Hunter & Phillip Streets  
SYDNEY NSW 2000  
Tel: +612 9230 4000  
Fax: +612 9230 5333  
email: matt.vitins@aar.com.au

### **Lesley Hitchens**

C/- Faculty of Law,  
University of Technology Sydney  
PO Box 123  
BROADWAY NSW 2007  
Tel: +61 2 9514 3694  
Fax: +61 2 9514 3400  
Email: lesley.hitchens@uts.edu.au

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