

Cold, Dead Hand? Broadcasting Regulation and the Emergence of the National Broadband Network

Luke Waterson and Nicholas Dowsley consider the position of next generation audio-visual media services under existing broadcasting laws.

Bernard Keane's recent article on Crikey "Alston's cold, dead hand still controls broadband"¹ caught our eye not just for the catchy (but macabre) title but for the issues it raises in what will become an increasingly important debate regarding the scope for existing broadcasting regulation to accommodate new services to be provided over the Government's proposed fibre-to-the-premises (FTTP) national broadband network (NBN).

To date, much of the commentary and discussion around the NBN has centred on changes to the existing telecommunications regulatory scheme which would apply in the interim period before the NBN is fully constructed. For example, the Government has released a Discussion Paper outlining potential changes to many key areas of the telecommunications regime including: enhanced separation arrangements for Telstra; strengthening the telecommunications access and anti-competitive conduct regimes; changes to the universal service obligation arrangements; and changes to consumer protection just to name a few.² Submissions on these proposals were due on 3 June and the Government's response is eagerly anticipated by the industry.

Chapter 5 of the Discussion Paper entitled The Bigger Picture flags a full scale review of the approach to regulation in light of the likely impact of the NBN in increasing the trend towards "convergence" (described as the use of different technology platforms to provide similar services). The review is intended to commence in 2011 so that it can take into account the practical impact of the NBN roll-out.

This review appears likely to be broad-ranging and would cover both telecommunications and communications regulation more generally i.e. media and broadcasting regulation. Although 2011 seems a long time off, the matters raised by Keane are a good starting point for developing the debate around these important public policy issues.

But first, a quick outline of the NBN itself and its potential implications for delivery of video services.

The NBN

As set out above, the NBN will be based on FTTP technology. While the Government's announced implementation study for the NBN will develop detail around specific network design and coverage issues, the important feature of an FTTP platform for current purposes is that it will support download speeds that enable the delivery of multiple video programs in high definition formats.

The NBN would be able to support both broadcast (one to many) and on-demand (point to point) delivery mechanisms. Whilst some of these services are already available to broadband consumers, the very high bandwidth characteristics of FTTP are likely to see an increase in "true" on-demand services. The Government has estimated that a 1GB movie would take

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1m20s to download at the theoretical speed of 100 Mbps.³ This can be contrasted with “near” video on demand services where, for example, the end user selects from a limited number of programs that have been broadcast to and stored on set top units attached to the network.

A catalyst for the Determination was legal uncertainty over whether “live” streaming services delivered over the Internet fell within the definition of “broadcasting service”.

Keane’s article raises a number of issues concerning the application of the existing regulatory regime in the Broadcasting Services Act 1992 (BSA) to NBN-delivered services. A discussion of some of the key issues is set out below.

Existing exception for Internet-delivered services

With some important exceptions, the BSA regulates “broadcasting services”. That definition is as follows:

broadcasting service means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

- (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or

- (b) a service that makes programs available on demand on a point to point basis, including a dial up service; or
- (c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.⁴

In 2000, the then Minister administering the BSA, Richard Alston, made a determination under paragraph (c) of the definition (**Determination**) excluding the following category of service from the definition:

a service that makes available television programs or radio programs using the Internet, other than a service that delivers programs or radio programs using the broadcasting services bands.⁵

A catalyst for the Determination was legal uncertainty over whether “live” streaming services delivered over the Internet fell within the definition of “broadcasting service”. Central to this issue was the scope of the exemption for “on demand” services in paragraph (b) of the definition. The Determination removed the need to resolve this issue in relation to services covered by the Determination (but it may remain an issue with NBN-delivered services and this is considered further below).

There are two key issues with the Determination. First, what does “using the Internet” mean? Secondly, what is the scope of the exception for services delivered using the broadcasting services bands.⁶ The first part of Keane’s article focuses on the second question. It concludes that the exception applies to programs delivered by existing free to air commercial services with the result that those broadcasters would be prevented from making those programs available over the Internet (thus the “dead hand” of Mr Alston).

As we see it, the exception in the Determination is not directed at program content but covers services which deliver content using

the Internet where the broadcasting services bands form part of the means of delivery. Accordingly, if a commercial broadcaster makes available, via the Internet, programs which happen to also be delivered using the broadcasting services bands (eg. an Internet "simulcast" of a broadcast program), the Internet-delivered service would still be covered by the Determination unless the broadcasting services bands were used as part of the Internet delivery platform. This view appears to us to be consistent with the explanatory statement released with the Determination, which stated that:

[t]he exclusion from the exemption for a service that delivers programs using the broadcasting services bands is necessary to prevent the exemption being exploited to deliver a de facto broadcasting service using those bands.⁷ [emphasis added]

However, the application of the Determination to services delivered over the NBN is still an important issue to consider. In this regard, the first question posed above: "What does 'using the Internet' mean?" is the key threshold issue.

The "Internet" is not defined for the purposes of the BSA. The Macquarie Dictionary simply defines the "Internet" as "the communications system created by the interconnecting networks of computers around the world".⁸

The Australian Communications and Media Authority (ACMA) recently defined the "Internet" in a 2008 report on content filtering as "a worldwide, publicly accessible series of interconnected computer networks".⁹ These definitions appear to emphasise the general public accessibility of the Internet as one of its chief characteristics.¹⁰

To add further complexity, the Determination was intended to cover those services that do not use the Internet as their entire means of delivery. The Report to Parliament which accompanied the introduction of the Determination contained the following statement:

The determination is intended to include a service that uses the Internet, even if part of the means of delivery of the service may not clearly be part of the Internet...For example, the determination will cover services that enable an end user to access material from the Internet using a wireless application protocol device such as a mobile phone, whether or not the wireless application protocol itself is part of the Internet.¹¹

The reference to "protocols" in this statement raises the issue whether a service is delivered "using the Internet" if it is delivered (in whole or part) using internet protocols. It is relatively well accepted that internet protocols are a key component of the Internet. However, caution is required in equating delivery of services using internet protocols with "using the Internet". Although an FTTP platform (and therefore the NBN) will deliver services using internet protocols (for example, Internet Protocol Television (IPTV)), it does not necessarily follow that a service provider providing an IPTV service would fall within the Determination. For example, it may be that a so-called "walled garden" IPTV service (where content is only accessible by a closed user group by means of the NBN and is not generally accessible via other platforms) would not be regarded as a service making available programs "using the Internet" even though the method of delivery uses internet protocols.

"On demand" exception

Even if services to be delivered over the NBN, like IPTV, are in some cases not excluded from the definition of "broadcasting service" by the Determination, they may still fall within the "on-demand" exception to the definition. As set out above, paragraph (b) of the definition excludes:

a service that makes programs available on demand on a point-to-point basis, including a dial-up service.

The Explanatory Memorandum to the Broadcasting Services Bill 1992 (EM) states that a "dial up service" includes a:

Although an FTTP platform will deliver services using internet protocols it does not necessarily follow that an IPTV service would fall within the Determination.

... 'video-on demand' service whereby a service provider transmits a video upon request to a person who has communicated that request to the service provider by dial-up through a public telecommunications network, or by some other means.¹²

By contrast, the EM gives the following explanation of where a service will not be a "point to point" service:

...each time a person receives or accesses a service, the person receives programs which are being provided according to time-tabling determined by the service provider, so that the program being received by the person is the same as that being received by any other person receiving the service at the same time.¹³

"True" on-demand services delivered via the NBN as outlined above are, perhaps not surprisingly, likely to be covered by this exception and therefore not regulated as a "broadcasting service". However, the position remains unclear in relation to "live" services, such as news or sports programs.

If the bandwidth of the NBN means that on-demand services become the prevalent type of video service delivered over the NBN, there is a policy question as to whether exemption from regulation as "broadcasting services" would be desirable. This in turn requires examination of the policy underlying the existence of the exemption. At a broad level, a key regulatory principle underlying the BSA is that different levels of regulatory control be applied across a range of services according to the degree of influence they are able to exert in shaping community views.¹⁴ If, for example, the exemption was originally put in place because the number of people accessing "on-demand" services was small, there may be scope for re-considering the exemption in light of the advent of the NBN and the likely increase in the number of these types of services. On the other hand, it may be that it is inherent in the nature of an on-demand service that it has a lesser degree of influence because it is only accessible by a person individually who chooses to access the service having some knowledge of the nature of the program to be received. The latter approach may sit uneasily with an on-demand news or current affairs service potentially accessible by 90% of all households that will eventually be connected to the NBN.

If no other amendments were made to the BSA (and assuming the Determination did not apply), the removal of the "on-demand" exception would see these services regulated according to matters such as the nature of the programs provided: for example their level of appeal to the general public, or whether they were provided on a free or subscription basis.¹⁵

Licence areas/media diversity tests

Another issue that Keane raises is the application of the current media diversity rules in the context of the NBN. The current regime applies to commercial television and radio broadcasting licensees and associated newspapers. The key restrictions are:

- **Commercial television:** a person must not control licences whose combined licence area populations exceed 75% of the population of Australia;¹⁶ and a person must not control more than one licence in the same licence area, with some exceptions.¹⁷
- **Commercial radio:** a person must not control more than 2 licences in the same licence area.¹⁸
- **The "4/5 rule":** any transactions involving commercial radio licensees, commercial television licensees and associated news-

papers (media operations) must not result in the minimum number of 'points' for metropolitan licence areas falling below five and the minimum number of 'points' for other licence areas falling below four.¹⁹ In essence, an independently controlled media operation (or group of them) counts as one point.

- **The "2-out-of-3 rule":** prohibits transactions that result in a person controlling a commercial radio licence in an area, a commercial television licence where more than 50% of the population in that area is attributable to the licence area of the television licence, and a newspaper associated with that area.²⁰

The existing rules clearly work on a licence area basis. In essence, Keane argues that this regime is inadequate to cope with the advent

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of services provided nationally over the NBN.

Assuming they are regulated as broadcasting services in the first place, a threshold question to ask is whether NBN services should be regulated by these diversity rules at all. For example, if the NBN-delivered services are provided on a subscription basis, then, consistent with the current treatment of subscription broadcasting services (such as those provided by FOXTEL and AUSTAR), the diversity rules would not apply. In 1992, when subscription services were introduced into the BSA, the then ownership and control rules were not generally applied to this type of service because:

it is considered they provide a discretionary service that consumers must pay to receive, and arguments about its ability to influence are therefore not considered as persuasive.²¹

In a similar vein to "on-demand" services referred to above, it may be that there is something inherently less influential about subscription based services which means they should not be included in the diversity rules regardless of the availability of the service. While it is true that the original decision not to strictly regulate subscription broadcasting services under the ownership and control rules was made when those services were just beginning to be provided, at the time the diversity rules were changed in 2006 to enact the current regime outlined above, the penetration rate of pay TV was reported to have increased to 26% however subscription broadcasting services remained excluded from the diversity regime.²² It remains to be seen whether this position will be maintained if subscription services delivered over the NBN become available to almost every home in Australia.

If it was considered that NBN-delivered services were potentially so influential as to warrant inclusion under the diversity rules, the question would arise as to the best way to include them in that regime. As the current rules are based on licence areas, unless a completely new regime is established, it would be necessary to link the NBN service to a particular licence area or areas. A mechanism for such a link currently exists in relation to newspapers. For example, under section 59 of the BSA, a newspaper is associated with a particular radio licence area if at least 50% of its circulation is within the licence area and that circulation is at least 2% of the total population of the licence area. It needs to be noted that "national" newspapers such as The Australian Financial Review and The Australian do not currently fit within this requirement due to the national spread of their circulation. If a similar rule is applied to NBN-delivered services, then they too may be unlikely to have 50% of their end-users located in a particular licence area.

It will be up to the Government to determine whether this type of approach is appropriate or whether alternative methods need to be considered.

Conclusion

In the second reading speech for the introduction of the Broadcasting Services Bill 1992, the then Minister, Senator Collins, stated that:

[t]he Bill incorporates objectives and policy guidelines. It sets out the categories of service, describing them by their nature rather than by their technical means of delivery—it should thus not need constant amendment as technical conditions change.²³

The NBN will potentially effect a momentous change in "technical conditions". It remains to be seen whether the BSA will undergo significant amendment to accommodate this development.

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(Endnotes)

- 1 Bernard Keane, "Alston's cold, dead hand still controls broadband", 25 May 2009, <http://www.crikey.com.au/2009/05/25/alstons-cold-dead-hand-still-controls-broadband>.
- 2 National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper, April 2009, http://www.dbcde.gov.au/communications/national_broadband_network/regulatory_reform_for_21st_century_broadband.
- 3 National Broadband Network Policy Brochure, 21st Century Broadband, p 8, http://www.dbcde.gov.au/communications/national_broadband_network/national_broadband_network_policy_brochure.
- 4 Broadcasting Services Act 1992 (Cth), s 6.
- 5 Broadcasting Services Act 1992 (Cth), Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000).
- 6 The broadcasting services bands are essentially those parts of the radiofrequency spectrum designated for transmission of broadcasting services (see Broadcasting Services Act 1992 (Cth), s 6).
- 7 Broadcasting Services Act 1992 (Cth), Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000), Explanatory Statement, p 2.
- 8 Macquarie Dictionary Fourth Edition, 2005.
- 9 ACMA, Closed Environment Testing of ISP-Level Internet Content Filtering: Report to the Minister for Broadband, Communications and the Digital Economy, June 2008, p 72.
- 10 See *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 (but in a different context).
- 11 Department of Communications, Information Technology and the Arts, Report to Parliament: Review of audio and video streaming over the internet, http://www.dbcde.gov.au/broadcasting/television/digital_television_switchover/digital_broadcasting_policy_reviews/report_to_parliament_review_of_audio_and_video_streaming_over_the_internet, accessed on 10 June 2009.
- 12 Broadcasting Services Bill 1992 (Cth) Explanatory Memorandum, p 16.
- 13 *Ibid*.
- 14 Broadcasting Services Act 1992 (Cth), s 4(1).
- 15 If the services were a commercial broadcasting service, under the current regime, the Minister (not the ACMA) would have the key role in the issuing of the licence according to the public interest - see Broadcasting Services Act 1992 (Cth), s 40.
- 16 Broadcasting Services Act 1992 (Cth), s 53(1).
- 17 Broadcasting Services Act 1992 (Cth), s 53(2). For exceptions, see ss 38A and 38B.
- 18 Broadcasting Services Act 1992 (Cth), s 54(1).
- 19 Broadcasting Services Act 1992 (Cth), Part 5, Division 5A.
- 20 Broadcasting Services Act 1992 (Cth), s 61AEA.
- 21 Broadcasting Services Bill 1992 (Cth) Explanatory Memorandum, p 41.
- 22 Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth) Explanatory Memorandum, para [10].
- 23 Commonwealth of Australia, Parliamentary Debates, Senate, 4 June 1992, 3600 (Senator Collins, Minister for Transport and Communications).