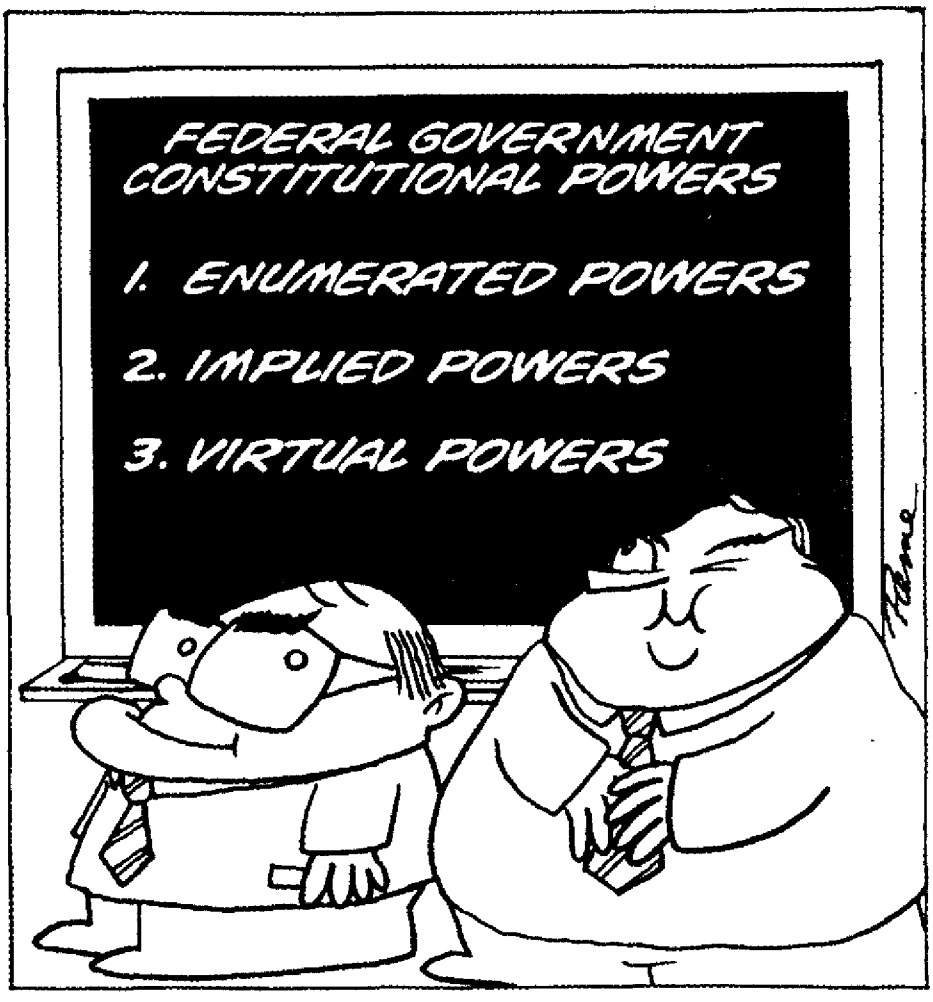
The Communications Power: The Real Threat to States' Rights?

Holly Raiche looks at the gradual extension of the Commonwealth's communications power and questions the basis of some recent legislation.

In 1983, the Tasmanian Dams Case[1] was applauded (or feared) as authority for the Commonwealth, through its external affairs power, expanding its legislative power into areas formerly reserved for the states. Today, it may be the Federal Government's power to make laws with respect to 'postal, telegraphic, telephonic, and other like services'[2] which is the bigger challenge to the Australian States' plenary powers.

Arguably, Placidum 51(v) was intended to ensure Federal control over the *means of transmission* of communications: the postal service, the telephone, the telegraph, or whatever else was developed to *transmit* communications. However, the power has been interpreted more broadly, with recent Federal legislation extending to both content and activities carried by the transmission systems.

Given the range of material carried over transmission systems, including the internet, such as gambling, distance education, or medical diagnosis and treatment, it may be time to ask not only what the head of power was intended to cover but how far Placidum 51(v) extends - or should extend - in today's online environment.



EARLY INTENTIONS

The communications power includes, apart from the words 'postal, telegraphic and telephonic' the phrase 'other like services'. No other head of power is followed by that phrase, so it must be asked both what the enumerated powers were intended to cover and whether or how the phrase 'other like services' was intended to extend the head of power.

Quick and Garran's classic text on Australian constitutional law sheds little light both on what Placidum 51(v) was intended to cover and what 'other like services' was intended to mean.[3] Quick's later response on 'other like services' is a quote from *Attorney-General for New South Wales v Brewery Employees' Union*. [4] In discussing the term, Chief Justice Sir Samuel Griffith spoke of 'advancing civilisation with new developments, now unthought of....

> *For instance, I cannot doubt that the powers of the Legislature as to posts and telegraphs extend to wireless telegraphy and to any future discoveries of a like kind, although in detail they may be quite different from posts and telegraphs and telephones as known in the nineteenth century'.*[5]

Arguably, this interpretation of 'other like services' does not extend the head of power beyond that of control over the *means of transmission*. Wireless telegraphy was simply the latest transmission technology on the horizon, but a *means* of transmission nevertheless.

WIRELESS TELEGRAPHY ACT 1905 AND REGULATIONS

The *Wireless Telegraphy Act 1905* can be viewed as simply extending the exclusive right of the Postmaster-General to control the *means* of transmission to the latest technology - wireless telegraphy - radio. Under the Act, the Postmaster General had the exclusive right to establish, erect, maintain and use stations for transmitting and receiving messages

by wireless technology both within Australia, and the power to licence stations for the purpose of transmitting or receiving those messages.[6]

Yet the Postmaster-General used his power over the *means* of transmission of wireless technology to impose restrictions that went far beyond simply transmission issues into issues of content.

Under Regulations issued under the Act, broadcasting licensees were subject to licence conditions including the right of the Postmaster to require licensees to broadcast items 'deemed desirable' by the Postmaster-General and 'be subject to such censorship as the Postmaster-General determines' as well as giving the Postmaster-General the right to approve advertisements being broadcast.[7]

The *Wireless Telegraphy Act* and regulations, therefore, raise two issues. Did the head of power extend to this new technology, radio. And did the head of power permit the Postmaster-General, using his powers to licence this new transmission system, to impose licence requirements that went beyond transmission to other issues such as the ownership or control of the licensees or the content of the broadcasts.

The High Court decisions in *Brislan* and *Herald and Weekly Times* provide some answers.

BRISLAN

In *R v Brislan; ex parte Williams*[8] the High Court found that federal regulation of wireless telegraphy - transmission using the electromagnetic energy spectrum - was within the Federal Government's legislative powers under Placidum 51(v).

The main issue before the High Court, for the purposes of this paper, was whether the *Wireless Telegraphy Act 1905* was *ultra vires* the Constitution.

The arguments made were that Placidum 51(v) did not mention the word broadcast, that broadcasting is different in character from postal, telegraphic or telephonic services: those services are forms of communications between individuals, whereas broadcasting is the dissemination of information or entertainment to the public at large. Therefore, broadcasting cannot be seen as another 'like service'.[9]

This was supported by the definition of wireless telegraphy in the *Wireless Telegraphy Act* which referred to wireless telegraphy as transmitting or receiving 'messages' - which, it was argued, means inter-personal communication rather than dissemination of information to the public.

Dixon J agreed with this argument but was the only judge to do so. The rest of the Court upheld radio broadcasting as coming under Placidum 51(v), although for slightly different reasons.

Chief Justice Latham characterised the similarity between postal, telegraphic and telephonic services as their ability to transmit messages at a distance. In wireless telegraphy,

> *There is a distance between the transmitter and receiver, and the function of the appliance referred to in the Act is to assist in bridging that distance. ... The essential characteristic of a message appears to be found in communication from a distance, as distinguished from direct communication between persons who are face to face.* [10]

And later in his judgment:

> *The common characteristic of postal, telegraphic and telephonic services, which is relevant in this connection is, in my opinion, to be found in the function which they perform. They are, each of them, communications services.*[11]

It was a characterisation which was largely accepted by Justices Rich, Evatt and Starke.[12]

To paraphrase the decision, the Federal power in Placidum 51(v) is to regulate transmission systems, the means by which people communicate at a distance, whether that communication is inter-personal or broadcast from one or a few sources to a few or many recipients. [13]

If the Federal Government has the exclusive power to control the establishment, maintenance and use of communications systems, what additional requirements can be imposed on those licensed to own or operate those systems?

We have already seen that the Postmaster-General used his powers under the *Wireless Telegraphy Act* to impose content rules on those holding licences to broadcast. The High Court decision in *Herald and Weekly Times* suggests additional answers.

HERALD AND WEEKLY TIMES

The *Herald and Weekly Times* case was a challenge by those holding interests in television licences to the ownership and control rules under the *Broadcasting and Television Act 1942-1965* which imposed limitations on the ownership or control of commercial television stations. Under the rules, a person could not hold 'prescribed interests' in more than a specified number of television stations. And the definition of prescribed interest in the Act was set at a very small shareholding - well below what would be considered as control of a company under corporate law.

The Plaintiffs argued that the ownership restrictions were so removed from what was considered under company law to be in control of the television licences that the rules could not be characterised as laws with respect to television services.[14]

The High Court did not agree. Kitto J, in the main majority judgment argued:

> *Plainly, a law relaxing in the manner the prohibition of television transmission is a law with respect to television services; and, equally, any law regulating or qualifying the power to grant television licences, or subjecting television licences to conditions upon breach of which they may be suspended or revoked, is a law with respect to such services.*[15]

To the argument that the ownership rules were not a law with respect to Placidum 51(v), Kitto J said

> *The main attack, however, is directed against so much of Div 3 [the ownership rules] as, if valid, creates offences consisting of certain kinds of conduct on the part of persons who are not the holders of television licences. Plainly enough, the attack must succeed unless the conduct which is thus made unlawful is so relevant to the subject of television services that a law forbidding it is a law with respect to that subject.*[16]

Kitto J concluded that the conduct was

relevant:

> *... the offence provisions are setting up a barrier against, not indeed, the probability, but the possibility that a person who may be able, by reason of any of a number of legal or business relationships, to influence the exercise of the rights conferred by another television licence.*[17]

The message from the judgment is clear. Any restrictions or obligations placed on transmission licences, however remote the subject of the restrictions from the licence to transmit messages, would fall within Placidum 51(v) as long as they could be found 'relevant' to the head of power.

The next issue, however, is whether Placidum 51(v) can be used to regulate the behaviour of those who are not, themselves, the providers of the means of the transmission of communications services.

The High Court's judgment in *Jones* is seen as the authority for answering yes to the question. However, upon closer examination, the High Court's answer is equivocal and leaves open the question as to how far the Federal government's power over the means of communication can or should be extended.

JONES

What was at issue in *Jones v Commonwealth of Australia and anor*[18] was the Commonwealth's power to acquire land for the Australian Broadcasting Commission in Victoria. While much of the judgment concerns the Commonwealth's power to acquire land, the Commonwealth's power to establish the ABC under Placidum 51(v) was also at issue.

At the time of this case, the ABC was established under Part III of the *Broadcasting and Television Act 1942*. While the functions of the Commission were to broadcast or televise adequate and comprehensive programs[19], it was the responsibility of the Minister (Postmaster General's Department) - not the ABC - to transmit those programs.[20] In other words, the ABC was the provider of content; unlike commercial licensees, it was not also the transmitter of that content.

The Commonwealth argued that the establishment of the ABC was within its powers under Placidum 51(v). *Brislan* had decided that broadcasting did come under the communications head of power and that case must not be reviewed.[21] The Commonwealth had established an instrumentality for the purpose of providing or transmitting programs, or broadcasting - which was within the Commonwealth's power so to do.[22]

The Plaintiffs argued to the contrary. The similarity between a postal service and a broadcasting service is that both relate to a 'medium of communication'; the Commonwealth's power 'does not extend to the provision of programmes any more than the Commonwealth can produce books, etc and send them by post and justify the whole transaction under the power as to postal services'.[23]

While the majority of the High Court did hold that the establishment of the ABC was within the Commonwealth's power under Placidum 51(v), the reasons given by the various judges do not suggest solid agreement and may even suggest a dodging of issues to arrive at their conclusion.

While Windeyer J would have agreed with Dixon J, rather than the majority judgments in *Brislan*, he accepts the *Brislan* judgment:

> *It follows that the Commonwealth Parliament may provide and control, television stations; it may authorise or forbid others to do so. And it seems to me that it may control or authorise its corporate agency to control the programmes to be shown and, if it desires, to provide them.*[24]

The best explanation of that statement is to view the Commonwealth and its agencies as one entity. The logic would run that, if Placidum 51(v) allows the Commonwealth to licence/regulate television stations which both transmit programs and provide programs, then the same power must also allow the Commonwealth itself to both transmit the programs (the PMG transmitted ABC programs) and also, through its agency the ABC, to provide those programs. If that is not what Windeyer J meant, then he did not deal with the fact that ABC was not the transmitter of the programs it produced.

Owen J more closely addressed the issue:

> *To hold that the only power exercisable by the Commonwealth is to provide the technical apparatus for transmission would be to take an unduly narrow view of the powers conferred by s. 51(v). In my opinion a law establishing an authority with the functions of producing broadcasting and television programmes and transmitting them is a law with respect to broadcasting and television services.*[25]

However, Owen J had earlier talked about the respective roles of the Postmaster-General and the ABC. It was the Postmaster-General's role to provide the apparatus 'by means of which ... programmes may be transmitted' .... while the ABC's function 'is to prepare the programmes for transmission and transmit them'.[26] The difficulty with that conclusion is that the ABC's role in transmission was to deliver programs to the Commonwealth transmission facilities; it was the Commonwealth Postmaster-General staff that transmitted ABC programs to the public - not the ABC.

Two other judges, McTiernan and Kitto JJ found the establishment of the ABC within Commonwealth power - but because the establishment of a body to provide content could be seen as incidental to the communications power.

Quoting McTiernan J:

> *Proper incidents of such services are the preparation of programmes for broadcasting to inform and entertain the public. It is incidental, therefore, to the conduct of the service not only to provide and compile adequate and comprehensive programmes for transmission but also to take appropriate measures to maintain a supply of programmes for transmission....*[27]

Similarly, Kitto J said that the ABC's 'activities involved in preparing and otherwise acquiring programme material are necessarily incidental to the presentation of the programmes before the transmitting apparatus....'[28]

Both Barwick CJ and Taylor J, agreed with Kitto.

It was left to Menzies J in dissent to argue that the establishment of the ABC is not

within the communications power of the Commonwealth. Menzies J spelled out the functions of the ABC and the Commonwealth - to provide and present programmes, and to transmit programmes, by the ABC and the Commonwealth government respectively.[29]

For Menzies J, the *Brislan* decision established no more than that broadcasting was a 'service which is the means of communication or a particular way of communicating....'[30] And because the ABC was not a 'service like a telephonic service', it was not within Commonwealth power.

While *Jones* is held as authority for the establishment of the ABC as within Placidum 51(v), it may now be time to revisit that issue: to what extent can Placidum 51(v) be used to extend Commonwealth power to regulate content or an activity merely because that content or activity is carried over a communications system. As we are moving inexorably into an 'online' environment, should the communications head of power be used by the Commonwealth to regulate online content or activities where there is no other head of power to support such legislation.

CONTROL OVER CONTENT

On many content issues, the rules about what people can say or publish have generally been within a state's plenary powers. What is or is not a defamatory publication is determined by the common law and/or legislation of each state.[31] Each state has its own laws on the publication and/or distribution of material which is obscene or indecent. Indeed, the national classification of films, literature and computer games is through complementary federal and state legislation.[32]

The Federal government increasingly, however, appears to be using its powers under Placidum 51(v) to become a regulator of content, and not just content provided by those who also hold a transmission licence, but those who have no direct connection with the dissemination of their content by electronic communications means. The two examples under the *Broadcasting Services Act 1992* include 'Internet Content Hosts' and 'channel providers'.

Internet Content Hosts

The Federal Government now exercises control over content carried on the internet under *the Broadcasting Services Amendment Online Services) Act 1999* which adds *Schedule 5 - Online Services* to the Act. Under Schedule 5, there are content rules applying to both Internet Service Providers and Internet Content Hosts,[33]

The definition of Internet Service Provider is ultimately tied back to the *Telecommunications Act 1997* and to carriage service providers which are authorised under that Act to provide carriage services to the public.[34] That is, rules about the content carried by transmission systems are imposed on those licensed to provide those transmission systems.

An Internet Content Host, however, is defined simply as a 'person who hosts Internet content in Australia, or who proposes to host Internet content in Australia.[35] That is, like the ABC in *Jones v The Commonwealth*, Internet Content Hosts provide - but are not licensed to transmit- content.

Yet the content regulation is Federal, although with vestiges of state power still exercised.

The regulator of Internet Content Hosts is the (federal) Australian Broadcasting Authority (ABA). However, the content rules are based on the scheme for the classification of material by the Federal Classification Board - which, in relation to films, publications and computer games, relies on state legislation for enforcement.[36]

Further, Schedule 5 modifies the liability of Internet Content Hosts, relieving them of liability from any state or territory laws or rules of common law for their content if they either had no knowledge of the material or would be required to monitor the content generated.[37]

Channel Providers

Like Internet Content Hosts, channel providers are defined simply as the providers of content - not the licensees who transmit the content.[38] While there is less direct control over content by the ABA than for Internet Content Hosts, channel providers must lodge annual returns to provide evidence of expenditure levels relating to Australian content requirements.[39]

Interestingly, there were other models which the Government had considered for regulation of internet content which do not raise the same constitutional issues as *Jones*, or the current regulation or Internet Content Hosts or Channel Providers.

In 1993, the Federal Attorney-General and Minister for Communications established a joint task force to develop a regulatory system for Computer Bulletin Board Systems, or BBS - defined as public access computer systems which provide services to common interest groups.[40] The options for the regulation of Bulletin Boards included the development and adoption of Guidelines by the industry, the application of partial classification along the lines of the current classification scheme, or the application of full classification of BBS.[41] The options did not include extending Federal regulation to the Bulletin Board Systems operators.

The Australian Broadcasting Authority also reported to the Minister for Communications and the Arts on the regulation of internet content. The regulatory regime it suggested included a combination of industry codes, community education, the use of technical controls over access and regulatory controls over Internet Content Service Providers, ie, additional requirements attached to the providers of the transmission of the content.[42]

CONTROL OVER ACTIVITIES

Federal regulation of gambling over the internet is another example of, again, the Federal government using its communications power to control an activity which has traditionally been within the States' legislative powers.

The *Interactive Gambling (Moratorium) Act 2000* was passed in December 2000. Under the Act, a person will be guilty of an offence if they intentionally provide an interactive gambling service within a twelve month period beginning on May 19, 2001 unless the person was providing

that service prior to 19 May 2000.[43]

Like Schedule 5 of the *Broadcasting Services Act* regulating on-line content, the Moratorium Act also specifically states that the Act 'is not intended to exclude or limit the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act'.[44]

Like Federal regulation of on-line content or channel providers, this regulation applies not to those who transmit the activity, but to those who simply provide the activity, which can then be accessed by members of the public through their own communications access provider.

The Federal Government's reliance on its communications power for the regulation of gambling was not discussed in the Explanatory Memorandum to the Act, but was highlighted in an earlier Senate Committee report on Online Gambling.

In discussing Federal power to regulate on-line gambling, and the limits of that power, the Committee said:

> *Online gambling by its nature utilises telecommunications technology. The Commonwealth Parliament has power to legislate with respect to 'postal, telegraphic, telephonic, and other like services'. This power would allow the Commonwealth to specify the way that telecommunications could be used for specific purposes, such as gambling. It would not, however, provide the Commonwealth with the type of overarching legislative powers that States and Territories have relied upon to effectively regulate the many and various aspects of gambling.... It could be argued that the Commonwealth Government's limited powers are insufficient to intervene in gambling regulation, which requires the exercise of a broad range of powers. However, it could play an important and valuable lead role if it did so cooperatively with the State and Territory Governments.*[45]

In other words, the Senate Committee felt it arguable whether Federal power to regulate an activity which is transmitted over a communications system extends not only to those who transmit that activity, but to those who provide, but do not themselves transmit, that activity over a communications system, where that content or activity is otherwise not within Commonwealth power.

Yet again, there is another regulatory model which recognises the States' powers to regulate gambling. On-line gambling had been discussed by the state and territory ministers responsible for gambling and complementary state legislation was being discussed as the way to deal with some of the problems raised by on-line gambling.[46] Indeed, there is some state legislation in place which covers some or all on-line gambling provided from that State.[47]

CONCLUSION

The Commonwealth Government's power to make laws with respect to postal, telegraphic, telephonic and other like services was originally intended to ensure there could be national control over Australia's communications systems. And, as High Court decisions such as *Brislan and Herald and Weekly Time* show, that communications power extends both to new communications technologies and to conditions placed on those who operate those communications systems.

The High Court in *Jones*, however, went further, suggesting that the Commonwealth's communications power extended beyond those who own or operate the communications systems, to those who simply provide the content or activity which is transmitted. Recent Federal legislation regulating Internet Content Hosts, Channel Providers or providers of interactive gambling services are excellent examples of content or activity providers, caught by Federal regulation simply because they supply what will be transmitted to the public electronically when there is no other Commonwealth head of power supporting such regulation.

As Australia increasingly moves towards an online environment, where more and more goods and services such as education, health, community services and commerce are conducted on-line, it may be time to rethink how far the Commonwealth's power to regulate communications systems extends.

1 The Commonwealth of Australia v Tasmania (1983) 158 CLR 1

2 Placidum 51(v) Commonwealth of Australia *Constitution Act 1900.*

3 Quick, John and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, London: The Australian Book Company, 1901, p. 559-560. See also Quick, John, *The Legislative Powers of the Commonwealth and the States of Australia*, Sydney: The Law Book Company of Australasia, 1919, p. 368.

4 Quick, 1919 p. 370.

5 6 CLR at p. 501. See also Mark Armstrong, *Broadcasting Law & Policy in Australia*, Sydney: Butterworths 1982, p. 6, citing A La Nauze "other Like Services: Physics and the Australian Constitution" [1968] 1 *Records of the Australian Academy of Science*, 36 which suggests that the Constitutional draftsmen were well aware of the developments with wireless technology being demonstrated in the 1890s.

6 *Wireless Telegraphy Act 1905* s 4-6.

7 *Wireless Telegraphy Regulations*, Statutory Rules 1924 No.101 Cl 59-60.

8 (1935) 54 CLR 262

9 Ibid, pgs 264.

10 Ibid p. 271

11 Ibid p. 280

12 Ibid, particularly pgs 284-286.

13 In the various judgments it is debatable whether wireless telegraphy was held to be within power because it was a 'telegraphic' service, a 'telephonic' service or 'another like service'. However, the characterisation of postal, telegraphic and telephonic services as all being services for communications at a distance ensured that not only broadcasting but other technologies would come under this head of power.

14 The Herald and Weekly Times and anor v The Commonwealth of Australia (1966) 115 CLR 418, at 428-9.

15 Ibid, p. 433.

16 Ibid p. 434

17 Ibid p. 436-7.

18 (1964-65) 112 CLR 206

19 Section 59, *Broadcasting and Television Act 1942*

20 Section 73(2) *Broadcasting and Television Act 1942*

21 Jones p. 216

22 Jones p. 212

23 Jones p. 215

24 Jones p. 237

25 Jones p. 245

26 Jones p. 239.

27 Jones p. 223

28 Jones p. 227

29 Jones p. 232

30 Jones p. 233

31 See The Law Reform Commission, *Report No. 11 Unfair Publication: Defamation and Privacy*, AGPS, Canberra: 1979, especially Chapter 4 where it is assumed that any codification of defamation law will have to be done by each state. However, the High Court decision in Lange v ABC 189 CLR 520 limits state common or statute law on defamation by extending the defence of qualified privilege for material on matters of public interest, subject to some limitations of the defence.

32 Originally, the *Customs (Cinematrgraphic Films) Regulations* passed under the *Customs Act 1901* established a Chief Censor and Classification Board. The Scheme has been modified by the later *Classification (Publications,*

Films and Computer Games) Act 1995 Cth which establishes a renamed Classification Board and National Classification Code. The scheme is given effect by complementary state and territory legislation.

33 Division 3 and Division 4 respectively, Schedule 5, *Broadcasting Services Act 1992*.

34 Clauses 8 and 3, Schedule 5 *Broadcasting Services Act 1992* and section 87 *Telecommunications Act 1997*.

35 Clause 3, Schedule 5, *Broadcasting Services Act 1992*.

36 Content which is prohibited or potentially prohibited is defined in Division 1, Schedule 5 of the *Broadcasting Services Act 1992* on the basis of how it has or would be classified by the Classification Board, established by the *Classification (Publications, Films and Computer Games Act 1995* (Cth)

37 Clause 91, Schedule 5, *Broadcasting Services Act 1992*. The High Court decision on 'subordinate distributors' in Thompson v Australian Capital Television Pty Ltd (1996) 186 CLR 574 at 595 may have made this Clause unnecessary, at least in regards to those Internet Content Hosts who had no knowledge of the material made available for transmission.

38 Section 103C *Broadcasting Services Act 1992* which defines a channel provider as the person who 'assembles a package of programs'..., supplies a licensee with the package and 'carries on business in Australia... that involves the supply of the channel'. A similar concept of 'program supplier' was also introduced in 1999 amendments to the Act, (in the new Part 10A) referring to a person who supplies programming (primarily sport) to a broadcasting licensee.

39 Section 103ZB *Broadcasting Services Act 1992*.

40 Task Force Report, *Regulation of Computer Bulletin Board Systems*, 8 August 1994, at p. 12.

41 The options are summarised at Task Force Report, pp 5-9.

42 Australian Broadcasting Authority, *Investigation into the Content of On-line Services: Report to the Minister for Communications and the Arts*, 30 June 1996, Chapter 7. The recommendations were later adopted by the Minister in June 1997, although Schedule 5 of the Broadcasting Services Act 1992 does not follow the regulatory model suggested by the ABA report and adopted by the Minister.

43 Sections 10-11, *Interactive Gambling (Moratorium) Act 2000*. The definition of Gambling Service in Section 5 of the Act has four elements: the service is a gambling service (further defined), the service is provided in the course of carrying on business, the service is provided to customers using communications services including the internet or other listed carriage service, a broadcasting or other content service or a datacasting service, and the service is linked in a specified way to Australia. The Act specifically excludes a telephone betting service or, essentially, on-line trading. (Section 5(3) of the Act).

44 Section 14, *Interactive Gambling (Moratorium) Act 2000*

45 Senate Select Committee on Information Technologies, *Netbets: A Review of Online Gambling in Australia*, March 2000. Paragraphs 2.42-2.42

46 The State Ministers responsible for gambling formed the Australian Regulators Working Party which, in May 1997 released the *Draft Regulatory Code Model for New Forms of Interactive Home Gambling*, its Basic Principles included:

- Licensing of Service Providers after financial and probity checks
- Required player authentication - especially to screen minors
- Prohibition on credit betting
- Audits of provider accounts
- Reporting of transactions to AUSTRAC
- Prohibition on advertising unlicensed products
- Facility for players to specify certain protection measures
- contact information for problem gamblers
- privacy protection
- Industry Code of Conduct

47 See, for example, the *Unlawful Gambling Act 1998* (NSW), Section 8 which makes it an offence to bet on a race if, inter alia, the bet is made electronically by the Internet, subscription TV, or other online communications systems, unless the person is authorised in NSW or other states or territories to conduct totaliser betting, or the *Interactive Gambling (Player Protection) Act 1998 (Qld)*

which contemplates a cooperative scheme between Queensland and other jurisdictions for the regulation and control of interactive gambling, along the lines of the Draft Regulatory control model.

The views expressed in this article are those of the author.

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Local Councils Claw Back Powers Over Telcos

Shane Barber and Lisa Vanderwall examine the recent trend towards re-empowering local councils and the community over telecommunications rollouts.

The *Telecommunications Act 1997 (Cth)* ("Act") places limited obligations upon carriers in dealing with local councils in relation to the installation and use of telco infrastructure by a carrier.

This article will examine a recent trend towards re-empowering local councils and the community in this regard. The Australian Communications Industry Forum Draft Deployment of Radiocommunications Infrastructure Industry Code and recent Federal Court decision of Wilcox J in *Telstra Corporation Ltd. v. Hurstville City Council* [2000] FCA 1887 are given as examples of this new trend towards empowerment.

It is argued that while this means that local councils and the community may have a greater ability to influence a carrier's rollout decision, other effects such as increased costs must also be considered.

THE TELECOMMUNICATIONS ACT 1997 (CTH)

As a general principle, carriers installing telecommunications infrastructure must seek development and other approvals from the relevant local council. However, Schedule 3 to the Act, complemented by the *Telecommunications Code of Practice 1997* ("Code") and expanded upon by the *Telecommunications (Low Impact Facilities) Determination 1997* as amended in 1999 ("Determination") set up a regime pursuant to which "low impact" telecommunications facilities do not require such approval prior to installation.[1]

In addition the Act provides that, in certain circumstances, carriers do not have to seek local council approval when maintaining existing telecommunications facilities.[2]

The power to install low impact facilities and maintain certain existing telecommunications facilities without local council approval derives from clause 37 of Schedule 3 to the Act. Among other things clause 37 provides that a carrier may undertake such activities despite a law of a State or Territory about the powers and functions of a local government body.