THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED

B•U•L•L•E•T•I•N

Print Post Approved PP: 234093/00011 EDITED BY NIRANJAN ARASARATNAM AND SHANE BARBER Vol 20 No 1 2001

Broadcasting Regulation in Review

Suzanne Shipard looks at the past few years of Australia's broadcasting regime and asks whether new legislation is required to accommodate the rapid convergence of broadcasting technologies

Next year will be the 10th anniversary of the enactment of the *Broadcasting Services Act 1992* (BSA).[1] According to the Explanatory Memorandum, one of the reasons it replaced its predecessor, the *Broadcasting Act 1942*, was that between 1983 and 1992 there had been "at least 20 substantial amendments to the *Broadcasting Act* resulting in a complicated Act".[2] Those amendments were "mostly ad hoc in nature in that they were responses to emerging circumstances rather than anticipating and providing for trends in the provision of broadcasting-type services".[3] It is with a sense of *deja vu* that one realises that the BSA has also been amended by approximately 20 Acts and, in the process, has more than doubled in size.

The past 12 months, in particular, have been a period of rapid change. The digital television and retransmission provisions in the BSA have been modified, new categories of international broadcasting and datacasting licences have been introduced and the BSA has finally gained regulations. A number of new statutory instruments have also been made by the ABA and Senator Alston, the Minister for Communications, Information Technology and the Arts (Minister). Over the same period, the Australian Broadcasting Authority (ABA) has been busy conducting investigations into pay TV expenditure on local content and the acquisition and use of sports rights. Lastly, waiting in the Parliamentary wings are two amending Bills.[4]

While space does not permit a full treatment of all these developments, the main changes and any related proposals that remain on the drawing board are outlined below.

MEANING OF "BROADCASTING SERVICE"

One of the main parameters on the ambit of broadcasting regulation is the definition of "broadcasting service" in s 6(1) of the BSA:

> ***broadcasting service*** *means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:*
>
> (a) *a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or*
>
> (b) *a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or*
>
> (c) *a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.*

This "technology-neutral" definition of "broadcasting service" was seen as a significant reform when the BSA was introduced and has also recently been carried forward into the *Copyright Act 1968*.[5] However, since the BSA was enacted, advancements in technology have made it possible to stream audio and audio-visual content to multiple users via the internet.

By the middle of last year there was considerable uncertainty as to whether these sorts of transmissions were caught by the definition of section 6 of the BSA. The issue was resolved on 27 September 2000 after the Minister determined that "a service that makes available television

INSIDE THIS ISSUE

CONTENTS

programs or radio programs using the internet, other than a service that delivers television programs or radio programs using the broadcasting service bands" was not a "broadcasting service".

"Internet" is not defined in the BSA. However, the Macquarie Dictionary, 3rd Edition, defines "Internet" as "the communications system created by the interconnecting networks of computers around the world". Thus, transmissions streamed over the internet have been distinguished from "broadcasting services" solely on the grounds of their means of carriage.

PAY TV LOCAL CONTENT REQUIREMENTS

Drama programs

The regulatory policy of the BSA indicates that the degree of regulation imposed on services should accord with their degree of influence on community views.[6] Since subscription television was first introduced into Australia in 1995 its influence has continued to increase. Between December 1995 and December 1999 the number of pay TV subscribers rose from 65,000 to 1,160,000.[7] With the growth in audience penetration there has been increased scrutiny of expenditure on local content.

On 23 December 1999 new enforceable arrangements were introduced into the BSA[8] in relation to the drama expenditure requirement for licensees providing a "subscription television drama service". [9] Such licensees are required, as a licence condition, to spend at least 10% of their total program expenditure on new Australian and/or New Zealand drama programs.

Unlike the previous provision[10] the new legislation requires that expenditure by channel providers be taken into account in assessing expenditure. If a channel provider supplies a channel that is televised on a subscription TV drama service, the 10% requirement is calculated by reference to the channel provider's total program expenditure on the channel. It is a condition of the pay TV operator's licence that any shortfall in drama expenditure by the channel provider must be made up in the following financial year.

In the lead up to the amendments, issues were raised about the appropriate treatment of development expenses. On 18 December 1999, the Minister referred the matter to the ABA for investigation. Under the current provisions pre-production expenditure can only be counted once principal photography has commenced.[11] Hence, nomination of development expenses must be deferred until filming begins, or altogether if the project does not proceed to production. Last year the ABA released a discussion paper with a proposal for more flexible treatment of development expenditure. It was proposed that, subject to some conditions, script development expenditure made to third parties on bona fide projects should count towards the expenditure requirement even if production does not ensue.

Under the proposal, projects would need to have Australian or New Zealand producers and scriptwriters. The ABA received 13 submissions, most of which, with the notable exception of the Screen Producers Association of Australia,[12] gave support to the proposal. The ABA provided its final report to the Minister on 18 December 2000. The ABA can not publish reports of Ministerially-directed investigations except at the direction of the Minister.[13]

Documentaries

Pay TV operators are currently not under any obligation to spend minimum sums on local documentary programs. On 18 December 1999 the Minster directed the ABA to investigate and report on whether there should be a requirement on subscription television licensees providing documentary channels to spend a minimum amount on "new eligible documentary programs" and if so, what models of regulation were appropriate. "Eligible documentary program" is defined in the Direction as a documentary program that is an Australian, Australian/New Zealand, New Zealand or official co-production (within the meaning of the *Australian Content Standard*) for Pay TV documentary channels. The ABA released a discussion paper in September 2000 asking for submissions on the key

question "Is the regulation of pay TV documentary channels necessary to guarantee an adequate level of support for the production of new eligible documentary programs for the cultural benefit of Australian audiences?" In response it received 14 submissions. The ABA provided its final report to the Minister on 16 February 2000.

SPORTS BROADCASTS

Anti-siphoning

It is almost a truth universally acknowledged that Australians love watching sport. In fact, in a national survey in 1999, Brian Sweeney & Associates found that 96% of people surveyed watched sport on television. [14] In recognition of the importance of sports broadcasting to Australian social and cultural life, the BSA contains anti-siphoning rules to "ensure, on equity grounds, that Australians will continue to have free access to important events"[15].

Under the rules, the Minister issues a list of sporting events which it is considered should be available free to the public.[16] The events currently listed include football, cricket, basketball and netball matches, tennis and golf tournaments motor races and the Melbourne Cup. There is a standard condition on subscription television licences that licensees are not permitted to acquire the rights to televise events on the list unless a free-to-air television broadcaster already has the right to televise the event.[17] Subscription broadcasters can only negotiate subsequent rights to provide complementary, or more detailed, coverage of events.

Even if the rights are not acquired by a free-to-air broadcaster, a subscription television licensee must apply to the Minister for an event to be delisted before it can acquire the rights. The Government recently introduced a Bill[18] into Parliament that, if passed, would mean events on the anti-siphoning list would be automatically delisted 6 weeks before the start of the event.[19] Under the proposal, the Minister could publish a declaration in the Gazette to stop the event being automatically delisted. To do this, the Minister would need to be satisfied that at least one commercial television broadcaster or national broadcaster has not had a reasonable opportunity to acquire the rights to televise the event.[20]

On 22 December 2000, the Minister directed the ABA to undertake an investigation into which events should be removed from, and which events should be added to, the anti-siphoning list and the date or dates on which protection should expire for listed events. In conducting the investigation, the ABA is to have regard to the policy that an event should only be included in the anti-siphoning list if the event has been consistently broadcast by free-to-air television broadcasters in the past five years. The ABA released an issues paper on 15 February 2001. Ten submissions were received by 12 April 2001. A report is to be provided to the Minister by 30 June 2001.

Anti-hoarding

The anti-siphoning rules only restrict the acquisition of rights to an event. They do not ensure that the event is actually broadcast by the rights holder. This has long been a bone of contention. In 1997 the first session of 'The Ashes' test in England was not televised by the Nine Network, who chose not to displace its scheduled prime time programming. Nine did offer the first session to the ABC and the SBS, who both declined the offer.

Since 23 December 1999 the BSA has had provisions governing the televising of events once the rights are acquired by a free-to-air broadcaster. These provisions, known as the "anti-hoarding" or "must offer" rules, were introduced to discourage free-to-air broadcasters and program suppliers from hoarding the rights to provide live coverage of important events or tournaments.

The Minister has the power to designate events or series of events that are subject to the anti-hoarding rules and the offer time for such events. The "must offer" rules provide that the minimum offer time is 30 days before the start of the event or series, unless the Minister is satisfied that it should be closer to the start. The offer period is a minimum of 7 days. If a commercial television licensee does not intend to use all its rights to a listed event it must offer to transfer the unused rights to the ABC or SBS for a nominal charge. Similar provisions apply to the commercial television licensee's program supplier. If they do not intend to televise the event, the ABC and SBS must offer the rights to listed events to each other.

On 29 February 2000 the ABA was directed by the Minister to investigate which events, or series of events, he should consider putting on the anti-hoarding list and the offer times which should apply in relation to those events or series of events. In conducting the investigation, the ABA was to have regard to the policy that an event or series of events should not be listed:

> *unless there is a widespread public expectation, based on past practice, that the event or series will be televised live and in full on free-to-air television or the event or series has so grown in importance in the public's perception over time that it warrants full live free-to-air coverage.*[21]

The ABA released an issues paper in June 2000. In response, it received 49 submissions. A report on the investigation was provided to the Minister on 31 August 2000. To date, the only event listed on the anti-hoarding list is a World Cup Soccer tournament listed in July 2000.

COMMERCIAL RADIO STANDARDS

In August 2000, following investigations into radio stations 2UE, 3AW, 5DN and 6PR, the ABA published its final report on the Commercial Radio Inquiry. The report found that the *Commercial Radio Codes of Practice* were not operating to provide appropriate community safeguards within a significant proportion of current affairs programs.[22]

Subsequently, the ABA determined three standards under section 125 of the BSA that operate as licence conditions on commercial radio broadcasting licences. The Standards came into effect on 15 January 2001 and will end on 2 April 2003, by which time the ABA has said that it expects adequate Codes to be in place.[23]

The Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 requires on-air and off-air disclosure of commercial agreements held by presenters of current affairs programs and on-air disclosure in current affairs programs of the payment of production costs by advertisers and sponsors. Licensees must also ensure that presenters of current affairs programs have a condition of employment that they comply with the BSA, the Codes and the Standard.

The Broadcasting Services (Commercial Radio Compliance Program) Standard 2000 requires commercial radio licensees to formulate, implement and maintain training and compliance programs for staff on the BSA, the Standards and the Codes. *The Broadcasting Services*

(Commercial Radio Advertising) Standard 2000 requires licensees to ensure that advertisements are clearly distinguished from other programming.

INTERNATIONAL BROADCASTING LICENCES

On 21 December 2000, the BSA was amended to provide for a new category of licences for international broadcasting services.[24] International broadcasting services are services targeted, to a significant extent, to audiences outside Australia, where the means of delivery involves use of a radiocommunications transmitter inside Australia.

An application for an international broadcasting licence must be made to the ABA.[25] It can be rejected if the ABA is not satisfied that the applicant is an Australian company or a suitable applicant or if the Minister for Foreign Affairs is of the opinion that the international broadcasting service is likely to be contrary to Australia's national interest.[26] Before allocating an international broadcasting licence, the ABA must provide a report to the Minister for Foreign Affairs about whether the proposed service complies with the international broadcasting guidelines.[27] The ABA has formulated written guidelines in relation to international broadcasting services.[28]

It is a condition of international broadcasting licences that licensees keep records of all programs broadcast for 90 days.[29] Licences can also be cancelled or suspended if the Minister for Foreign Affairs is of the opinion that the service is contrary to Australia's national interest.[30] The ABA can make nominated broadcaster declarations allowing international broadcasting licences and related transmitter licences to be held by different persons, as long as the transmitter licence is held by an Australian company.[31]

RETRANSMISSION OF FREE-TO-AIR BROADCASTS

A number of small communities would be unable to obtain adequate reception of free-to-air broadcasts without the retransmission of television and radio signals. As a consequence, special provisions exist in the BSA to protect persons who retransmit national, commercial and community broadcasting services.[32] Such persons have immunity from suit in respect of the content retransmitted and do not require individual broadcasting service licences under the BSA.

On 4 March 2001 amendments to the retransmission provisions came into effect. Subsection 212(1) of the BSA now provides that:

> (1) *Subject to this section, the regulatory regime established by this Act does not apply to a service that does no more than:*
>
> a) *re-transmit programs that are transmitted by a national broadcasting service; or*
>
> (b) *re-transmit programs that are transmitted by a commercial broadcasting licensee;*
>
> (i) *within the licence area of that licence; or*
>
> (ii) *outside the licence area of that licence in accordance with permission in writing given by the ABA.*

"Retransmission" in subsection 212(1) does not include retransmission by free-to-air broadcasters of their own services. Conditions have been placed on the licences of commercial and community broadcasters that prohibit them from retransmitting outside the licence area unless the retransmission is accidental or necessary or permission has been given by the ABA.

Subsection 212(2) of the BSA provides that:

> *No action, suit or proceeding lies against a person in respect of the retransmission by the person of programs as mentioned in subsection (1).*

The immunity from suit extends beyond the BSA to affect actions for infringement under the *Copyright Act 1968*. The *Copyright Act* was amended on 4 March 2001[33] to insert a new technology-neutral right of communication to the public that applies to, amongst other things, broadcasts.[34] In addition, a statutory licence scheme has been inserted into the *Copyright Act* to remunerate underlying copyright owners for retransmissions of free-to-air broadcasts.[35]

At the same time that the *Copyright Act* was amended, changes were made to section 212 of the BSA. As a result, with one important exception, subsection 212(2) does not prevent an action, suit or proceeding against a person under the *Copyright Act* for the infringement of copyright subsisting in a work, sound recording or cinematograph film if it is re-transmitted under subsection 212(1).[36] The exception is if the re-transmitter is a self-help provider acting in accordance with subsection 212(1).

"Self-help provider" includes non-profit bodies, local government bodies, and certain types of companies and other persons whose sole or principal purpose is the retransmission of a signal to obtain or improve reception in a particular community or place.[37] The Minister can also determine that a person is a declared self-help provider.[38]

It is worth noting that subsection 212(2A) does not refer to the infringement of copyright subsisting in a "broadcast". Thus, subsection 212(2) continues to operate to prevent the holder of copyright in the broadcast itself from bringing a *Copyright Act* suit against the re-transmitter.

THE DAWN OF DIGITAL TELEVISION

Digital terrestrial television broadcasting (DTTB) commenced in metropolitan areas of Australia on 1 January 2001. On the same date the legal framework for DTTB was substantially amended.[39] Important amendments were made to Schedule 4 of the BSA and to the Commercial Television and National Television Conversion Schemes formulated by the ABA.

Under the amendments, commercial and national television broadcasters are required to simulcast their analog signal in standard definition television format (SDTV) and, to some extent high definition television format (HDTV) for a period of 8 years (the triplecast requirement).[40] HDTV is the premium version of digital television, offering picture and sound quality that is close to cinema quality while SDTV is a lesser quality version with picture quality equivalent to analog television but without snow or ghosting.

An amendment to the *Copyright Act* means that broadcasters will not infringe copyright when making a copy of a broadcast solely for the purposes of complying with the simulcast requirements.[41] Any copies are to be destroyed within 12 months from the end of the simulcast period.[42] The duration of the simulcast period is to be reviewed by 1 January 2006.

Transmissions of analog are to cease at the end of the simulcast period.[43] After that time, commercial and national broadcasters are to transmit in digital mode using the channels allotted by the ABA having regard to the need to plan for the most efficient use of the spectrum and other relevant policy objectives.[44] All transmitter licences are to be surrendered to the ACA and new transmitter licences will be issued to reflect the ABA's channel planning decision.

As an exception to the simulcast requirement, free-to-air broadcasters are allowed to provide digital enhancements to their main simulcast programs if the subject matter of the enhancement is closely and directly linked to the primary program.[45] They are also permitted to multichannel 2 television programs where a sporting or other event overruns its time into a regularly scheduled news program and to provide an electronic program guide (EPG). [46] National broadcasters now have considerably more freedom to multichannel than the commercial broadcasters. They are permitted to multichannel certain television programs including programs that deal with regional matters and educational, science, religious, health and arts-related programs.[47]

Regulations under the BSA came into effect on 1 January 2001 setting captioning standards and HDTV quotas for commercial television licensees and national broadcasters in non-remote areas. HDTV transmissions must commence as soon as practicable and in any event within 2 years of the start of SDTV transmissions. There is a requirement to simulcast a minimum 20 hours per week of HDTV programming after the first two years of the simulcast period in addition to the SDTV version of the service.[48] If passed, a Bill currently before Parliament would allow the ABA to determine that specified programs or advertising transmitted in HDTV may be different from the SDTV or analog version of the service.[49]

To receive DTTB consumers need to purchase either a new digital television or a set top box to convert the signal so that it can be watched on an analog television set. A basic box, without interactive capability, went on sale in January 2001 for $699. Less than 3,000 digital television set top boxes had been sold by the end of March.[50]

The ABA has attempted to facilitate the take-up of set top boxes, by exempting certain demonstration programs from the simulcast requirement in clause 6 of Schedule 4 of the BSA. On 21 December 2000 the ABA determined that a commercial broadcaster could transmit certain programs on the SDTV version of its service that are different to those on the analog version.[51] The transmissions must be for the sole purpose of allowing the benefits of transmission in digital mode to be demonstrated to potential purchasers of digital reception equipment. To be exempt, the programs can only be transmitted between 11 am and 5 pm on weekdays, after 5 pm on one weekday and between 10 pm and 5 pm on weekends with no more than 44 hours of exempt programs per week. The determination came into effect on 1 January 2000 and will cease on 30 June 2001. The ABA made a second determination on 25 January 2001 to permit Channel 9 to demonstrate the One-day International Cricket Finals in SDTV in cities where it was restricted from broadcasting the program in analog mode.[52]

Before more sophisticated boxes become available and appealing to viewers important issues will need to be resolved. These include the development of a common operating system for the set-top boxes, management of the channel sending requested information back to viewers, set top box compliance and management of the electronic program guides.[53] In April 2001 FACTS established an industry-wide Digital TV Strategy Group to try to jointly overcome these hurdles. The strategy group includes the commercial networks and the ABC and SBS.

POTENTIAL FOR DATACASTING SERVICES

Content licences

One of the great drawcards of DTTB is the potential for viewers to receive interactive television. On 1 January 2001 the BSA and the *Radiocommunications Act 1992* (Radcom Act) were amended to provide for a new type of content offering, known as datacasting services. A datacasting service is defined broadly as a service that delivers content in any form using the broadcasting services bands.[54] If a service is provided in accordance with the conditions of a datacasting licence, the service is deemed not to be a broadcasting service.[55] The delivery of datacasting-like services outside the broadcasting services bands remains unregulated.

While the definition of "datacasting service" is wide enough to include the delivery of television and radio programs, the licences to provide datacasting services are subject to significant content restrictions which were "designed to encourage datacasting licensees to provide a range of services that are different to traditional broadcasting services" [56]. Licence conditions prevent datacasting licensees from transmitting certain genres of television programs and certain audio content .[57] Prohibited genres include drama, sports, music, infotainment or lifestyle, documentary and "reality television" programs.[58] There are also restrictions on the transmision of news, current affairs, financial, market or business information bulletins and weather bulletins.[59]

Datacasting licensees are specifically allowed to provide, amongst other things; information-only programs (including those that facilitate transactions), educational programs, interactive computer games, content in the form of text or still images, parliamentary broadcasts, advertising or sponsorship material,EPGs, ordinary electronic mail and Internet carriage services.[60]

An anti-avoidance provision has been inserted into the BSA to prevent the use of Internet carriage services to circumvent the genre conditions.[61] Datacasting licensees are also subject to general conditions of licence, that are similar to the standard conditions on broadcasting licences.[62]

Datacasting licences will be allocated by the ABA on written application, and are subject to a suitability requirement.[63] The ABA has approved an application form and a fee of $350 per licence. Once datacasting commences, an industry group representing datacasting licensees will be required to develop codes of practice for registration in consultation with the ABA.[64] Datacasting licences are transferable but unlike commercial broadcasting licences, they are issued without any entitlement to a transmitter licence.

Transmitter licences

Amendments to the Radcom Act have created a new type of transmitter licence called a datacasting transmitter licence (DTL). If the ABA is satisfied that the DTL licensee will not be involved in selecting the content to be transmitted, the DTL holder can obtain a nominated datacaster declaration that permits it to multiplex the transmission of datacasting content for one or more content providers.[65]

DTLs are to be allocated by the Australian Communications Authority (ACA) under a price-based allocation system for a period of ten years with the expectation of a single 5 year renewal. They can be transferred but cannot be held or controlled by commercial or national broadcasters.[66]

It has been said that a consequence of placing limitations on datacasting that separate it from commercial television will be that new entrant datacasters will be reluctant to commit resources to datacasting services thus leaving incumbent TV broadcasters to enter this field in the future.[67] The ACA called for applications to bid for 16 DTLs in 8 major metropolitan licence areas in January 2001. There are currently 3 prospective bidders,only one of which is seeking a DTL in all 8 licence areas. The ACA is yet to set the reserve price for the DTLs and a date for the auction.

Commercial and national television broadcasters are prohibited from commencing datacasting services in major metropolitan areas until 1 January 2002 or when a new datacasting entrant commences.[68] After that time, commercial and national television broadcasters can use residual capacity on their digital channels to carry datacasting services. To transmit these services they must hold a content licence issued by the ABA.[69]

Commercial broadcasters will be required pay a datacasting charge set by the ACA and collected by the ABA. In March 2001, the ACA published its Report to the Minister proposing that the datacasting charge be set as a percentage of datacasting revenue with the percentage set at the same level as is paid by a commercial broadcaster for broadcasting revenue.

ADDITIONAL COMMERCIAL TELEVISION LICENCES

Further amendments to the BSA on 1 January 2001 permit the ABA to allocate an additional commercial television licence to an existing licensee in a single-station market or, under certain circumstances, in a two-station market.[70] In a 2-station market there are three mechanisms available for allocation of the additional licence; an application by a joint venture company owned by the two existing licensees, separate applications from both licensees and price-based allocation or an application by one of the existing licensees.

For the additional licence to be allocated, the 2 existing licensees must give joint written notice to the ABA within 90 days of a designated time specifying one of the above alternatives. The requirement for a joint notice means that one of two licensees effectively has a veto power over the provision of a third service by the other licensee. Amendments that would remove this veto power are currently before Parliament.[71]

OPEN NARROWCASTING SERVICES

Since the beginning of the year, there have been two important developments concerning transmitter licences for the provision of open narrowcasting services on radio. First, on 1 March 2001, following a direction from the Minister, the ACA imposed a "use it or lose it" condition on low powered open narrowcasting (LPON) radio licences.[72] The condition was introduced to encourage the licensees to provide a service and to discourage hoarding of the licences. Licensees now have until 1 September 2001 to start providing a service or risk the cancellation or non-renewal of that licence by the ACA, or its delegate, the ABA.

Second, on 1 March 2001, a direction from the Minister to the ACA concerning high powered open narrowcasting (HPON) radio licences came into effect.[73] Under the direction, HPON radio licensees now have a limited right to renewal of their transmitter licences if the ABA decides to continue to make the spectrum that they have been operating on available for open narrowcasting services.

CONCLUSION

What was designed as "a simple regulatory scheme for broadcasting services that applies irrespective of the technical means of delivery"[74] is becoming increasingly complex and difficult to navigate. The clarification of the meaning of "broadcasting service" to exclude Internet streaming also means that broadcasting regulation is becoming less technology-neutral.

Many of the recent changes have anticipated or been in response to significant changes in the communications environment, such as the technological capabilities of digital transmission and the increased take-up of pay television services in Australia. It seems obvious that, like the industries it regulates, the BSA is in a transitional period. Not surprisingly, there are increasing calls for a major overall of the legislation that will facilitate the convergence of broadcasting technologies.[75] Perhaps, as in 1992, these voices for change will rise to a crescendo that results in a new framework of broadcasting, or even communications, regulation. In the meantime however, history teaches us that the introduction of new communications technology, and the cultural changes that inevitably accompany it, will make broadcasting regulation anything but simple.

1 The BSA gained royal assent on 14 July 1992 & commenced on 5 October 1992

2 Explanatory Memorandum to the Broadcasting Services Bill 1992, p 2

3 Ibid.

4 Broadcasting Legislation Amendment Bill 2001 & Broadcasting Legislation Amendment Bill (No 2) 2001

5 *Copyright Amendment (Digital Agenda) Act 2000* which came into effect on 4 March 2001

6 Section 4 BSA

7 Cited in Productivity Commission Report on Broadcasting, 3 March 2000, p. 79

8 Broadcasting Services Amendment Act (No 3) 1999

9 A subscription TV drama service is defined as a "subscription television broadcasting service devoted predominantly to drama programs" (s 103B BSA)

10 Section 102 BSA (now repealed)

11 Section 103H BSA

12 Submission dated August 2000

13 Section 179 BSA

14 Cited in Productivity Commission Report on Broadcasting, 3/3/2000 p. 423

15 Explanatory Memorandum to Broadcasting Services Bill 1992, p 63

16 Section 115(1) BSA

17 Clause 10(e) of Schedule 2 of BSA

18 Broadcasting Legislation Amendment Bill (No 2) 2001

19 Ibid. clause 5 (subsection 115(1AA))

20 Ibid. clause 5 (subsection 115(1AB))

21 ABA (Investigation) Direction (No 1of 2000)

22 Commercial Radio Inquiry, Final Report of the ABA, p 4

23 Ibid. p 5

24 Broadcasting Services Amendment Act 2000 inserted a new Part 8B

25 Section 121FA BSA

26 Sections 121FB, 121FC & 121FD BSA

27 Subsection 121FB(1) BSA

28 Broadcasting Services (International Broadcasting) Guidelines 2000

29 Section 121FF BSA

30 Section 121FL BSA

31 Section 121FLC BSA

32 Section 212 BSA

33 Copyright Amendment (Digital Agenda) Act 2000

34 Section 87 Copyright Act

35 Part VC Copyright Act

36 Subsection 212(2A) BSA

37 Section 212A BSA

38 Section 212B BSA

39 By the Broadcasting Amendment (Digital Television & Datacasting) Act 1999

40 Clause 6 Schedule 4 BSA

41 Section 47AA & section 110C Copyright Act

42 Subsection 110C(3) & clause 20 Copyright Regulations 1969

43 Clause 6(3) & 19(4) of Schedule 4 BSA

44 Ibid.

45 Clauses 6(8) & 19(8) Schedule 4, BSA

46 Ibid.

47 Clause 19(7B) Schedule 4, BSA

48 Clause 37E & 37F Schedule 4, BSA

49 Broadcasting Legislation Amendment Bill (No 2) 2001 clause 8 (would insert clause 37EA in Sch 4)

50 Anne Davies, Sydney Morning Herald, Business News Section, p 27

51 Determination under Clause 6 of Schedule 4 to the BSA (No 1) 2000

52 Determination under Clause 6 of Schedule 4 to the BSA (No 1) 2001

53 Jane Schulze, Australian, 20/04/01, Business News Section, p 26

54 Section 6 BSA

55 Clause 6 Schedule 6, BSA

56 Explanatory Memorandum to the Broadcasting Services Amendment (Digital Television & Datacasting) Act p 4

57 Clauses 14,16 & 21 Schedule 6, BSA

58 Clause 13(1) Schedule 6, BSA

59 Clause 15(1) Schedule 6, BSA

60 Clause 17-20 Schedule 6, BSA

61 Clause 23B Schedule 6, BSA

62 Clause 24 Schedule 6, BSA

63 Clause 8 Schedule 6, BSA

64 Clause 28 Schedule 6, BSA

65 Clause 45 Schedule 6, BSA

66 Sections 54A & 102B Radcom Act

67 Marett Leiboff, Media & Arts Law Review 5 (4) December 2000 p 243

68 Subsections 100A(1C) & 100B(2C) Radcom Act

69 Subsections 100A(1B) & 100B(2B) Radcom Act

70 Sections 38A & 38B BSA

71 Broadcasting Legislation Amendment Bill (No. 2) 2001, clauses 1-3

72 ACA Media Release No. 13, 1 March 2001

73 ACA (HPON Transmitter Licences) Direction No 1 of 2001

74 Explanatory Memorandum to the Broadcasting Services Bill 1992, p 2

75 Productivity Commission Report into Broadcasting, 3 March 2000, pp 47-59

The views expressed in this article are those of the author and not necessarily those of the Australian Broadcasting Authority.

Suzanne Shipard is a Senior Lawyer at the Australian Broadcasting Authority.

Interactive Television Emerges

Lisa Vanderwal takes a critical view of the Broadcasting Services Act and examines the emerging building blocks of interactive television.

Interactive television is an amalgamation of television-related services provided through different mediums. While television is typically a one-way transmission, interactive television empowers the viewer. Whether its a choice of camera angles, selection of player profiles for a sporting event or otherwise, such participation may well keep lounge lizards switched on and in their seats.

Although the medium is relatively new it is already subject to heavy regulation. The purpose of this article is to provide a high-level review of the current regulation of the building blocks of interactive television. Broadcasting, datacasting, video-on-demand and internet streaming will be considered.

BROADCASTING

Section 6(1) of the *Broadcasting Services Act* 1992 Cth ("**Act**") defines a "broadcasting service" as a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether delivered by the radiofrequency spectrum, cable, optical fibre, satellite or any other means or combination of those means, but does not include:

- a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images);
- a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
- a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.

The *Broadcasting Services Amendment (Digital Television and Datacasting) Act* 2000 Cth ("**Amendment Act**") amends the Act. The purpose of the amendments are to refine the arrangements for the introduction of digital television and establish a system for the regulation of datacasting services.[1]

Among other things the amendments impose restrictions on the number of broadcasters (effecting Government policy that no new commercial television licences are issued prior to 31 December 2006), restricts the ABC and SBS to limited multi-channelling prior to 2005 and restricts the broadcast of digital program enhancement content and electronic program guides.

The amendments also impose obligations on commercial broadcasters in relation to the transmission of standard definition digital television ("**SDTV**") and high definition digital television ("**HDTV**"). For example, in addition to a commercial television broadcaster in non-remote areas transmitting SDTV from 1 January 2001 that broadcaster must transmit HDTV of at least 20 hours per week from the end of 2002.[2]

The compulsory broadcast of HDTV is not without its critics. The Productivity Commission has expressed the view that mandating 20 hours per week of HDTV is a substantial policy risk. The cost of HDTV equipment is likely to inhibit broadcasters spending money on developing new services for the majority of their customers, who will not have the costly equipment required to receive HDTV transmissions. In addition, tying up spectrum by mandating transmission of the high definition signal in that spectrum is likely to prevent market development of other services that would be more widely used and appreciated by customers. As a result, the Productivity