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In this edition of AMM, I highlight some of the key developments in media industries, policy and regulation in the final half of 2009. There have been important changes in several industry sectors, and often we are seeing that these moves on the media monopoly board will ripple out and interconnect with other corporations, directorships, policies, content and access issues for audiences. The sweeping proposals for change to separate Telstra Corporation's wholesale and retail businesses that emerged in the second half of the year, are a case in point. The potential consequences of this particular law and its related policy and regulatory frameworks intersect most vividly with content and access issues in the potential sale of Foxtel, arising from the Telstra restructuring. Not only are there major ramifications for the rollout of the Rudd Government's National Broadband Network (NBN), there are crucial flow-on issues for major media corporations such as the Seven Network and Consolidated Media Holdings, for advertisers, for internet service providers (ISPs), content creators, channel packagers and for regulators. And there are implications for the sale of the legacy free-to-air television spectrum in the 'digital dividend' as analog television is switched over to digital, and as the shakeout between traditional and new media continues.

* **Mogul Wars**

The second half of the year started dramatically (with headlines like "Raid launched on Consolidated Media", *Sydney Morning Herald*, Business Day, Steffens, 9 July 2009, "Stokes share grab puts Packer in tight squeeze", *Australian Financial Review*, Shoebridge and White, 10 July 2009, and "Seven takes stake in Cons Media to 19.91 percent", AAP, 16 July 2009) when the papers began reporting that Kerry Stokes' Seven Network had lifted its stake in James Packer's Consolidated Media Holdings (CMH) to the maximum level allowed before launching a takeover. The Steffens piece began, "The remnants of the once powerful Packer media empire have come under attack in a \$150 million-plus hostile share raid, widely believed to have been launched by media rival Kerry Stokes' Seven Network". About 85 million CMH shares changed hands in the first skirmish: CMH was 'in play', as they like to say in the business pages.

From an early buy up of 18.32 percent of CMH, Stokes/Seven Network spent \$29.48 million buying a further 11 million shares taking his stake in Cons Media to 19.91 percent. This was from a low base position of 5 percent of CMH that Seven Network has held since 2008. It was speculated, as is usually the case in this kind of threshold bid governed by Corporations law, that Stokes/Seven Network would either launch a takeover or use creep provisions to increase his stake slowly every six months in 3 percent increments.

At the same time, Packer raised his stake in CMH by 1.04 percent to 40.77 percent, funded by, in a surprise move, the sale of his share in the online advertising company, Seek. Soon after this the key Packer controlled company, Consolidated Press Holdings (CPH), announced an on-market share buyback of up to 10 percent of CMH, which took CPH's stake in the company to a formidable (and yet certainly not unassailable) 45 percent. It also raised the Stokes/Seven Network stake by a couple of percent points to around 22 percent.

Amid all the hype and speculation, the consensus is that Stokes/Seven Media were positioning the company for a slice of pay-TV Foxtel (25 percent owned by CMH) and Fox Sports, majority owned by the Premier Media Group (50 percent owned by Foxtel). They are described as "two of the most valuable media assets in the nation". (*Sydney Morning Herald*, Steffens, "Packer's dare to Stokes: Bring it on", 27 August 2009, and *Australian Financial Review*, Kitney and Shoebridge, "Two cool hands playing their game", 29-30 August 2009, "Pay TV still target, even with truce", Oakes, and, "From gambit to endgame, Stokes stalks Packer", *Sydney Morning Herald*, Weekend Business, Maiden, 12-13 September 2009).

Stokes sought, and subsequently gained, two board seats at CMH, while Packer Jnr. picked up another, taking his total to three seats. But the mechanism through which Stokes gained his board seats is itself an intriguing issue. Bryan Frith, a business news veteran of News Corporation, questions the self-interested morality of a 'standstill' agreement between the parties and their directors. Stokes was given the seats in return for no further purchasing activity on the CHH share register for the next 12 months. The irony here is that News Corporation has used similar commercial tactics for years in the cut and thrust of its deal making ("Stokes, Packer Truce cost \$125 million", *Perth Now/Sunday Times*, 12 September 2009; "Regulators should examine ConsMedia Deal", *The Australian*, Business, Frith, 15 September 2009).

* **The End of the C7 Courtroom Drama**

In a drama on an adjacent channel, Stokes has apparently reached the end of the long-running series, at least in its litigious format: his legal action seeking compensation for the demise of the Seven Network's C7 pay television arm. "Seven years, one month and \$200 million after the directors of Seven Network" first launched their legal action against Foxtel, News Corporation, Consolidated Media Holdings and Telstra, among others, the Network, and Stokes, appear to have decided on not taking the case to the High Court. In the article "Season finale: C7 case finally over", (*Sydney Morning Herald*, Business Day, Sexton, 4 December 2009) some interesting wrap-up data and quotes were reported. After losing its appeal 3-0 on 3 December before a full bench of the Federal Court, Seven decided enough was enough. Justice Sackville caught the flavour of this in his judgment, noting "the transactions that gave rise to this litigation are long passed and have been overtaken, not only by later events, but a changed commercial environment in the industries in which they operate". The acrimony between the parties is probably reflected in the costs arising from the long-running case. Sexton writes, "As it turned out, News and its affiliates spent \$40 million, Cons Media and Telstra \$21 million each, and Optus \$9 million. Smaller sums were spent by the AFL, the ARL, the NRL and the Ten

Network. After spending more than \$100 million itself, Seven had to pick up about 60 percent of its opponents' costs". Not surprisingly, the term 'megalitigation' was popularised by the case.

* **Telstra's Structural/Functional Separation**

The main editorial in *The Australian* on 16 September 2009 catches the zeitgeist of these key policy changes. In "At Last, A Good Call on Telstra's Future", it's suggested that this idea is an "audacious move from Canberra delivers the right result". It was so audacious and politically tricky, that rather than get caught in the cross-wake of the equally controversial ETS legislation the government decided to defer introducing the legislation until the new year. The opening paragraph of the piece states: "Almost two decades after a Labor government fluffed the deregulation of the telecommunication sector, the Rudd government has put it right with a stunning piece of national policy". And then continues, "The decision to force the break-up of Telstra into separate wholesale and retail companies is as audacious as it is obvious. This is a big move by Communications Minister Stephen Conroy to force a commercial entity to operate in the national interest".

It argues that government fiat will ensure a "new model" for telecommunications in this country, promising "true competition" for the "first time in our history". Time will tell just how competitive the telecommunications industry becomes, but clearly there's a lot of undoing required before it reaches that point. But the signs are promising should the legislation make it through both houses in the form it is currently proposed.

The front page of *The Australian* on the same day shouts "Conroy rings in a new era" (Berkovic & Bingemann), and describes it as "the biggest shake-up of the communications sector in a generation", in preparation for the roll-out of the \$43 billion NBN. The article interprets the proposal as a very robust way of "increasing pressure on the telco giant to fold its existing copper, cable and fibre optic networks into the NBN". Full double page "Telstra Shake-Up" coverage included "Consumer the big winner in reform" (same authors), "Break-up has been a long time coming" (Stutchbury), "Radical Surgery of slice and dice" (Kennedy), "NBN process already taking shape" (Denholm) and "No other choice but to accept the Conroy call" (Hewett). The Business Section leads with "Telstra gets offer it can't refuse" (Bingemann), while the Business backpage ran "Telstra toyed with the big split" (Durie), arguing that the split is the biggest "micro-economic reform" of the Rudd government, and is really just a plan Telstra has long considered.

Dennis Shanahan, in "As usual politics is the real driver" (*The Australian*, 16 September) notes that in the prehistory of the separation when Telstra was privatised by the Howard government "politics again intervened and allowed the privatised giant to continue as an effective monopoly". He argues "there were too many pressure groups, too much self-interest and too much potential for customers to be left incommunicado by a privatised, divided company without community (universal) service obligations – especially in the Coalition-dominated electorates in regional Australia – for the economically smart thing to be done". The question is: will this 'too hard' history be repeated? Shanahan's view is that the NBN struggle is the real driver behind the Rudd government's decision to bite the bullet with structural separation and set to work building the "biggest single capital works" expenditure. It's all about moving those Telstra customers on their copper access network (CAN) over to the new NBN, to get with the program.

Other news comment and analysis noted that the package's champion, Stephen Conroy, could be likened to "a bovver boy in steel-capped boots offering the hapless and hopelessly underperforming Telstra an 'offer it couldn't refuse'" ("The Telstra Ultimatum, or how to

embrace the 21st century", *Sydney Morning Herald*, Verrender, Weekend Business, 19-20 September 2009). The reference of course is to the government's veiled threat that unless Telstra voluntarily splits, the government will legislate it out of access to spectrum buy up (critical for a major telco player in a mobile wireless broadband world), and force it to sell its 50 percent of Foxtel Pay TV. As it's noted in this piece, "Consumers around the world are abandoning it (fix line telephony) in droves, switching instead to mobile technology, wireless broadband and high-speed fibre optic cable applications".

News Corporation's chairman has indicated that News would "make a grab for a bigger slice of Foxtel if Telstra is forced to offload its 50 percent stake in the pay TV company" ("Murdock circles Telstra's share of Foxtel", *SMH*, Business Day, Oakes, 6 November 2009). Foxtel, based on subscription model, has avoided the economic downturn and is therefore a very attractive cash cow for media investors. It's worth reminding ourselves that Australia's cross-media restrictions do not include pay television. Another piece of the puzzle can be seen in Seven Network's submission to the Rudd Government's review of telecommunications laws, which argued that Telstra should be forced to sell its Foxtel HFC investment ('Stokes share grab puts Packer in tight squeeze', *Australian Financial Review*, Shoebridge and White, 10 July 2009).

* Digital 'Revolution'?

In "Conroy caned as he looks to net revolution" (*The Australian*, 20 July 2009), Mark Day wrote at the launch of a new report called "Australia's Digital Economy – Future Directions", the Minister was also named "Internet Villain of the Year", for the Rudd Government's intentions to introduce mandatory internet content filtering. So although Conroy was at the event in London to promote Australia's digital credentials, understandably, he ended up being pegged as the internet free speech bad guy.

Conroy singled out the feature "Google Maps" which was developed in Sydney by brothers Lars and Jens Rasmussen and sold to Google in 2004, as evidence of Australia's IT prowess. Launching the 'feel good' report, the Minister highlighted some key part of its content, the report:

- notes the Rudd Government's role in developing the digital economy, by laying the foundations for infrastructure just as previous governments have ensured the ubiquitous supply of electricity, gas and water;
- names the NBN as a key part of the infrastructure;
- calls for a major round of regulatory reform, particularly in the area of broadcast communications.
- notes that the trend of convergence challenges existing regulatory structures by blurring previous distinctions between various products and services.
- also notes that the emergence of internet protocol TV, which is unregulated, as an alternative to free-to-air TV content, which is highly regulated.

However, the paper also notes some downsides, cautioning that a full-scale review of media regulation is dependent on establishing the regulatory framework surrounding the NBN.

* NBN Legislation Saga

In "Bill requires Telcos to provide info to government for NBN" (AAP, 25 June 2009), Minister Stephen Conroy fired off an early shot, saying accessing information about telecommunications infrastructure like ducts, pits and poles, would support the timely roll-out of Labor's national broadband network (NBN). This issue alone has had a tortuous trajectory in the NBN Parliamentary debates.

There have been a number of legislative steps and processes on the road to the setting up of

the NBN Co structure. On 25 June 2009, the government introduced the Telecommunications Legislation Amendment (NBN Measures No. 1) Bill 2009 (the first NBN-related legislation). It was immediately referred to the Standing Committee on the Environment, Communications and the Arts Legislative Committee. The purpose of this bill was to amend the Telecommunications Act 1997 to give the Minister the power to require that telecommunications carriers provide network information.

When the inquiry reported to the Senate on 17 August 2009, the majority report recommended that the Bill should be passed without amendments. This didn't actually take place because the government subsequently introduced an almost identical piece of legislation into the House of Representatives, where it was passed and sent to the Senate on 21 October 2009.

Prior to that, on 15 September 2009, the government introduced the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the second NBN-related legislation), a consequence of the extensive submission process on regulatory reforms. The Bill attempts to address anti-competitive behaviour in the telecommunications industry. Again, the Bill was sent to the Environment, Communications and the Arts Standing Legislative Committee for inquiry and report.

Given only four weeks to investigate and analyse 119 written submissions, the government-led committee reported on 26 October 2009, with the majority recommending that the Bill be passed (*Senate Select Committee on the NBN. Third Report, 29 November 2009*, available at http://www.aph.gov.au/senate/committee/broadband_ctte/third_report/index.htm). However, Coalition senators remain concerned with the proposed functional separation of Telstra. The Committee recommended that: "further consideration of the bill not proceed until after the NBN Implementation Study has been completed". The study is yet to be tabled or commented on by the government. The Bill itself was scheduled to proceed to be debated in final sitting weeks of November 2009. However, the ETS debate led to the NBN/Telstra issues being put on hold until the first session when Parliament resumes in 2010.

But the NBN Co is just waiting for that green light. It was reported in "NBN beefs up executive team" (*The Australian, Business*, 10 September 2009) that three new high level appointments had been made to the NBN Company executive team. A former telecommunications analyst, Tim Smeallie (Head of Commercial Strategy), ex-Qantas HR manager Kevin Brown (Corporate Services Manager) and a former McKinsey employee Christie Bryce (Policy Adviser) to the Executive Chairman and CEO Mike Quigley.

* **Cross-Media Visions**

According to Martin Sorrell, the head of the world's biggest advertising group WPP, Australia's cross-media ownership laws, including rules governing the reach of television networks, must be abolished if traditional media companies are to survive the digital age ("Unshackle media outlets: Sorrell", *The Australian*, Sinclair, 20 July 2009). Mr. Sorrell, who was visiting Sydney, expressed his opinion that increased concentration of TV and newspaper companies was "inevitable" if they were to survive the impact of the internet. Interestingly, his comments followed shortly after those made by Communications Minister Stephen Conroy about a new regulatory framework, when he was opening discussions with media proprietors. Sinclair reports Conroy as saying the old framework would not survive the launch of Australia's planned NBN and the launch of high-speed internet TV services.

* **Lachlan Murdoch buys 50 percent of DMG Radio**

The Australian, Media section, ("The year of living dangerously", 14 December 2009) notes a

second half highlight being Murdoch Jnr. spending \$110 million in cash and debt on 50 percent of DMG Australia's radio assets including the Nova and Vega FM networks. Perhaps it was a good deal when it's considered that DMG Australia's British parent, Daily Mail and General Trust, originally spent about \$550 million buying these FM commercial radio licences ("Murdoch tunes into radio to buy DMG", *Sydney Morning Herald*, Oakes, Business Day, 27 November 2009). Under the terms of the deal, Murdoch also becomes chairman of the joint venture. Recapping recent history, this 'year in review' story observes that "since quitting executive duties at News Corp in 2005, Murdoch's Illyria vehicle had completed several small deals (including stakes in Prime Media, Funtastic and the Rajasthan Royals cricket team) and missed out on a large one (a \$3.3 billion joint bid for James Packer's Consolidated Media in early 2008)".

That radio is apparently suffering less in advertising revenues in comparison to television and newspapers may explain the first big investment in Australian media by Murdoch Jnr. Lachlan Murdoch has run a slide ruler over about 300 media assets before deciding on this major investment in DMG Radio Australia. He recently withdrew from a consortium that bought a group of US publications including *The Hollywood Reporter* and *Daily Variety*. He had been in discussions to snare a stake of "at least 10 percent" of a new media company – e5 Global Media ("Murdoch drops movie magazine venture", *Freed, Sydney Morning Herald*, Weekend Business 12-13 December 2009).

The damage to commercial radio by the advertising downturn "has been limited by the lower production costs and fast turnaround time of its advertisements" ("Murdoch tunes into radio to buy DMG", *Sydney Morning Herald*, Oakes, Business Day, 27 November 2009). The same article quotes DMG Australia CEO Cathy O'Connor as saying "DMG Radio Australia is well positioned for further growth and can extend its brands in both broadcast radio and related media. Working with an experienced and committed Australian owner in Illyria will increase our opportunities".

* Free-to-air Networks Update

In the context of the 2006/07 cross-media changes, you'll recall that the Seven and Nine Networks changed their ownership structures to being majority, foreign, private equity owned. To recap: Kohlberg Kravis Roberts bought 47 percent of the Seven Media Group, while CVC Asia Pacific eventually ended up with almost all PBL Media. Both deals were very highly leveraged, and there is now growing speculation about the wisdom of such financial engineering. For example, in "Tune in for the next episode of their mad, sad world" (*Sydney Morning Herald*, Washington, 7-8 November 2009), it's argued that both are "groaning under reported debt loads that are either increasing (Seven) or staying roughly stable (Nine)". The consequences of this for more expensive, well-made, high quality forms of programming, has to be rather gloomy.

Network Ten, on the other hand, has returned to local ownership, with the Canadian CanWest group finally selling out. It was reported in Business Day "Debt-ridden CanWest sells majority stake in Ten Network" (*Sydney Morning Herald*, Oakes, 25 September 2009) that "the ailing media company CanWest has put an end to months of speculation by selling off its majority stake in Ten Network". This is the latest installment in a story that has run from 2006 when CanWest, who own, among other assets, newspapers and a TV network in Canada, announced its intention to sell out of their Australian network operation. Their 50.1 percent share goes to a range of mostly Australian institutional investors, who no doubt will be looking for more programming successes of the *MasterChef Australia* variety. CanWest pockets \$680 million

which will "help it chip away at its \$3.8 billion debt" owed to its private equity owners."

In "Now they're cooking: Ten's new life after sale" (*Sydney Morning Herald*, Business Day, Knight, 25 September 2009), the writer notes that the challenge for Ten and the other networks will be to overcome several threats, at a time of significant structural change in the industry. These include, the possibility that they'll lose the protection offered by the anti-siphoning laws for key sporting events, and also the looming alternative distribution methods – especially, IPTV over broadband networks, as the NBN infrastructure eventually rolls out.

In relation to this last point, some are of the view that in the Australian market at least, "Internet-delivered TV became the next big media battleground after Telstra confirmed it was about to begin a trial of its Tbox digital video recorder and IPTV player" (*The Australian*, Media section, "The year of living dangerously", 14 December 2009). The IPTV market is also poised to accommodate Malaysian billionaire T. Ananda Krishnan, an investor in Fetch TV. It's reported in the same article that Fetch "has signed at least two smaller ISPs to a set-top box and IPTV player of its own and plans to market them to broadband customers by March next year. Sony, Microsoft, Apple, Freeview, TiVo and others are also competing to pipe video content over the internet to the TV screen".

But the future of local news broadcasts in regional areas, when the analog signals are switched to digital, is not looking all that rosy in some areas. In "Digital plan may cap rural TV news", *The Australian*, Sinclair, 9 November 2009), it's argued that local evening TV news broadcasts could become "a thing of the past for up to 10 percent of regional viewers under government plans to use satellite to provide TV services in digital black spots". The Communications Minister, Senator Stephen Conroy, has come up with a plan to deliver a generic state-based satellite service that would be available for those residents who are unable to receive terrestrial digital TV services when digital TV is switched on. The problem is that the new service would be unlikely to broadcast local news bulletins to regional towns. The proposal instead is that viewers in these towns would press a button on their remotes "to call up localised news headlines and footage from an archive of on-demand news content supplied by the broadcasters". A Town Hall meeting in the Victorian town of Mildura was told by representatives of the Digital Switchover Taskforce that they would receive encrypted smartcards to allow them to access some of the on-demand local news services. It was reported that the locals were pretty underwhelmed by the proposal. The article reports a spokesman for the shadow Communications Senator Nick Minchin as saying there were "many unanswered questions about how digital switchover will be managed at the local level".

* **The Australian Communications and Media Authority (ACMA)**

The big-ticket event of the year for the ACMA was the *Kyle and Jackie O Show* debacle on 2Day FM on 29 July 2009. Announcing it had commenced an inquiry "to investigate adequacy of community safeguards for live-hosted entertainment programs on commercial radio", ACMA so began a broad ranging examination under section 170 of the Broadcasting Services Act 1992 (BSA) into whether the commercial radio codes of practice provided "sufficient safeguards for participants and subjects in live-hosted entertainment programs on commercial radio" (ACMA Media Release, 102/2009, 11 August; *ACMA Sphere*, Issue 45, Sept. 2009). The investigation called for public submissions from interested stakeholders, and the submission period closed on 30 September.

Prompted by the much discussed lie-detector test involving a 14 year old on the *Kyle and Jackie O Show*, the section 170 investigation is in effect an ethical spotlight on a full range of

dubious 'stunts', 'pranks' and 'competitions', and other related practices, on live-hosted Australian commercial radio. This discretionary investigation was conducted in tandem with a complaints-triggered investigation into the specific incident itself, where the licensee company of the 2Day FM station is accountable under the 'co-regulatory' industry codes.

On 16 December 2009 the ACMA announced that it would "commence the formal process required under the BSA to impose a new condition on the broadcasting licence of 2DAY Sydney. The condition is intended to provide increased protection for children participating in hosted entertainment programs broadcast by the licensee" (ACMA Media Release, 178/2009). The ACMA investigation relating to the program broadcast on 29 July 2009 also found that the "licensee had breached the complaints handling provisions of the code by failing to provide a response to complainants that adequately addressed the substantive concerns raised in the complaints" (ACMA Media Release, 178/2009).

It is interesting to note that these investigations occurred while the (2004 registered) *Commercial Radio Codes of Practice* are being reviewed, as is required every three years. The timing would suggest that some targeted amendments should be the order of the day. No doubt the very able team at ABC TV's *Media Watch* will be closely scrutinizing the regulatory response in the broader review, which ACMA says it will finalise by the end of 2009.

The personal fallout for Kyle and Jackie? This is how *The Australian* saw it: "After his lie detector test went wrong in late July, he [Kyle Sandilands] was suspended from his Sydney breakfast program, dumped from Australian Idol and pilloried by his peers. He returned to his show bold as brass with barely a blip in the *Kyle and Jackie O Show's* ratings. It will end the year as top FM breakfast show in Sydney yet the industry is furious at the ACMA review into the entire industry's behaviour resulting from one buffoon's errant behaviour" (*The Australian*, Media section, "The year of living dangerously", 14 December 2009).

* **Civil penalty under the Broadcasting Services Act**

On 17 July 2009 the Federal Court made the first civil penalty order under the BSA. Sydney's commercial radio station 2UE was fined \$360,000. Justice Rares made orders imposing a financial penalty on commercial radio station 2UE for breaches of a licence condition which requires it to make disclosures under the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000, (post the original 'Cash for Comment' breaches). The Disclosure Standard was introduced in the wake of the 'Cash for Comment' inquiry in 2000, and requires licensees to announce during a program when the name, products or services of a presenter's sponsor are mentioned. The licensee must keep a register (including on the station's website) of any agreements between presenters and their sponsors (see them here <http://www.2ue.com.au/agreements>). This followed an application by the ACMA in November 2008 to the Federal Court to have a civil penalty order imposed for Disclosure Standard breaches because of the failure of 2UE to satisfy an enforceable undertaking given to the ACMA in 2007. This arose in the main because then presenter, Mr John Laws (who retired in late 2007), had failed to disclose on 20 occasions a relationship with a sponsor. His honour awarded penalties ranging from \$10,000 to \$50,000 per breach, totaling \$360,000 (*ACMAsphere*, Issue 44, August 2009).

Other important regulatory activities for the ACMA in the period since the last edition of Australian Media Monitors, includes ongoing radio frequency spectrum planning and management. The switchover to digital TV was also an important and time consuming activity. The ACMA is now working closely with the dedicated switchover agency, the Digital Switchover Taskforce. Consumer protection initiatives in telecommunications were another important area,

as were the full suite of complaint investigations, enforcement action and other policy initiatives. For a full consideration of the ACMA's activities in 2008-09 please consult their annual report ([HTTP://www.acma.gov.au/WEB/STANDARD/pc=PC_311933](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311933)).

*** Another 'First': SMS Spam Case**

In a landmark case, ACMA was successful in obtaining injunctions against five parties in relation to breaches of the *Spam Act 2003* and the *Trade Practices Act 1974*. (*ACMASphere*, Issue 45, Sept. 2009). Justice Logan in the Federal Court, handed down his judgment on 14 August 2009, noting that the conduct showed "sustained and systematic violation of statutory prohibitions rather than a mere isolated aberration". The main significance of this judgment was that it was the first SMS spam case that ACMA has brought before the courts. Initially ACMA commenced proceedings against eight respondents in the Federal Court in Brisbane back in December 2008. The alleged breaches involved premium SMS chat services. ACMA argued that the respondents "were engaged in a complicated scheme to obtain mobile phone numbers from members of dating websites, using fake member profiles in order to send commercial electronic messages by SMS". Consumers were billed at up to 5 dollars per message. Penalties and further hearings were pending at the time of publication (*ACMASphere*, Issue 45, Sept. 2009).

These kind of breaches of the *Spam Act 2003* can be read in the context of recently introduced safeguards and protections in the "Mobile Premium Services Code", now registered with ACMA. Under the code, Premium SMS Service Providers need to ensure that their marketing and other related practices comply with the Spam Act 2003, the Trade Practices Act 1974, and other state and territory fair trading laws (*ACMASphere*, Issue 42, June, 2009).

*** VoIP Take-up Increases**

The ACMA reports an expanded VoIP market, and increasing take-up by consumers. According to a report released on 17 December there's been "A steady increase in service providers and more convenient consumer options have boosted the take-up of voice over internet protocol (VoIP) services in Australia from 10 percent in 2008 to 14 percent in 2009" (Media Release, 180/2009, 17 December 2009). The Chairman of ACMA, Chris Chapman explained that "VoIP is recognised by the ACMA as one of nine areas of regulatory pressure that are occurring as a result of convergence and the ACMA continues to review and respond to how existing voice regulation applies to the growing number of VoIP services" (Media Release, 180/2009).

In a backgrounder accompanying the release of the report, he noted that ACMA is undertaking an ongoing examination and analysis of emerging technologies and issues in the communications services sector as part of its remit. Further, "VoIP services are a potential complementary or substitute services for the public switched telephone network voice service, the ACMA continues to monitor developments in VoIP and its implications for voice services regulation". The ACMA notes that the report shows more providers are offering VoIP and broadband services, and there is an emerging trend for ISPs to include VoIP services as a part of a bundled package.

Other findings include:

- International calls are the most popular VoIP call type (71 percent of users), followed by long distance (50 percent) and local calls (38 percent).
- Heavy internet users (those using the internet eight or more times per week) and those perceiving themselves as possessing a high level of internet skill were the most likely to use VoIP. As internet users' skills levels develop, VoIP service use is expected to increase.

- Eighty two per percent of VoIP users are satisfied or very satisfied with their VoIP services.
- The majority of VoIP users access VoIP via their PC or laptop (76 percent). Only 17 percent access it via a home phone.
- VoIP usage by medium-sized SMEs grew from 27 percent to 30 percent.

*** Legal Affairs**

Richard Ackland mocks the double standards of politicians using defamation laws in "Libel suits fail the lie detector test" (*Sydney Morning Herald*, 27 November 2009). He drew inspiration from the recent situation of the South Australian Premier, Mike Rann and a former parliamentary waitress who "told Channel Seven she had sex with him on his parliament desk, his office floor, and near a golf course". Ackland writes that Rann now "wants to sue, not her, but the TV station and its sister magazine, *New Idea*". He suggests that since there are no jury trials for defamation in South Australia it's not very likely that the action will gag public discussion of the events, real or imagined. But Ackland observes that Rann infers that the truth will prevail through the premier calling on the state's defamation law. He quips, "He seems to be saying defamation cases deliver just results to litigants who tell the truth. Where do we start to dismantle this furphy, given the rich and deep history of political figures climbing into the box in libel cases to fib their way to a verdict?" Ackland, quite rightly, cautions that "we shouldn't get carried away with the idea defamation cases are a reliable way of extracting the truth". He rolls off a long list of entertaining cases where it was clear that telling fibs was no curb on the awarding of excessive damages. Contested truth claims are always at the heart of the process. But under Australian defamation law the burden of proof falls disproportionately to defendants, and truth alone is now a complete defence in the new uniform regime – but one suspects that persuasive evidence may be tricky to marshal on that front.

An article in the *Walkley Magazine*, "Hacks and flacks square off in the public domain" (Mannheim, Issue 58, October-November 2009), argues that "government plans to reform Freedom of Information laws will mean a shift in the time-honoured battle line between political journalists and public affairs bureaucrats". However, the entrenched information games between a politicised cadre of government PR flacks and journalists who watch and report government affairs, is a culture that will take some mighty efforts to dismantle. Labor frontbencher John Faulkner is committed to open government, and "changing the culture of public service secrecy". So Mannheim argues that, "For the first time in more than 25 years, the control of public documents will shift from government lawyers to the public servants whose core work should be sharing information". But despite the fact that the government has told the bureaucracy that its new role will be to "proactively publish" reports and other information documents that usually would be quietly left on the shelf, this is a major reversal from the ingrained public service culture of secrecy and non-disclosure. On the other hand, more transparency, Mannheim suggests, is a two-way street. Journalists also need to be open to scrutiny and government PR officials should allow their conversations to become available to a variety of media platforms. The Ozcar scandal would have been a very different story in such circumstances.

In the December 2008 edition of AMM, I noted the release of a major report into privacy by the Australian Law Reform Commission (ALRC). I reported that an editorial in *The Australian* (13 August 2008) expressed the view: "Privacy Laws Shield Acts of Malfeasance: Law reform proposals give more power to the powerful". The editorial made the argument that journalists would "have to think twice" when investigating maladministration or political corruption. It strongly insisted that, "If the ALRC's proposal goes ahead, it would remake media law by skewing the balance in favour of public figures with something to hide".

Sections of the media have reacted in a very similar way to the NSW Law Reform Commission's report *Invasion of Privacy*. David Marr, in an opinion piece "Pesky press annoying you? Now you can just sue them" (*Sydney Morning Herald*, Weekend Edition, 15-16 August 2009), writes "the NSW Law Reform Commission reckons the trouble with freedom of speech is that it comes up trumps too often. But the commissioners yesterday released plans to do something about it: give those whose privacy has been violated by the press wider and less-constrained rights than in any in the world to sue for damages". The NSW commissioners, a former judge, James Wood, a current judge, Kevin O'Connor, and Professor Michael Tilbury, according to Marr, ignored opposition to the proposal from the Law Council of Australia, the Right to Know Coalition, the Law Society of NSW and the Press Council – and himself – he says, "We were all ignored". So both the law reform bodies have now recommended the introduction of a statutory tort of privacy. It will be interesting to follow the next steps in this ongoing debate.

* **Watching News Corporation**

Affecting all the markets in which it operates, Rupert Murdoch announced that News Corporation was moving to a standard user pays online news business model ("Murdoch pledges to make online news pay", *Sydney Morning Herald*, Steffens, 7 August, 2009 and "Read all about it ... how Murdoch plans to rescue his business", *Sydney Morning Herald*, Knight, Weekend Edition, 8-9 August 2009). Not surprisingly, the announcement came at the same time as the publication of a 32 percent fall in News Corporation's full year profits. The new model was needed, Murdoch argued, because the advertiser/free online news model is financially unsustainable with newspaper revenues in steady decline. Needless to say, the intention of getting audiences to pay for content which they have previously received for free, is currently a risky strategy. News's consortium partners, as well as all other news providers, may be influenced by these developments.

Added to this mix, news aggregators such as Google News and Yahoo News were in Murdoch's view, "content kleptomaniacs". News Corporation would therefore lead the charge by having its news services de-indexed from the Google Search engine. This announcement had the unintended consequence of exposing the tenuous commercial relations between media companies who produce news, and the search engines which aggregate it for their own purposes. The positive element in these developments is that more people can begin to get a sense of the lack of transparency about seemingly diversely sourced news content. At this point, News and Microsoft announced that they had begun talks about News being indexed on Microsoft's 'Bing' search engine. As in other markets, the Australian divisions of Microsoft and Yahoo are still coming to grips with their joint venture announced in July. Search in Australia is dominated by Google (around 92 percent): in June 2009, of all searches, 9.8 million of them used Google, and 2.1 million used Bing, 1.5 million used Yahoo!7 and 1.3 million used Ask ("Ad deal quandary: better Google the answer", *Sydney Morning Herald*, Business Day, Lee, 31 July 2009).

But like other news organisations around the world, News Corporation is reconfiguring its cross media relations with advertisers and audiences, with the latter increasingly using purpose-built pay platforms (such as Amazon's 'Kindle' readers) and mobile online devices to access news content. The CEO of News Corporation's Australian digital media operations, Richard Freudenstein, (part of the global team looking at the move to paid content), is quoted as saying "News is platform agnostic – wherever consumers want to engage with us, we want to be", ("Publishers reject Amazon e-reader", *Sydney Morning Herald*, Business Day, Lee, 17 August 2009).

*** Free TV Australia's Commercial TV Industry Code of Practice Review**

Announcing the release of the new commercial television code of practice, the ACMA chairman, Chris Chapman said: "The past five years have seen significant changes to commercial free-to-air television broadcasting in this country including, this year, the launch of digital multi-channels that give Australians more program choice". He added: "While the new code allows some greater flexibility for broadcasters in programming for these multi-channels, the ACMA has ensured that industry also correspondingly introduces related community safeguards" (Media Release, 183/2009, 18 December 2009).

Digital TV then is the subtext of the Code review, and as we've seen there are ongoing changes. Since 1 January 2007, commercial free-to-air television licensees have been permitted to broadcast a high definition digital multi-channels. From 1 January 2009 commercial television stations have been able to broadcast a standard definition digital multi-channel. (To see a more complete discussion of the transition to digital TV programming see the Department of Broadband, Communications and the Digital Economy's discussion paper released on 4 December 2009 *Content and Access: the future of program standards and captioning requirements on digital television multi-channels* at www.dbcde.gov.au).

The year started off with Australians having only five free-to-air channels but ended with 16 multi-channels. First Ten launched sports channel ONE in March, and the ABC the final for the year when it launched ABC3 in the beginning of December. The ABC now has four digital channels, including ABC2 in high definition (ABCHD). There are more digital channels promised by the networks in the New Year.

The amended codes were the culmination of a statutory triennial review – the first major one since 2003. There have been two minor ones, however this major one was part of an evolutionary process of fine-tuning "to ensure continued relevance and effectiveness", according to the ACMA.

While routine in some respects, the review is also about allowing the industry to make adjustments in response to changing industry conditions. As QUT's Stuart Cunningham noted on ABC Radio National, "they're being squeezed ... their revenue ... the business model is under pressure" (Cunningham, ABC Radio National, Australia Talks Back, 24 September 2009). So, in a practical sense, this is about the Commercial TV stations saying "these changes will help us survive for a while". The pressures are coming from other forms of less closely regulated television consumption such as IPTV and the Internet, DVDs, and pay television. This translates to liberalizing the classification rules on the main channels, and rules for advertising time on the multi-channels, which is where the action will increasingly be situated.

One of the significant changes is that under the new code, the main digital channels will be allowed more flexibility to promote M, MA and AV programs in lower classification time zones, providing that the material is suitable to be shown for these lower time zones. On the releasing the new Code, the ACMA is already under fire from the Christian lobby Family Voice Australia, who called for the Code to be shelved ("Prepare for Porn at 9pm: Christian group", ABC Radio, Hall, 19 December 2009). The lobby group argues that the change waters down the guidelines to allow nudity at 9pm when many children are still watching. The same news story quotes Sue Turnbull from La Trobe University as saying, "If this particular group don't know what real pornography looks like, then maybe they should see some, so that they can actually make the kinds of distinctions that the people that are doing this classification make every day". She added: "If this family organisation is being really sensible, what it should be doing is talking about sex education, media education, media literacy." Another liberalising change is that

PG-classified programs may be shown at any time on a commercial television broadcaster's multi-channels.

But as well as liberalising in order to appease market pressures, there has also been some tightening down, including censorship for reality television and MA-rated shows. Commercial television is now prohibited from "presenting participants in reality television programs in a highly demeaning or highly exploitative manner". For MA shows, "all depictions of sexual activity or nudity and all verbal sexual references must now be relevant to the story line or program context and must not be high in impact".

The new Code also loosens the requirements for program promotion on a station's main digital channels. This again signals that arguments for stations to more flexibly self-promote due to the impact of mounting pressures from tougher market conditions have won the day with Free TV Australia and the ACMA. Other changes of a more minor nature have been made around corrections for news and current affairs programs and the amount of advertising during election periods.

But the major significance of the new Code is that it has in effect set-up a two track regulatory environment and review process: one is essentially the status quo one for the main channels, while the other is a new streamlined set for the digital multi-channels. This has been achieved by establishing a new Multi-channel Appendix to the Code, which sets out rules that apply only to digital multi-channels. Reviews can be undertaken as deemed necessary by Free TV and the ACMA, and the future public consultation period for the multi-channels can now be as short as three weeks under the new Multi-Channel Appendix to the Code. This would allow quick changes to classification, station promotion, advertising, news and current affairs presentation, complaints or indeed any matter the broadcasters would like to change, in a nimble, market responsive way. Watch this space.

'Non-program matter', code-speak for advertising, is to be afforded a more liberalised regulatory environment on the multi-channels than on the main channels. This includes that:

- Additional non-program matter will be permitted on multi-channels. Non-program matter includes spot commercials and program promotions.
- Between 6.00 pm and midnight, up to an additional two minutes per hour of non-program matter will be permitted compared with limits for broadcasters' main services. Between midnight and 6.00 pm, an additional one minute per hour of non-program matter will be permitted

Free TV were not intending to introduce an electronic web-based complaints mechanism judging by its absence in their draft code of practice, despite it being recommended in the ACMA's Reality TV Review and a Senate Inquiry. Arguably the best outcome of the review is that from 1 March 2010, broadcasters must accept complaints made using a form that will be available on the Free TV Australia website (www.freetv.com.au). The ACMA anticipates that broadcasters will link to the complaints form from their websites.

And finally, the ACMA's explanation for loosening regulation for new television digital channels? "The ability to broadcast more non-program matter is intended to support the new and emerging multi-channels; for example, the amendments are intended to provide flexibility to show European programs and live sporting events that have longer segments. Under the increased time limits, broadcasters will be able to 'make up' in later hours for advertising not shown during those longer segments" (Media Release, 183/2009, 18 December 2009). The political economics of these changes are also about the lobbying power of commercial free-to-air television, and giving some continuing advantage to assist commercial television

with their survival in a digital multi-platform television future. The way in which these legacy regulated sectors compare with services delivered over the NBN, and how 'public interest' content rules are developed, is quickly emerging as an important area of regulatory policy formation. 'Must carry' rules, Australian content, ownership diversity, are all issues which will be determined beyond the ken of the Code of Practice in interactions with the Australia-US Free Trade Agreement, and undoubtedly with an eye to profitable business models for services such as IPTV.

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