ACLA SEMINAR ON VAEIS
SATELLITE VIDEO ENTERTAINMENT SERVICES - IS OUR LAW OFF THE PLANET TOO?

Despite the fact that Sky Channel, Club Superstation and Sportsplay are commonly referred to as 'new media', from what I have read and heard of them, they seem to me to be just a variety of subscription television, with the special feature of being marketed not to private households but to pubs and clubs. Clearly, the target audience makes a difference to the economics of the service, and avoids placing the service in direct competition with free to air television, but conceptually what we have here is good old 'pay-TV'.

Pay-TV is not a new concept, having been available in North America for many years. The introduction of pay-TV in Australia has been looked at in past years. Many of the issues relating to pay-TV were given a thorough canter round the course in the Tribunal's Cable and Subscription Television Report of 1982.

Having said that, I must then say that the Tribunal has no current position on what should be done in a regulatory sense with video entertainment services. At present, so we are told, they do not fall within the definition of 'broadcasting'. Therefore, the Tribunal simply has no jurisdiction over them. We do not regard it as our role to offer policy advice to Government in this area, unless the Minister asks us to, which he has not. We simply await with interest the ultimate decision about how to classify these services.

However, we can and frequently do offer gratuitous advice on the deficiencies of the legal framework under which we all have to labour. What the headscratching over video entertainment and information services shows yet again is that we do not have a systematic body of communications law which allows new technologies, and new uses of old technologies for that matter, to be conveniently slotted in to their correct place in a single integrated regulatory framework.

Consider the fundamental proposition that video entertainment and information services are not 'broadcasting'. How does one decide what is 'broadcasting'? In short, after cross-referencing and synthesising various sections and definitions in the Broadcasting Act and the Radiocommunications Act, you arrive at the following: you are broadcasting if you are using a transmitter emitting electromagnetic energy (including laser beams), otherwise than along a continuous cable, for the purpose of transmitting radio programs or television programs to the general public. This definition only dates from last year, although the change from the old definition of broadcasting (which, as it related to television, referred to 'images and associated sound intended for reception by the general public') is said by the Department of Communications to be 'policy neutral'. I have doubts about that, but in any event the definition is policy neutral to the extent that it perpetuates the long-standing practical difficulties in defining the limits of a broadcasting service, particularly in two respects - it does not define what is meant by 'the general public', and it does not define what is meant by 'radio programs' or 'television programs'. What is the general public? When is one transmitting to the general public? It is said that if you charge a fee for the receipt of a service, you are not transmitting to the general public. To me that is like saying that the fact that the Urban Transit Authority charges people to use its buses means that its service is not for the general public. Putting that aside, one might also ask if many people are setting up to transmit programs to five people in a remote homestead, is it transmitting to the general public? If not, is it because there are only five of them, or because all the recipients of the service can be identified with precision? If they are the general public, then one might innocently ask why the patrons of 5,000 pubs are not the general public. The answer might be that even if the patrons of 5,000 pubs were the general public, the material being transmitted to them is not 'television programs'.

That raises the question of how one identifies a 'television program'. Perhaps we should apply the well-known objective 'duck' test: if it looks like a duck, quacks like a duck, and waddles like a duck, then it's a duck. If, applying the 'duck' test, you say that a piece of video footage 30 minutes long is not a

television program, does that mean it is not broadcasting if you transmit it to the general public using radiocommunication? As an alternative approach to the 'duck' test, we could say that a television program is any video item which is transmitted to the general public. Of course, this makes your definition of broadcasting rather circular, or elliptical, or possibly both. Anyway, does any of this legal masturbation really matter? The answer to that question is 'yes', but only because very practical consequences follow from classifying a service as broadcasting or not broadcasting.

What happens if the desired service is characterised as broadcasting? In short, the consequences are these. A planning proposal must be prepared. It must be consistent with established broadcasting planning policy. The Minister for Communicaitons must decide to invite applications for a licence. There must be an inquiry into the grant of the licence by the Australian Broadcasting Tribunal. Ultimately, the licence may be granted, subject to a variety of rules (depending on the kind of licence) laid down by statute and by the Tribunal, relating to the structure of the applicant, its ownership and control, the content of the broadcasts and so on. If the service is not characterised as broadcasting, a licence under the Radiocommunications Act can simply be issued over the counter (on the Minister's authority) by a clerk in the Radio Frequency Management Division of the Department of Communications with no public inquiry, no involvement of the Tribunal, and no complex rules relating to structure, ownership or content (unless specially imposed by the Minister as licence conditions).

The point I am making is that we are maintaining two completely different licensing regimes in the Broadcasting Act and the Radiocommunications Act, but the criterion which divides them (the slippery definition of broadcasting) is the product of a past era. Fifty years ago it made sense to classify services broadly as either inter-personal or intended for reception by the general public. There was no real need for subtle gradations between those extremes because the technology was not really used in subtle ways. These days we are seeing more and more services which are not really intended for the undefined general public, but are not person-to-person either. Our current legal structure is directing our minds to the wrong questions - instead of being forced to decide whether the service is or is not broadcasting, we should simply be able to concentrate on the rules that are appropriate to that kind of service.

What can be done to create a legal structure in which each kind of service, including services we have commonly called broadcasting, can grow within a properly co-ordinated telecommunications system? There are several options available, and I will mention three.

Option 1, of course, is do nothing. That is always popular. I will say no more about it.

Option 2, is total integration. By that I mean the creation of a legal structure for a single multifaceted telecommunications system, which applies (as far as possible) common principles to the whole spectrum of services. Within that basic structure, there would naturally be a need to apply different rules to different kinds of services according to certain enumerated criteria such as the need to control frequency allocations, whether the service was for private communication or not (which raises its own definitional problems), proposed content of the service, whether a cost was payable in order to receive it and so on. I say nothing about the level at which rules should be pitched in each case, only that the structure would need to provide flexibility within broad policy objectives applicable to the development of the whole telecommunications system. This concept is consistent to some degree with the approach taken by the Davidson Committee (if anyone still remembers it), and with the long term scenario suggested by the Tribunal in the Cable and Subscription Television Report. Even assuming that this option were regarded as conceptually attractive (and it may not be for many), its implementation would face the same difficulty as the tourist in Ireland who asked a farmer the way to Cork and received the answer: 'If I were you, I wouldn't be starting from here'. There are, of course, severe practical problems (political, commercial, logistical and industrial) with this course.

Option 3, is partial integration. The Davidson Committee proposed a new Telecommunications Act which would bring together radiocommunications and wired communications into a single Act based on common principles. It saw the separation of 'system' from 'service' as leaving a much simplified but still separate Broad-

casting Act, regulating content alone. This could well be true, if the existing broadcasting definitions are completely reworked. It may be possible to move down this track without a major dislocation of the existing system.

In summary, I believe that our present legal framework is a shambles. Unless urgent action is taken to try and bring some flexibility into it, the introduction of new services will always be a mad scramble of law trying to catch technology.

Leo Gray

The views expressed are not necessarily those of the Australian Broadcasting Tribunal or any of its members.

ACLA SEMINAR ON VAEIS
VIDEO AND AUDIO ENTERTAINMENT AND INFORMATION SERVICES

First I want to suggest that the subject of tonight's discussion deserves another name. Video and Audio Entertainment Services is such a mouthful and, in typical Department of Communications style, it has now been abbreviated to VAEIS.

No-one can hope to communicate to the general public or even limited sections of the public with terms like this.

I recognise that the policy makers are intent on distinguishing these services from subscription TV, broadcasting, and satellite program services, but terms like "quasi broadcasting" or even "like services" (which someone in the Department used at one stage last year) are so much simpler.

The program menus of several of these new services - in particular Bond's Sky Channel and the Holmes a Court - RCA venture "Club Superstation" (we don't know the Packer group's program plans yet) indicate that these services are "like" television and radio broadcasting.

As for the distinction between information and entertainment - information in the form of images, sound and text can entertain, and entertainment can inform. And if a technological framework is used, it won't be long before images, data, sound, and text are integrated and transmitted in digital form.

Perhaps we should borrow the term audiovisual services from the French?

If I understand the Department's reasoning correctly, because the services are only available to certain sections of the public they are not defined as broadcasting under the Broadcasting and Television Act. For example, services will be limited to subscribers or customers who lease special equipment to pick up the video, audio or text signals.

If the services are not regarded as broadcasting, then they escape the program and advertising standards laid down by the Broadcasting Tribunal. There is no requirement for a quota of Australian programs, no limit on advertising time or type, no need to broadcast childrens' programs at certain times, and no restriction on ownership and control - let alone foreign ownership. Even the Tribunal's public licensing and monitoring processes are redundant.

In theory, service providers could deliver 24 hours of news, rock video or sports direct from the USA, movies specialising in explicit sexual violence, and an unlimited amount of foreign or even Australian-made advertising for products like cigarettes.

These services are not tied to any one mode of delivery. They can be transmitted to subscribers via satellites or via "over-the-air" techniques which are very similar to broadcast TV and radio ... techniques called "MDS" by the Department and engineers. Telecom's broadband fibre optic cable network remains an option in the future.

It seems that as long as the service is not delivered into the domestic environment it is not defined as broadcasting. The recipients or subscribers could be places like pubs, clubs, sports grounds, racecourses, TAB's, hospitals, prisons, luxury hotels, office complexes, schools or shopping centres ... anywhere but the home. The boundaries are somewhat blurred for someone who happens to live in a combined office/residential complex ... or in a hotel or club.

And no! These services are not strictly pay TV either. The Government argues they are not being offered to the general public - and anyway subscribers to these "private networks" will be paying for the lease of the receiving equipment rather than the service.

Actually, a number of people, including the Shadow Communications Minister, Ian McPhee, have been using the term "subscription TV". McPhee observes that instead of individuals paying directly, they pay by virtue of being members of a club