

# Communications Law

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## Pirate Pay TV - A Viable Alternative?

Page Henty considers the possibility of pirate pay TV

**T**here has been discussion in the press recently about pirate broadcasting into Australia. Much of this has been critical of the unrealistic treatment of the Australian airwaves as a "containable" jurisdiction in our new broadcasting legislation.

Australia's isolation from the rest of the broadcasting world can at least partly explain why the issue of pirate pay TV has come to the attention of the Australian public and broadcasting regulators so late. But as we approach the phenomenon of a satellite glut over South East Asia, what is the legal status of pirate pay TV?

This article looks at how the *Broadcasting Services Act 1992* ("BSA") might affect outside operators proposing to transmit pirate subscription television services direct to Australian homes by use of a satellite. Depending on the structure of any given pirate pay TV service, other local legislation (such as the *Radio-communications Act 1983* and the *Telecommunications Act 1991*) and international treaties (such as the *Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*) may be relevant. The scope of this article does not permit any discussion of them here.

The kind of pirate pay TV operation we are considering might operate through a company set up in a foreign country to provide an encrypted television service, designed to appeal to the general public. The pirate service would be transmitted to Australia by a "non-Optus" satellite and Australians invited to subscribe to the service by calling a free phone number linking the caller direct to a subscriber facility in the foreign country. Subscriber service calls would then be taken in the foreign country and all subscriber billings would originate in the foreign country and would be payable by credit card over the phone.

A television service of this kind can be distinguished from other non-subscriber services, such as the pan-Asian STAR TV, which are advertising funded.

### Offences under the BSA

**U**nder the BSA, it is an offence, punishable by a penalty of \$200,000 and \$2,000,000 per day (respectively), for a person:

- to provide any subscription television broadcasting services (pay TV), unless that person has been allocated an appropriate licence by the Australian Broadcasting Authority ("ABA") (section 132(1)); or
- to provide pay TV by satellite unless it is provided through the use of an Optus satellite (section 132(2)).

Pay TV is defined in the BSA as a service which delivers television programs that appear to be intended to appeal to the general public and which is made available to the general public, but only on payment of subscription fees (sections 6(1) and 16).

### The service provider

**W**here subscription fees include any consideration (periodical or otherwise), there is little doubt that the pirate service described above is a pay TV service under the BSA. However, it is not clear from the legislation what act or combination of acts constitutes the "provision" of pay TV services. The meaning of "provision" in this context will define who it is, in any set of circumstances, who will be guilty of the offences prescribed in the BSA.

To provide services might mean to collect and format programs for inclusion in a broadcast service. Alternatively it might mean to manage the subscription process (including connection and disconnection of subscribers) and/or to

deliver the service from the point at which it leaves the facilities of the entity responsible for preparing the broadcast to the point of receipt by the subscriber.

From the Explanatory Memorandum released with the Bill for the BSA, and the general regulatory scheme the BSA promotes, it appears that the intention is for the "service provider" (and hence the person required to hold a licence) to be the person or company which is ultimately responsible for controlling the content of the service being sold to subscribers and for making the overall commercial arrangements necessary for delivery of that service up to the point of receipt. Were the pirate company in the model above to be operating in Australia, it would almost certainly be regarded as the "provider" of the service and therefore the person who commits an offence, if it does so without a licence. However, assuming that all the acts by the pirate company in "providing" the service are done outside Australia, does the BSA apply? That is, is there an offence committed under Australian law?

### The operation of the BSA outside Australia

**W**hen interpreting an Australian statute the starting presumption is that the statute refers only to matters within Australia. This is, however, only a *prima facie* presumption and can be rebutted if it appears from the statute that a rebuttal is intended. For example, the statute might expressly provide that it will operate extraterritorially. Alternatively, the overall subject matter of the legislation might imply that the statute is intended to operate in relation to acts done outside Australia or particular offences in the statute, by their very nature, might contemplate that

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relevant offences may be committed, wholly or partly outside of Australia.

The BSA does not contain any express provision extending its operation to cover acts performed extraterritorially. However, courts in Australia and elsewhere have come to recognise that in the modern world (with international communications, trade and crime) many offences created by statute have elements that may be committed partially or entirely internationally. As a result Australian courts have, in recent times, been prepared to rebut the presumption against the extraterritorial operation of Australian legislation.

Most precedent cases in this area deal with offences like conspiring to import drugs or concern conflicts of power between the States and Territories. Nevertheless, Australian courts might well apply a low threshold to rebutting the presumption against extraterritoriality in the case of the BSA. After all, the subject matter of the BSA, namely broadcasting, is often transnational and includes, for example, the extensive use of satellites. Satellites in geostationary orbit are 38,000 kms above the equator – well outside national boundaries.

Accordingly, if an unlicensed service provider operating wholly outside Australia provides pay TV to Australia, it would be open to Australian courts to apply the BSA extraterritorially so as to find the pirate services illegal, and their provider guilty of an offence. There is, of course, the separate issue of whether it is legally or practically possible to bring a foreign person to trial in Australia or to enforce any penalty. Australian courts have no jurisdiction outside the country.

### **Aiding, abetting, being knowingly concerned or conspiring**

**U**nder section 5 of the Commonwealth *Crimes Act* 1914 “any person who aids, abets, counsels, or procures, or by any act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of an offence ... shall be deemed to have committed that offence and shall be punishable accordingly”. This offence has been found to have extraterritorial application.

Section 86 of the *Crimes Act* has also been found to apply outside Australia. It provides that any person who conspires with another person to commit an offence or to “effect a purpose that is unlawful under a law of the Commonwealth” is guilty of an indictable offence with a penalty of imprisonment for three years.

In applying sections 5 or 86 of the

*Crimes Act* (or both) to pirate broadcast offences, it may be that the courts will find that individuals or companies which assist the pirate company in the model above are guilty of an offence. There are obvious difficulties bringing proceedings and enforcing penalties against people and companies operating offshore. However, the effects of the aiding and abetting and conspiracy provisions of the *Crimes Act* may be of real concern to local advertisers and subscribers thinking of using or taking up the service, and to equipment providers and/or local promoters.

### **Practicalities of extradition and prosecution**

**A**s mentioned, Australian courts have no jurisdiction in overseas territories. The law does, however, make provision for the Attorney-General to request the extradition of alleged criminals from countries with which Australia has extradition treaties.

A person cannot be extradited from a treaty country for criminal prosecution other than for an offence punishable by a term of imprisonment of at least 12 months. The relevant provisions of the BSA do not attract imprisonment penalties. It would not, therefore, be possible for Australian prosecutors to extradite individuals providing pirate pay TV from an extradition country.

By contrast, the conspiracy provisions of the *Crimes Act* do impose imprisonment penalties. Theoretically, someone overseas who is assisting in the provision of illegal pay TV to Australia might be extradited and brought here to trial.

The succession of policy changes of the Australian Government in recent months has indicated, if nothing else, that the Government will take all possible steps to protect the integrity of the pay TV regime set out in the BSA.

Even if the Government could not stop a pirate operation of the kind described above under the current legislation through the courts, it could relatively easily inhibit the operations of a pirate company:

- by applying diplomatic pressure in the country from which the pirate service is being provided;
- by applying pressure on the satellite operator carrying the pirate service;
- by restricting the manufacture and/or sale of decoding or receive equipment in Australia; or
- by legislating specifically to prohibit any local promotion of the service.

A precedent for legislating against pirate services can be found in the United Kingdom *Broadcasting Act* 1990. Under the UK Act, it is an offence for a person inside Britain to promote, advertise, provide programming to and/or supply and erect receive equipment designed to pick up pirate television services which the British Government prescribes as illegal. If the Australian Government took the view that it was necessary and desirable to protect its satellite pay TV model, it could well look to the British broadcasting legislation for ideas on where to start drafting. Whichever way you look at it, pirate pay TV falls far short of being a sure alternative to licensed pay TV services.

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