

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

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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

Commission recommends that HDTV should, rather than being mandatory, be left to market forces.³ It is hard to disagree with this policy.

DATACASTING

A datacasting service is defined in the Amendment Act as a service which delivers content in the form of text, data, speech, music or other sounds, visual images (animated or otherwise) or in any other form or combination of forms to people with appropriate equipment for receiving the content. The service must be delivered using the broadcasting services bands.⁴

Under the datacasting scheme the type of television and audio material that may be transmitted, however, is severely restricted.⁵ In relation to television, restrictions are imposed based on whether the matter which is transmitted is a "category A" or "category B" television program.

Section 14 of Schedule 6 of the Act restricts datacasters from transmitting matter that would, if broadcast on a commercial television broadcasting service, be a category A television program or an extract from such a program. Category A programs, which a datacaster is prohibited from transmitting, are:

- sports programs;
- music programs;
- infotainment or lifestyle programs;
- documentaries;
- "reality television";
- children's entertainment;
- light entertainment or variety programs;
- compilation programs;
- quiz or games shows;
- comedies; or
- programs that consists of a combination of any or all of the above.

Datacasters may however transmit extracts of category A programs, provided the extract is 10 minutes or less, is not combined with other such extracts to create the whole or a majority of a particular category A program, and it does not appear that the licensee intended to combine the extract with other such extracts to create a particular category A program.⁶

There are similar restrictions in relation to category B television programs. A

category B television program is defined as a:

- news or current affairs program;
- financial, market or business information bulletin;
- weather bulletin; or
- bulletin or program that consists of a combination of any or all of the above bulletins or programs.⁷

However, information only programs, educational programs and foreign language news bulletins are expressly excluded from category B programs⁸

The conditions which apply to datacasters in relation to category B television programs vary depending on whether or not a bulletin or program is presenter-based. Broadly speaking a datacaster may transmit a presenter-based bulletin or program if it is no longer than 10 minutes and is not part of a rolling or continuously updated service. The content of a later bulletin or program may not be altered until at least 30 minutes after the start of the first bulletin.⁹

In the event that a category B television program is not presenter-based, however, it may be transmitted by a datacaster where the bulletin or program can only be accessed by a viewer who makes a selection from an on-screen menu and:

- consists of a single item of news;
- is a financial, market or business information bulletin or program that deals with a single topic;
- is a compilation of items, the subject of which is the same or directly related, and is no longer than 10 minutes; or
- is a weather bulletin or program.¹⁰

The result of this confusing scheme of exceptions and restrictions is that datacasters are left with a limited scope in which to operate at a profit. In addition to the above limited permitted transmissions, datacasters may provide information-only programs, educational programs, interactive computer games, content in the form of text or still visual images, parliamentary broadcasts, ordinary electronic mail and internet content.¹¹

Not surprisingly, the incumbent broadcasters are in favour of these restrictions. Their argument is that unrestricted datacasting could undermine their substantial investment in upgrading their technology to facilitate digital transmission.

There is a strong argument, however, that the limitations on datacasting go too far in addressing this concern and are likely to prevent consumers from accessing the full potential of the digital age.¹² The Productivity Commission has expressed the view that the datacasting scheme places considerable and arbitrary limitations on the innovative, interactive and additional services made possible by the technology of digital transmission.¹³

Further, the Productivity Commission notes a number of anomalies in the scheme:

- while free-to-air broadcasters are required to show children's programs for social and cultural reasons, datacasters are prohibited from doing so;
- datacasters can show news and parliamentary proceedings, but not current affairs; and
- datacasters will be prevented from showing documentaries, but not educational programs, when the 2 categories are sometimes indistinguishable.¹⁴

As a result, while several organisations had shown interest in the new technology, most have been unable to develop a business case that would guarantee profits due to the strict restrictions placed on datacasting. This has resulted in a level of disinterest in datacasting most recently manifested by Telstra's decision to pull out of the datacasting auctions.

As it stands the major content providers have shunned the auction and only 3 of the 7 original bidders remain. The remaining companies at the time of writing are UK infrastructure major NTL, Gresham Partners subsidiary Barwix, which has links to Prime Television, and Perth-based Australian Datacasting Corporation. It appears that a combination of poor competition and a restrictive datacasting scheme may potentially stifle innovation and leave the public wishing for what might have been.

VIDEO-ON-DEMAND

To determine whether video-on-demand is regulated by the Act the nature of video-on-demand and the definition of "broadcasting service", as set out above, need to be considered.

A true video-on-demand service exists where an end-user is able to start, stop, rewind and forward the video content.¹⁵ Such a service, programs being made

available on demand on a point-to-point basis, is not within the section 6(1) definition of "broadcasting service" under the Act and indeed appears to be expressly excluded under paragraph (b) of the definition of Broadcasting Services in the Act.

However, this does not mean that there are no regulatory issues. Video-on-demand is most likely to be delivered via satellite or cable to enable the two-way communication indicative of interactivity. Both of these media have established regulation.

For example, in relation to delivery by cable, access to the relevant cable and regulation under the *Telecommunications Act 1997 Cth* should be considered. To provide video-on-demand by cable, providers would have to access the unconditioned local loop, effectively controlled by Telstra. The unconditioned local loop has recently been made a Declared Service under the *Trade Practices Act 1974 Cth*. Consequently a number of parties have notified the Australian Competition and Consumer Commission of access disputes with Telstra, many of which are still being decided.

Considering also the *Telecommunications Act 1997 Cth*, it is notable that a "content service" includes an on-line entertainment service (for example a video-on-demand service or an interactive computer game service).¹⁶ A "content service provider" is a person who uses or proposes to use a listed carriage service (being a carriage service between different points, one of which must be within Australia) to supply a "content service" to the public. At least one end-user of the content service must be outside the immediate circle of the supplier of the content service.¹⁷

As a service provider, a provider of video-on-demand services must also comply with the relevant service provider rules.¹⁸ These are set out in Schedule 2 of the *Telecommunications Act 1997 Cth* and include any service provider determinations issued by the Australian Communications Authority, of which there are none at this stage.¹⁹

INTERNET STREAMING

In July 2000 the Government expressed concern about whether streamed audio and video over the internet may be considered "broadcasting services". Senator Alston noted this was an issue relating to convergence and proposed to

refer the matter to the Australian Broadcasting Authority for detailed consideration over the following 12 months.

Understandably, this provoked an outcry from the internet industry which sought to avoid the regulatory burden imposed by the Act. The image of the internet as the final frontier, the last bastion of free communications and the dissemination of information, was at stake.

Whether in acknowledgement of the criticism of the time, or recognition of the significance of the issue, Senator Alston responded quickly. Within 2 months a Determination was issued, which pronounced that services which make television and radio programs available using the internet, other than services using the broadcasting services bands, are not "broadcasting services".²⁰

It appears, therefore, that radio and television services delivered via the internet over bands other than the broadcasting services bands may develop largely unregulated. Naturally, this does not mean that there is no regulation. Increasingly, regulation of adult content such as the amendments to the Act in the *Broadcasting Services Amendment (Online Services) Act 1999 Cth* must be considered. In this respect the Government's increasing confidence in formulating regulation where internationally there is no benchmark is laudable.

CONCLUSION

Australia is developing a reputation for legislating in response to the development of new technologies, and this area is no exception, nor is it free of the intense debate and criticism that has surrounded previous legislation relating to emerging technologies – witness for example the debate surrounding the *Electronic Transactions Act 1999 Cth*, the *Broadcasting Services Amendment (Online Services) Act 1999 Cth* and the *Interactive Gambling (Moratorium) Act 2000 Cth*.

The difference in this instance is that the amendments to the Act appear to have been poorly thought-out solutions to a politico-economic situation, rather than a bona fide attempt to direct development of a new medium. It remains to be seen whether the Act will in fact stifle development in the areas covered by this paper, and in particular datacasting, or whether the overly prescriptive regulations will spur the Australian

market to develop innovative ways in which to operate in this increasingly regulated environment.

11 Bills Digest No. 179 1999/2000, *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000* at 1

2 Section 37E, Schedule 4 *Broadcasting Services Act 1992 Cth*; see also section 37F for national broadcasters and sections 37G-H for remote areas

3 Productivity Commission, *"Broadcasting Inquiry Report"* (2000) at 252 et seq

4 Section 6 *Broadcasting Services Act 1992 Cth*

5 See Schedule 6, Part 3, Division 1 *Broadcasting Services Act 1992 Cth* in relation to television and schedule 6, Part 3, Division 2 in relation to audio content- this article will discuss television content only

6 See sections 13-14, Schedule 6, *Broadcasting Services Act 1992 Cth*

7 Section 15, Schedule 6 *Broadcasting Services Act 1992 Cth*

8 Section 13(3), Schedule 6, *Broadcasting Services Act 1992 Cth*

9 Section 16(2), Schedule 6 *Broadcasting Services Act 1992 Cth*

10 Section 16(3), Schedule 1 *Broadcasting Services Act 1992 Cth*

11 See Schedule 6, Part 3, Division 1, *Broadcasting Services Act 1992 Cth*

12 Bills Digest No. 179 1999/2000, *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000* at 11

13 Productivity Commission, *"Broadcasting Inquiry Report"* (2000) at 256 et seq

14 *Ibid*

15 See the discussion in Costelloe, *"Internet Television and Radio Services- The Streaming Controversy"* (2000) 19 *Communications Law Bulletin* 9 at 12

16 Section 15(1)(c) *Telecommunications Act 1997 Cth*

17 Section 97(1) *Telecommunications Act 1997 Cth*

18 Section 101 *Telecommunications Act 1997 Cth*

19 Section 98(1) *Telecommunications Act 1997 Cth*; note also, section 98(2) provides that the rule set out in section 152BA(2) of the *Trade Practices Act 1974* is a service provider rule for the purposes of the *Telecommunications Act 1997 Cth*

20 "Determination under paragraph (c) of the definition of "broadcasting service" (No.1 of 2000)"

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