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2011: The Year Ahead

Lawyers from Allens Arthur Robinson take a look at some key areas of likely reform for the communications sector in 2011.

It is widely recognised that the Australian legal and regulatory environment is always playing catch-up to the media and telecommunications industry and developments in technology.

The past few years have seen extraordinary developments in this space. Increases in network connection speeds, battery life, network capacity and unicast video uses, have contributed to the enormous take-up of new and converged services.[1] Last year's mobile data traffic was three times the size of the entire global internet in 2000.[2] Mobile *video* traffic constituted 49.8 percent of that data traffic and it is expected that this will increase to 66 percent by 2015.[3] 2010 was also the year of the tablet, which brought with it a data usage profile five times higher than that of a smart phone.[4]

While consumer habits and business models have been undergoing a rapid transformation for several years, the regulation of media and telecommunications industry has simply teetered on the cusp of change. 2011 looks to be the year that may tip these regulatory changes into reality.

The top five areas to watch in the regulatory space for 2011 are set out below:

1. The National Broadband Network

The National Broadband Network (***NBN***) has finally moved beyond political debate, with construction in pilot areas underway and the key tenets of the Commonwealth's policy either now enshrined in legislation or edging their way through the legislative process.

The *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (the ***CCS Act***), which received assent on 15 December 2010, has significantly altered the competitive dynamics of the Australian telecommunications industry by requiring Telstra to undergo either a voluntary structural separation or enforced functional separation. As a result, industry participants who provide retail services based on the acquisition of wholesale services from Telstra, will now deal with either NBN Co (if Telstra structurally separates and NBN Co concludes binding definitive agreements with Telstra) or with either NBN Co and a wholesale/network arm of Telstra that is at arm's length from Telstra retail (if Telstra functionally separates and NBN Co cannot conclude binding agreements with Telstra). NBN Co and Telstra are currently working towards finalising commercial terms and associated operational details of the deal, with a view to Telstra putting the proposal to its shareholders later this year.

Debate on the *National Broadband Network Companies Bill 2011* (the ***Companies Bill***) and the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010* (the ***Access Bill***) resumed in February this year. Both the Companies Bill and the Access Bill have now passed both houses of Parliament after vigorous debate in the Senate and amendment to certain key provisions. The Companies Bill establishes the ownership, operating and governance arrangements of NBN Co to ensure NBN Co will adhere to its wholesale-only mandate. It also establishes the conditions for the eventual sale of the Commonwealth's stake in NBN Co and sets out the reporting and governance obligations which must be complied with once NBN Co is no longer a wholly-owned Commonwealth company. The Access Bill builds on the Companies Bill by introducing additional rules relating to the sup-

1 Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2010-2015, February 2011, p8.

2 ibid, p1.

3 ibid.

4 ibid, p2.

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ply of services by NBN Co. The Access Bill contains new transparency and non-discrimination rules aimed at protecting the wholesale-only, open-access nature of the NBN initiative. It also seeks to establish a level playing field for 'superfast' broadband networks by imposing certain obligations on other owners of such networks.

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The NBN creates a unique set of regulatory requirements and the technological opportunities it enables provide the impetus for a regulatory overhaul of the entire industry. This change also underpins the remaining four areas to watch, as the NBN facilitates convergence, increases the numbers of consumers using and depending on technology, increases the demand for spectrum and the need to protect online transactions.

2. The Convergence Review

The last time the media industry underwent a major regulatory overhaul was in 2006/2007. That period saw changes to media ownership and control rules, the introduction of legislation to govern the transition to digital television and digital radio, and the reform of online content regulation in response to the infamous "Big Brother" incident.

Five years on, services that were once distinct have now converged. Fragmented and dedicated home networks carrying one or more analogue or digital services have transitioned to unified IP-based networks that can deliver multiple applications and services.

These developments have once again emphasised the need for a review of the regulatory regime. As a result, in December 2010, the government commenced the Convergence Review, announcing that a committee of independent experts will examine and provide advice to the government on an appropriate policy and regulatory framework for a converged environment. The Department of Broadband Communications and the Digital Economy (***DBCDE***) has released terms of reference to guide the work of the Committee in conducting the review.

The parameters of the Convergence Review are still unclear, though early statements suggest that it may not be as comprehensive as expected. The terms of reference focus on media and content regulation. While telecommunications are relevant to convergence, the government has indicated that, as a result of forthcoming changes to the telecommunications industry such as the NBN, it would be premature to conduct a broad review of telecommunications obligations.

The government has also stated that due to the Australian Law Reform Commission's review of the National Classification System, classification issues are beyond the scope of the review. However, given that the review is to consider "appropriate policy settings to ensure the adequate reflection of community standards and the views and expectations of Australian citizens", and that the *Broadcasting Services Act 1992* (Cth) (***BSA***) currently authorises regulatory schemes for classification of content over spectrum and the internet, the review will likely touch on the appropriateness of the current regulatory arrangements in a converged environment.

Similarly, the government does not propose to explicitly consider further changes to the anti-siphoning list as part of the Convergence Review, because Senator Conroy only recently announced a new anti-siphoning list that is to apply to listed events until 31 December 2015.

Likely areas of re-examination include Australian content quotas which act to ensure the production and dissemination of Australian content and which currently apply to commercial television and radio but not to internet broadcasting. It is expected that the Convergence Review will address this by recommending policies that promote the production and distribution of Australian content in relation to several forms of publication.

Media ownership and control restrictions are also likely to be revisited, as convergence means that these no longer sit easily with the reality of the diversified delivery of content. For example, the current restrictions on the control of broadcasting licences on the basis of audience reach, becomes less relevant where those same broadcasters may be able to reach 100 percent of the population via internet broadcasting.

3. Focus on the Consumer

As new technologies become ubiquitous, dependence on these technologies increases and so too do consumer complaints. Telecommuncations Industry Ombudsman (***TIO***) complaint numbers rose nine percent to 87,264 in the six months prior to 31 December 2010, compared to the preceding six months.[5]

Although the Communications Alliance (***CommsAlliance***) argues that the increase in complaints reflects the increased uptake of telecommunications services[6], regulators have focused on the treatment of consumers, complaints handling and the perceived deficiencies of the current self-regulatory regime.

As a consequence, both the DBCDE and the ACMA have recently taken steps to enable continuing reforms to telecommunications consumer safeguards.

ACMA's Reconnecting the Customer Inquiry, which is due to report its findings in the coming months, aims to identify the causes of, and recommend solutions for, what it regards as systemic problems in the Australian telecommunications sector with the way it deals with its consumers. The inquiry is focused specifically on customer service and complaints handling practices.

At the same time, the CommsAlliance Telecommunications Consumer Protection Code is under review and ACMA has been outspoken in its willingness to force changes to the existing regime. Registration of a mandatory standard by ACMA in the event that it is dissatisfied with the Code and unconvinced of the adequacy of the existing self-regulatory framework, remains a real possibility.

The Telecommunications Industry Ombudsman Scheme discussion paper recently released by the DBCDE requests submissions on options for reforming the TIO scheme and ensuring that it has the appropriate tools to deal with complaints.

4. Spectrum

The scarcity of spectrum and demands placed upon it by wireless access services and spectrum intensive technologies such as HDTV and IP based applications, remains a continuing issue for both the industry and ACMA, which has a mandate to manage the radiofrequency spectrum in Australia.

In March 2011, the ACMA published the Five Year Spectrum Outlook 2011-2015, which, amongst other things, outlines upcoming spectrum projects in Australia.

The most significant of these relates to the reallocation of spectrum that will become available as a result of digital switch-off. Digital switch-off has now commenced and steps are being taken to restack the digital television channels and realise the digital dividend spectrum. The auction of spectrum licences in respect of the digital dividend spectrum is expected to take place in late 2012, before completion of the digital switchover and restack processes.

Interestingly, the CCS Act prevents Telstra from acquiring or operating spectrum useful for advanced wireless broadband (including 520 MHz to 820 MHz and 2.5GHz to 2.69GHz), unless a structural separation undertaking is in force, in addition to Telstra divesting its interest in hybrid-fibre coaxial networks and subscription television broadcasting licences (however, the Minister may exempt Telstra from this latter requirement if it submits an adequate structural separation undertaking). Should Telstra be prevented from acquiring or operating that spectrum, opportunities will emerge for other market participants to bid for that spectrum without competition from Telstra, should it become available.

Another significant spectrum project is the reallocation of spectrum licences due to expire over the next few years. The ACMA has not yet announced whether these licences will be renewed, and if so, on what terms.

5. Electronic transactions

As the number of electronic transactions increase, so too does the need for effective regulation that protects online users whilst encouraging efficient and effective online transactions.

Following agreement at a Standing Committee of Attorneys General last year to enact a Model Electronic Transactions Bill (***Model Bill***), Attorney-General Robert McClelland has introduced into the House of Representatives the Electronic Transactions Amendment Bill 2011 (***ETA Bill***).

The Model Bill reflects the need for clarity in the current use of electronic contracting. Already in effect in New South Wales, it has been introduced in Tasmania, Western Australia and South Australia. Once enacted in all jurisdictions, the Government will accede to the UN Convention on the Use of Electronic Communications in International Contracts with the aim of facilitating international trade.

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The ETA Bill broadens the types of electronic signatures that are valid to include, in addition to methods reliable for the purpose, those proven in fact to have identified the person. It will be important for parties to agree up-front on the communication methods that will be relied on in an arrangement if a narrower definition is required.

It also broadens the definition of 'transaction' to include any statement, declaration, demand, notice or request, including offers and acceptances of offers, that a party makes in connection with the formation or performance of a contract.

The rules relating to time of dispatch and receipt of electronic communications have been amended so that dispatch is when the electronic communication leaves the information system under the control of the sender rather than when the electronic communication enters the information system outside the control of the sender. The time of receipt is when the electronic communication becomes capable of being retrieved by the addressee at the electronic address designated by the addressee rather than when it comes to their attention. Where the communication is made to an electronic address not designated by the addressee, receipt is when it is available and the addressee is aware of it.

The ETA Bill confirms the common law presumption that, unless clearly indicated to the contrary, an electronic proposal to form a contract is to be considered not an offer but an invitation to treat. It also clarifies that transactions formed through automated message systems are valid. It provides that a natural person will be allowed to correct an 'input error' they have made in transacting with a party through an automated message system where there is no opportunity to correct the error. The communication can be withdrawn by notification being given as soon as possible, so long as a benefit has not been received through the transaction. The ETA Bill states that this is not a right to rescind or otherwise terminate a contract but the notes confirm that in some circumstances the withdrawal may invalidate the entire communication. This measure is clearly directed at providing consumer protection but creates an unintended potential for what could in effect be a 'cooling off' period. The provision may be need to be amended to provide greater clarity in line with the fundamental purposes of the amendment. In any event, the implication of this change is that the owner of a website making use of automatic message systems should ensure their automatic message systems are designed to offer opportunities to correct errors prior to contract formation.

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5 "Vodafone Boosts TIO Complaints", *Exchange Daily*, 28 February 2011.

6 Long, G. "CommsAlliance defends industry against poor performance", *Communications Day*, Issue 3934, 28 February 2011.