

Communications Law BULLETIN

CAMLA

Communications & Media Law Association Incorporated

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Communications Policy Settings in a Time of Unprecedented Technological Change

In a speech to CAMLA members and guests on 18 September 2014, the Honourable Paul Fletcher Parliamentary Secretary to the Minister for Communications discussed the impact that unprecedented technological change is having on traditional policy assumptions in the communications sector and the policy approaches of the Federal Government to deal with these challenges.

We are living through an age of unprecedented technological change, and this has profound implications for communications policy in Australia.

To start with, I will review some indicators that we are undergoing unprecedented change; next I will point out how this is challenging many of the assumptions which have underpinned communications policy in Australia; and thirdly I will suggest some principles of policy making to deal with such change.

Unprecedented rate of change

There are numerous indicators showing of the unprecedented rate of technological change we are experiencing.

The amount of data generated in the world last year was approximately 4.4 zettabytes – about 33 times the data generated in 2005.¹

One good case study is the rate at which successive mobile phone technologies were commercially introduced in Australia. Analogue mobile telephony came along in the eighties, GSM in the early nineties, CDMA arrived in 2000 (and exited in 2008)², we had 3G introduced by Hutchison in 2003³, Telstra introduced 4G in 2011 and already there is talk of 5G.

Similarly, we have seen mobile go from being a voice to a data technology, and increasingly applications are delivered over the data layer, often by a third party rather than the network operator. For example, whereas under the GSM standard for mobiles the short messaging service—SMS—was an intrinsic part of the standard, now short message services are typically delivered by over-the-top IP applications like iMessage on iPhones or stand-alone applications like Viber.

The rate of uptake of the latest iteration of mobile technology is a further indicator of this change: in the two years to 2013 smartphone penetration has increased by around 34 per cent. Over that same period data downloads over smartphones increased by 453 per cent.⁴

1 <http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm> and <http://www.emc.com/leadership/digital-universe/2014iview/digital-universe-of-opportunities-vernon-turner.htm>

2 <http://www.crn.com.au/News/109389,telstra-closes-its-cdma-network-today.aspx>

3 <http://www.smh.com.au/business/final-countdown-for-3-as-telstrahutchison-sharing-deal-ends-20120704-21hil.html>

4 ABS (2013), Internet activity: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8153.0Chapter8December%202013>

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Keeping it in Proportion: Recent Cases on the Implied Freedom of Speech

The implied constitutional freedom of political communication has been continually considered in a range of Australian courts, shifting the consideration of the test established in *Lange*. Sophie Dawson and Rose Sanderson provide an overview of these developments through an analysis of recent case law.

The New Privacy Act: Six Months On

Nikki Macor Heath gives an update on the activities of the Office of the Australian Information Commissioner (OAIC) and Privacy Commissioner and enforcement of the Privacy Act since the commencement of the reformed legislation.

What's in a Name? Bloggers, Journalism, and Shield Laws

The High Court of New Zealand recently handed down a decision finding that bloggers can be legally considered as journalists and claim protection for their confidential sources. Hannah Ryan provides a summary of the Court's decision and compares it with the legislative framework in Australia.

Free Speech and Brown Paper Bags

Kieran Pender surveys the campaign finance regulation landscape in Australia post-Unions *NSW v New South Wales* and considers the potential impact of forthcoming litigation.

The Taxing Business of Taxing Bitcoin

The Australian Taxation Office recently handed down draft determinations on the tax consequences of the use of Bitcoin in Australia. David Rountree provides an overview of the draft rulings and the implications for domestic businesses operating with Bitcoin.

Similarly you could look at television. Black and white was commercially introduced in Australia in 1956, colour came along nearly twenty years later in 1975, digital television was introduced in 2001 and in 2014 we are seeing the introduction of the next phase: hybrid broadcast broadband TV (HbbTV).

In sector after sector, traditional analogue means of generating and disseminating content are being replaced with newer digital technologies: digital television, digital radio, digital phone technologies such as GSM replacing analogue, voice telephony being replaced by voice over IP, analogue audio tapes and records being replaced by MP3 files, even film reels being replaced by movies stored and shown as digital files.

Increasingly the high-margin products of the telcos are under threat from over the top IP-based operators such as Skype and Viber

We have also seen unprecedented changes in the economic importance of traditional industry players and newer players. Between 2003 and 2013, the market capitalisation of Fairfax and TEN fell by 80 per cent and 87 per cent respectively, while that of online jobs market Seek.com was up by 500 per cent and online real estate portal REA was up by 900 per cent.⁵

Challenging Many Assumptions

The unprecedented rate of change is challenging many of the assumptions upon which communications policy settings have traditionally been based.

The first assumption is that government can regulate all services that citizens in its own jurisdiction are able to receive.

Until the mid-nineties, it was virtually impossible for an Australian consumer to access content which was not generated or disseminated by an Australian-based company. You got your radio and television from broadcasters based in Australia; you read newspapers published in Australia; you read books or magazines which, even if published overseas, were distributed within Australia by companies with a local presence – hence it was a fairly straightforward process to regulate for matters such as content.

But today this basic assumption does not hold. Thanks to the internet, Australians can access content which could be generated by a party anywhere in the world.

Another traditional assumption was that only a few parties had the capacity to generate and disseminate content to large numbers of people, because it was very expensive to do so.

Today, almost anybody can generate content which can be seen or read by millions on YouTube, Twitter, or a blog. This presents a massively more challenging exercise for governments seeking to regulate content. Of course, regulating content does not necessarily have a sinister meaning; one good example is classification of content into age appropriate categories.

A second assumption now under challenge is that government can provide a valuable right, such as the right to broadcast radio or television signals, and because the economics of the businesses which use that right are compellingly attractive, you can justify imposing expensive regulatory obligations on those businesses.

Broadcasters for example are required to meet local content quotas, adhere to classification and advertising regulations, and pay licence fees. Increasingly this traditional bargain is being disrupted, because competitors using alternative internet-based distribution mechanisms are making the traditional business models of the broadcasters less attractive.

⁵ Fairfax's share price has risen this year so currently it is around 70 per cent down on 2003 levels.

There is no Australian content requirement that Netflix has to meet – even though Netflix is competing with traditional broadcasters and already some 200,000 Australians are estimated to have Netflix accounts.

The same trends are affecting telecommunications network operators. The traditional regulatory assumption has been that running telecommunications networks is lucrative, and hence imposing expensive burdens like the universal service obligation can be justified.

But increasingly the high-margin products of the telcos are under threat from over the top IP-based operators such as Skype and Viber. The risk is that the returns captured by the party which incurred the capital cost to build the physical network may become so low that there is no longer an incentive to maintain or expand the network.

Another assumption under challenge is that we can readily differentiate between a basic product and a premium product. For example, much of the regulatory framework in telecommunications assumes that the fixed line service is the basic service which everybody uses and mobile is the luxury option which is a nice-to-have but is not ubiquitous.

Whether those assumptions remain valid is very much a live question. After all, the mobile network is now the default network over which many Australians make their phone calls—fixed-line is what you use if you cannot get a mobile service. By December 2013 only 75 per cent of Australian adults had a fixed-line in the home, a fall of 13 per cent in four years.⁶

Another traditional assumption is that different networks and technologies deliver different services – an assumption reflected in the three key pieces of legislation regulating the sector (the *Telecommunications Act 1997*, the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992*).

Today, when every newspaper has a website which also carries video and is competing against websites from around the world, how valid are detailed regulatory constructs which divide media businesses into different categories of print, radio and television?

If the end result to the consumer looks the same regardless of how it is delivered, the traditional assumption that different regulatory frameworks apply to these three different services is increasingly hard to justify.

Policy making principles that make sense

The very rapid change in technology clearly creates significant challenges for communications policymakers. There are no easy answers – but there are at least some key principles of regulation that it makes sense to apply.

The first principle is to regulate in a way which is technology-neutral.

This is an easy thing to say and not necessarily an easy outcome to navigate to, particularly given that the starting point is a set of industry and technology specific regulatory frameworks. For example, we have one approach to regulating spectrum for broadcasters and another for every other spectrum user.

The government is not likely any time soon to abandon the framework which applies to broadcasting spectrum, but it is looking at ways to provide greater flexibility in the way spectrum is allocated to and used by broadcasters.

This follows a global trend towards a more flexible approach to spectrum, as the chairman of the United States Federal Communications Commission Tom Wheeler recently noted:

Slavishly sticking to analog age concepts of spectrum allocation can become, in the digital age, a government-imposed chokepoint that burdens competition and innovation by creating unnecessary and artificial scarcity of this essential resource.⁷

The next principle of regulation is global alignment: in a technology-rich area like communications, it is important to align regulatory settings in Australia with those in other jurisdictions.

Again, spectrum regulation provides a good example of this. By aligning Australia's usage of spectrum bands with other countries we can unlock greater economies of scale for mobile handset manufacturers, delivering lower prices to consumers.

Another example is content classification. Consider for example content on the Apple iTunes platform, widely consumed by Australians. The Australian government has legislated a system of classification for film and TV content. Apple classifies content using its own system, which is essentially an amalgam of the classification systems in the US and Europe. Does this mean that national content regulation systems like Australia's will have increasingly less work to do?

The flip side of global alignment is that governments in the internet age need to recognise their limitations.

A wise government will have a bias towards less regulation rather than more; to facilitating competition and a level playing field

An example of this is the Abbott Government's policy to enhance online safety for children, where we are legislating to provide regulations which will apply to 'large social media sites'. In other words, we are seeking to apply the legislation to companies that are sufficiently large, and that have a sufficient degree of activity in Australia – including employees and advertising revenue – such that we can have a degree of confidence that for both purely legal and also corporate reputational reasons they will comply.

Conversely, we are not purporting to cover the field and regulate for social media sites regardless of size and regardless of where in the world they may be located – this would be a futile exercise.

Finally, an important principle is to have a regulatory bias towards encouraging innovation, flexibility and new entry, rather than towards protecting incumbents.

When consumers rush to take up a new digitally-based product or service, that is strong evidence of the value that new product brings.

When industry after industry is being disrupted by new entrants with a better business model using superior digital technology, it is not surprising that there will be political pressures generated by existing businesses. But a wise government will have a bias towards less regulation rather than more; to facilitating competition and a level playing field rather than maintaining cosy arrangements which favour existing players; and to letting the market decide whether a new technology-based way of serving a consumer need is superior to the existing ways of doing it.

Conclusion

The pace of technological change clearly creates significant challenges for communications policymakers. There are no easy answers – but there are some key principles of regulation that it makes sense to apply.

6 ACMA, 'Older Australians resist cutting the cord' – Fewer fixed-line telephones, more mobiles heading (web article), and 'Figure 1: Change in use of fixed-line telephone and mobile phone' (excel document), <http://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Older-Australians-resist-cutting-the-cord>

7 Wheeler, T., (2014), "FCC Chairman Tom Wheeler Remarks at the Computer History Museum", <http://www.fcc.gov/document/fcc-chairman-tom-wheeler-remarks-computer-history-museum>