
A Temporary Fix For Temporary Reproductions?

and fast Internet content to users against the expectation of copyright owners to exploit copyright content.

¹ The author would like to acknowledge the assistance of Carolyn Dalton, Special Counsel at Minter Ellison.

² References in this article to CSPs are intended to apply to networks which are generally in the same position with respect to caching.

³ Geoff Huston (1999) 'Web Caching' *The Internet Protocol Journal*, September vol 2(3) at page 2.

⁴ Section 10, Copyright Act 1968 defines 'communicate' to mean 'make available online or electronically transmit'.

⁵ See the 'ALCC submission to the inquiry into the *Digital Agenda Bill*' at: <http://www.alia.org.au/advocacy/copyright/digital.agenda/1999.11c.html> at section 7, although note that this issue has now been resolved following the *US Free Trade Agreement Implementation Act 2004*.

⁶ Section 111A, *Copyright Act 1968* is an identical provision for other subject matter (audio-visual material).

⁷ *Copyright Amendment (Digital Agenda) Bill 1999*.

⁸ Section 22(6), *Copyright Act 1968*.

⁹ Section 43A(2), *Copyright Act 1968* says that the exception in section 43A(1) does not apply where the communication for which the temporary copy is made is an infringement of copyright. A corresponding section 111A(2), *Copyright Act 1968* also applies to audio-visual material.

¹⁰ Submission from the Copyright Subcommittee of the Intellectual Property committee of the Business Law section of the Law Council in respect of the *Copyright Amendment (Digital Agenda) Bill* at page 8; The Australian Digital Alliance 'Comments on April 2000 Interim Report' at page 5.

¹¹ Phillips Fox 'Digital Agenda Review: Report and Recommendations', 2004 at page 47.

¹² Section 116AA, *Copyright Act 1968*.

¹³ Section 116AH(1), *Copyright Act 1968* specifies a number of conditions that must be satisfied before the exception can be relied upon.

¹⁴ Section 116AG(4), *Copyright Act 1968* lists the remedies and section 116AG(2), *Copyright Act 1968* specifies that no monetary relief can be awarded.

¹⁵ Section 116AB, *Copyright Act 1968*.

¹⁶ Hosting copyright infringing material would require the reproduction and communication of copyright works without the permission of the owner (thus infringing). Similarly, providing links to infringing material can be a copyright infringement if it amounts to 'authorisation' of infringing communications. See *Universal Music v Cooper* [2005] FCA 972.

¹⁷ Section 200AAA(1), *Copyright Act 1968*.

¹⁸ Section 200AAA(2), *Copyright Act 1968*.

¹⁹ Section 200AAA(3), *Copyright Act 1968*.

²⁰ Section 200AAA(4), *Copyright Act 1968*.

²¹ In the earlier drafts of the Bill and Explanatory Memorandum there was a requirement that the material be removed after the course of instruction but this was not retained.

²² At paragraph 125.

²³ Philip Blenkinsop (2007) 'Belgian Court rules against Google over Copyright' *Reuters*, 13 February. See <http://www.copiepresse.be/copiepresse.google.pdf>

²⁴ *Blake A. Field v. Google Inc.*, 412 F. Supp. 2d 1106. See http://www.eff.org/IP/blake_v_google/google.nevada_order.pdf

VOIP Services – An exception to the Customer Service Guarantee?

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Certain types of Voice Over Internet Protocol (**VOIP**) services may soon be effectively exempt from the Customer Service Guarantee (**CSG**). The draft

Telecommunications (Customer Service Guarantee) Direction No. 1 of 1999 (Amendment No. 1 of 2007) (Direction), released for public

comment in January by the Minister for Communications, Information Technology and the Arts, the Hon Senator Helen Coonan, proposes to

remove certain types of VOIP services from the range of services to which the CSG applies. This article discusses the current CSG framework and the changes proposed to “better accommodate” VOIP services.¹

What is the CSG?

The CSG (that is, the *Telecommunications (Customer Service Guarantee) Standard 2000 (No. 2)*), has its legislative basis in the *Telecommunications (Consumer Protection and Services Standards) Act 1999* (Cth) (the *Act*). Under section 115 of the Act, the Australian Communications and Media Authority (ACMA) may make performance standards on various matters which must be complied with in relation to carriage services.² ACMA may only make such standards where the Minister³ directs it to do so pursuant to section 124 of the Act. The CSG was made as directed by the Minister under the *Telecommunications (Customer Service Guarantee) Direction No. 1 of 1999*.

The CSG first commenced on 7 July 2000 and has since undergone a number of amendments, the most recent of which commenced on 18 February 2004. ACMA describes the CSG as “a standard designed to encourage service improvement and guard against poor service”⁴ in the context of certain telephone services (that is, *CSG services*).⁵

The CSG sets out minimum performance requirements which must be met by carriage service providers⁶ in relation to CSG services. Specifically, carriage service providers are required to work within specified maximum timeframes in relation to the connection of services, rectification of faults and service difficulties, and appointments with customers. As an incentive for meeting the minimum performance requirements,⁷ service providers are liable to compensate customers where the timeframes are exceeded.

With some exclusions, CSG services⁸ are essentially “standard telephone services” as defined in section 6 of the Act. In summary, a standard telephone service is a carriage service for the purpose of:

- voice telephony; or
- another form of communication equivalent to voice telephony that would be required to be supplied to a particular end-user with a disability for whom voice telephony is not practical, so as to comply with the Disability Discrimination Act 1992 (Cth).

Also, the end-user supplied with the service for such purpose must be able to communicate, by means of the service, with each other end-user who is supplied with the same service for the same purpose, whether or not the end-users are connected to the same telecommunications network.

The services currently excluded from the definition of “CSG service” (notwithstanding that they may be standard telephone services) are public mobile telecommunications services, designated basic rate ISDN services and satellite services, except where such services are supplied in fulfilment of the “universal service obligation” as it relates to standard telephone services. This is the obligation to ensure that standard telephone services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business.

As currently defined, “CSG service” is broad enough to capture certain VOIP services. Providers of those VOIP services are, therefore, required to comply with the CSG.

What is VOIP?

VOIP is a form of digital technology that enables voice communication by encoding the communications into packets for transmission using the Internet Protocol. VOIP services can take various forms, including those that are based on a personal computer and enable users to make and receive calls while on the Internet, and those that are analogous to traditional telephone services⁹ and which allow users to make and receive calls to or from any other telephone. VOIP services are software-based services, and are therefore often provided by an entity distinct from the provider of the Internet access service over which the VOIP service is delivered.¹⁰

As compared with traditional telephone services, VOIP is able to offer increased transmission efficiency as well as more advanced call processing and features. A key feature of VOIP services is that users are able to make and receive calls at any location where there is access to a broadband connection (this is referred to as “nomadicity”).¹¹

The take-up of VOIP has been strong in the corporate market in Australia,¹² and is also used by providers within their networks for trunk transmissions.¹³ With the increasing availability and adoption of broadband in the consumer market, it is expected that there will also be an increase in the provision of VOIP services to and from consumers’ premises in the future. It is this type of VOIP service that the draft Direction is concerned with.¹⁴

Proposed changes to the CSG

The draft Direction proposes to amend the definition of “CSG service” by specifically excluding “VOIP services”. A “VOIP service” is defined in the draft Direction as “a carriage service that enables a voice call to originate and/or be received on customer equipment at the premises to which the service is supplied by means of the Internet protocol”.

However, a VOIP service is *not* excluded from the definition of “CSG service” if:

- the service is supplied or offered to be supplied in fulfilment of the universal service obligation (i.e. the existing qualification that already applies in relation to the other excluded services); or
- both of the following apply:
 - (a) the service is supplied or offered to be supplied as a “VOIP CSG service”; and
 - (b) the entity providing the service and the entity providing the Internet access service over which the service operates are either:
 - the same legal entity (sub-paragraph (f)(i) of the proposed definition of “CSG service”); or

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- two different entities between whom there is a contractual relationship (sub-paragraph (f)(ii) of the proposed definition of “CSG service”).

A “VOIP CSG service” is defined in the draft Direction as:

“a service that is:

- (a) a standard telephone service; and
- (b) a VOIP service; and
- (c) offered for supply, or supplied, for use solely or predominantly on a fixed basis at a customer’s premises; and
- (d) accessible without the continuous use of a personal computer;¹⁵

but does not include such a service when it is used outside the premises to which it is supplied solely or predominantly for use.”

The proposed definitions of “CSG service” and “VOIP CSG service” are discussed further in the following section.

Background to the proposed changes

The draft Direction was instigated by the findings and recommendations in the *Examination of Policy and Regulation Relating to Voice Over Internet Protocol (VOIP) Services* report, which was published by the Department of Communications, Information Technology and the Arts (*DCITA*) on 22 November 2005 (the *VOIP Report*).¹⁶ Specifically, the proposed changes are in response to Recommendation 16 in the VOIP Report, which was made based on the view that the CSG is not an appropriate form of regulation for all types of VOIP services to which the CSG currently applies.¹⁷

Recommendation 16 provided that the CSG should only apply to a VOIP service where:

- the service is supplied in fulfilment of the universal service obligation;
- or

- (i) the service is the primary service provided to the premises; and
- (ii) the VOIP service provider is also the carriage service provider.

The basis for the above components of the Recommendation and the manner in which the draft Direction purports to give effect to these components (as explained in the Explanatory Statement released with the draft Direction (*Explanatory Statement*)) is discussed below.

(1) “Supplied in fulfilment of the universal service obligation”

The first component of Recommendation 16 does not introduce any new concept into the existing CSG framework. Rather, it seeks to ensure the continuation of the long-standing, general practice under the Australian telecommunications regime whereby any standard telephone service provided in fulfilment of the universal service obligation (regardless of the technology used) should be subject to the same requirements that apply to the provision of traditional telephone services (including the CSG).¹⁸

The draft Direction provides that a VOIP service which would otherwise be excluded from the definition of “CSG service” will nonetheless be regarded as a CSG service if it is provided in fulfilment of the universal service obligation. This proviso, which (as discussed above) also applies in relation to the other types of services currently excluded from the CSG, already forms part of the current definition of “CSG service”, and, therefore, is not a material change to the CSG.¹⁹

(2) “Primary service provided to the premises”

This component of Recommendation 16 is based on the view that the CSG should only apply to VOIP services that are akin to, or are supplied or offered as a close substitute for, traditional telephone services.²⁰ The argument is that some VOIP services do not possess the characteristics that would make them substitutes for the traditional telephone service and therefore do not warrant the regulatory burden of the CSG, which was

originally designed to apply to traditional telephone services and other services supplied in fulfilment of the universal service obligation.²¹ The example of such VOIP services given in the Explanatory Statement is that of services that are only operable via a personal computer.²²

The draft Direction introduces the “primary service” concept by way of the new term, “VOIP CSG service”. The definition of “VOIP CSG service” is intended to capture the characteristics of a VOIP service that would make it a close substitute for a traditional telephone service. It purports to do this by referring to the extent to which the service is supplied on a fixed basis (see paragraph (c) of the definition) and the type of customer equipment used in supplying the service (see paragraph (d) of the definition).²³ The definition recognises the ability for VOIP services to be used on a nomadic basis, but specifically excludes the application of the CSG where the service is actually being used nomadically outside the premises to which it is supplied for use (see the concluding clause of the definition).²⁴

(3) “VOIP service provider is also the carriage service provider”

The basis for this final component of Recommendation 16 is the finding in the VOIP Report that it would be impractical and inequitable to impose CSG compensation payment obligations on VOIP providers where they have no relationship with the provider of the Internet access service over which the VOIP service is provided, who may be the party actually responsible for the breach of a CSG obligation.²⁵ The VOIP Report considered it equally impractical and inequitable to allow a VOIP provider to seek contributions for CSG payments from the underlying Internet access service provider (as might be permitted under the CSG framework) with whom they have no contractual supply relationship, and who is possibly not even aware that customers are using VOIP services on its Internet access service.²⁶

The requirement that the provider of a VOIP service be the same entity as the provider of the underlying Internet access service in order for the CSG to

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apply (in addition to the VOIP service being the “primary service”) is set out in sub-paragraph (f)(i) of the proposed definition of “CSG service” (as discussed above).

The draft Direction goes further than Recommendation 16 in that it includes an additional circumstance in which the CSG will apply to a VOIP service (that is also the “primary service”), namely where the VOIP service provider and underlying Internet access service provider have a contractual relationship. This is set out in sub-paragraph (f)(ii) of the proposed definition of “CSG service”. The rationale behind this is that it is practical and equitable to apply the CSG to a VOIP service where there is a contractual framework between the two providers which could govern the implementation of the CSG (including rights of contribution to CSG payments).²⁷

Conclusion and next steps

If the draft Direction takes effect, ACMA will be required to amend the CSG in accordance with the Direction, or to revoke the current CSG and determine a new standard that complies with the Direction.²⁸

Arguably, the amendments proposed under the draft Direction do nothing more than reflect the practical reality that the CSG as a regulatory measure is not the right fit for all VOIP services, since for some VOIP services its application may be impossible or at least impractical and/or inequitable. It therefore seems essential that some adjustment be made to the current CSG framework to remove its application to those VOIP services, and that such adjustments are inevitable.

It is also reasonable to expect that the exclusion of certain VOIP services from the CSG will be accepted in principle by industry and consumer groups given that the VOIP Report and its recommendations were prepared with the aid of submissions from industry and consumer groups in response to a call for submissions.²⁹ Notwithstanding this, we can probably expect differing views to emerge from the responses to the draft Direction as to the exact scope and type of VOIP services to be excluded.

Assuming changes do take effect such that some VOIP services are excluded from the CSG, the more important underlying question remains, being the question of what, if any, consumer safeguards should be implemented in relation to the VOIP services that are no longer covered. With the goal of adopting the “best approach” to the regulation of VOIP services, the Minister has invited suggestions for alternative approaches to be included in submissions made in response to the draft Direction.³⁰ It will be interesting to see what regulatory approaches are proposed and ultimately adopted to address the challenges presented by this new age of voice communication.

The closing date for submissions to DCITA in response to the draft Direction was 23 February 2007. Since writing, five submissions have been published on the DCITA website.³¹ As at 31 May 2007, DCITA was in the process of considering the submissions.

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¹ Department of Communications, Information Technology and the Arts (DCITA), “Customer Service Guarantee (CSG) and Voice Over Internet Protocol (VOIP) services”, http://www.dcita.gov.au/communications_and_technology/consultation_and_submissions/customer_service_guarantee_csg_and_voice_over_internet_protocol_voip_services at 22 January 2007.

² A “carriage service” is defined in section 7 of the *Telecommunications Act 1997* (Cth) as “a service for carrying communications by means of guided and/or unguided electromagnetic energy”.

³ That is, the Minister for Communications, Information Technology and the Arts.

⁴ Australian Communications and Media Authority (ACMA), “Customer Service Guarantee for phone users FAQs”, http://www.acma.gov.au/WEB/STANDARD/pc=PC_1782 at 15 February 2007.

⁵ The CSG also applies to “enhanced call handling features” defined in section 4 of the *Telecommunications (Customer Service Guarantee) Direction No. 1 of 1999* (and also in section 4 of the CSG) as call waiting, call forwarding, call barring, calling number display and calling number display blocking features.

⁶ As defined in section 7 of the *Telecommunications Act 1997* (Cth).

⁷ ACMA, *Guide to the Telecommunications (Customer Service Guarantee) Standard 2000* (No. 2) as amended (Issue No. 1 of 2004), at p3.

⁸ The current definition of “CSG service” is in section 4 of the *Telecommunications (Customer Service Guarantee) Direction No. 1 of 1999* and section 4 of the CSG.

⁹ That is, services supplied over the public switched telephone network (PSTN).

¹⁰ DCITA, *Explanatory Statement – Telecommunications (Customer Service Guarantee) Direction No. 1 of 1999* (Amendment No. 1 of 2007), at p3.

¹¹ DCITA, *Examination of Policy and Regulation Relating to Voice Over Internet Protocol (VOIP) Services*, November 2005, at p17.

¹² *Ibid*, Finding 2 at p4.

¹³ DCITA, above note 10, at p1.

¹⁴ *Ibid*.

¹⁵ The note to the definition clarifies that a “personal computer” is intended to include a desktop, laptop or smaller computing device (e.g. a personal digital assistant) that provides a range of functions, not solely or predominantly VOIP.

¹⁶ The report is available at http://www.dcita.gov.au/_data/assets/pdf_file/34194/VOIP_Report_November_2005.pdf.

¹⁷ DCITA, above note 10, at p3.

¹⁸ *Ibid*, at p5.

¹⁹ In the proposed definition of “CSG service”, this proviso is set out in paragraph (e).

²⁰ DCITA, above note 10, at p3 and 6.

²¹ *Ibid*, at p3.

²² *Ibid*.

²³ DCITA, above note 10, at p6-7.

²⁴ *Ibid*, at p7-8.

²⁵ *Ibid*, at p3.

²⁶ *Ibid*.

²⁷ DCITA, above note 10, at p9. The argument is that this situation is analogous to the supply of traditional telephone services by resellers who source PSTN services from an underlying provider under a contract and resupply the services at the retail level.

²⁸ *Telecommunications (Consumer Protection and Services Standards) Act 1999* (Cth), section 125(3).

²⁹ DCITA, above note 11, at p20. The VOIP Report indicates that 49 submissions were received.

³⁰ Above note 1.

³¹ The submissions were received from Communications Alliance, CTN, Optus, TEDICORE and Telstra. The submissions

are available from http://www.dcita.gov.au/communications_and_technology/consultation_and_submission/customer_service_guarantee_csg_and_voice_over_internet_protocol_voip_services

[ns/customer_service_guarantee_csg_and_voice_over_internet_protocol_voip_services](http://www.dcita.gov.au/communications_and_technology/consultation_and_submission/customer_service_guarantee_csg_and_voice_over_internet_protocol_voip_services)

How e-commerce has required tax authorities to re-evaluate how they impose taxation

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Introduction

The Internet has brought with it new ways of conducting commerce and delivering new types of products. The border-ignorant nature of the Internet has made the application of traditional taxation principles, largely dependent on borders to define jurisdiction, much harder to apply. This article looks at some of the effects on taxation of e-commerce in both Australia and abroad, and the reaction by tax authorities to secure taxation revenue.

Key Taxation Concepts

Source and residence are two critical concepts used by tax authorities to establish jurisdiction for the imposition of taxation.

Residence

In essence, any income received by individuals or companies is taxed by the sovereign entity they are considered to reside in for taxation purposes. Generally, Australian residents are taxed on their income derived from sources worldwide. The residency tests used in Australia to determine residency have evolved through the common law, with tax rulings providing specific guidance. With regard to companies, determining residency for taxation purposes can be found in section 6(1) of the *Income Tax Assessment Act 1936* (Cth) which defines a "resident" to include a company incorporated in Australia, or a company that carries on business in Australia that has either central management and control in

Australia, or whose voting power is controlled by Australian residents.¹

Source

The source of income is usually defined by the geographical boundaries of the tax jurisdiction that income is earned in. In addition to this, a tax state will usually have jurisdiction to tax any income derived from business conducted within its borders. Whether income is regarded as sourced in Australia is determined by judicial rules which vary depending on the type of income involved. The starting point of any determination is the approach that Isaacs J formulated in *Nathan v Federal Commissioner of Taxation*, which is what "a practical man would regard as a real source of income".²

In addition, Double Tax Treaties between trading nations are used to settle nations' jurisdictional claims to tax where an entity is resident in one country, but income is deemed sourced in another. Generally, source income principles will take precedence over residence principles.³

Taxation Concepts and E-commerce

Due to the fact that, traditionally, a company wishing to conduct trade and commerce with a nation would require some form of physical presence, the principles of source and residency have, until recently, been adequate for determining jurisdiction to tax. However, e-commerce challenges the need for this physical requirement to engage in commerce with a country's residents. No physical presence is in fact now necessary for a foreign

company to sell products and services to Australian residents.

The Australian Tax Office (*ATO*) is concerned by this, because foreign companies can use Australia as a customer base and effectively conduct business in Australia without the ATO being able to easily tax the business conducted. Furthermore, it is possible for businesses to move their entire operations to a low-tax or tax-free state, whilst essentially retaining their Australian customer base and capitalising on efficient global logistics for delivery of tangible products. Such a scenario makes it difficult for the ATO to assert jurisdiction over the company using the physically rooted concepts of source and residency, and illustrates just how non-residents can use Australian markets (or those of any other jurisdiction) as a customer base.

Tax jurisdiction is further challenged by electronic intangible sales performed completely electronically or online.⁴ Existing tax rules worldwide are not adequately addressing enterprises utilising such e-commerce. For example, the U.S. Treasury has listed the following four major barriers to taxation imposed by electronic intangible sales:

1. identification of the buyer and seller in an electronic transaction is often difficult;
2. where the transaction takes place is often difficult to identify due to the borderless nature of the Internet;