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COMMUNICATIONS, MEDIA & TECHNOLOGY

February 2008

DIGITAL TELEVISION REGULATION

Over the past 18 months, the Government made incremental changes to the Broadcasting Legislation Amendment (Digital Television) Act 2006 to facilitate the transition from Australia’s single analogue television broadcasting service to a system requiring broadcasting in digital mode, and facilitate the associated services and new channels. Meanwhile, ACMA has released a Digital Television Codes and Standards Discussion Paper on the development of technical standards, industry codes and standards for digital broadcasting services as required by the legislation. Lawyer Valeska Bloch looks at what will change.

HOW DOES IT AFFECT YOU?

- The switch-off date for analogue television has not yet been fixed but it has been postponed to some time in 2009 in metropolitan markets and 2013 in regional markets. The switch-off date marks the end of the simulcast period (that is, the period during which both analogue and digital channels may be broadcast).
- The ABC and SBS have been permitted to provide multi-channels without genre restrictions from 5 November 2006. The commercial broadcasters have been permitted to provide a High Definition TV multi-channel with differentiated programming to their core service from 1 January 2007.
- From 1 January 2009, commercial free-to-air television broadcasters will be permitted to provide a single multi-channel in Standard Definition TV in digital mode in addition to their Standard Definition TV simulcast of their analogue service.
- Regulatory restrictions on the number of multi-channels that may be provided by free-to-air commercial television services will be removed at the end of the simulcast period. The existing High Definition TV quota will also be removed at the end of the simulcast period.
- Events or parts of events on the anti-siphoning list cannot be shown on a Standard or High Definition TV multi-channel without first being shown, or being shown simultaneously, on the main (or simulcast) service. A review of the anti-siphoning scheme will occur prior to 31 December 2009.
- An additional two types of datacasting transmitter licences (known as Licence A and Licence B), with specific licence conditions, will be allocated.
INTRODUCTION

On 18 December 2007, the new Minister for Broadband, Communications and the Digital Economy, Stephen Conroy (the Minister), announced a further delay to the switch-off date for analogue television until 2009 in metropolitan markets and 2013 in regional markets.

The amendments made by the Broadcasting Legislation Amendment (Digital Television) Act 2006 (the Digital Television Act) were structured to introduce changes incrementally with the next scheduled date of commencement being 1 January 2009.

AMENDMENTS THAT HAVE COMMENCED TO DATE

NEW COMMERCIAL TELEVISION BROADCASTING LICENCES

The moratorium on new commercial television broadcasting licences expired on 31 December 2006. Although the amendments do not extend or re-impose the moratorium, they do modify the power to allocate new commercial television broadcasting licences by granting the Minister the ultimate discretion in issuing licences.

Before the end of the simulcast period, the Minister must conduct a review in relation to whether new commercial television licences should be allocated, and if so, what variations should be made to licence area plans. The review must be conducted in a manner that provides for wide public consultation. If, following such a review, the Minister is satisfied that a commercial television broadcasting licence should be allocated, the Minister may direct the Australian Communications and Media Authority (ACMA) to allocate the licence.

In allocating commercial television broadcasting licences, ACMA is required to determine a price-based allocation system.

MULTI-CHANNELLING

During the simulcast period, commercial television broadcasting licensees will be required to provide:

- a core service, which is either simulcast in analogue and digital mode or which is a single Standard Definition TV (SDTV) service (for new, digital only licences allocated after 1 January 2007); and
- a High Definition TV (HDTV) multi-channel.

The programming provided on a HDTV multi-channel may differ from that provided on the core service. Provided the licensee complies with the HDTV quota obligations, the hours of transmission are at the discretion of the licensee.

National broadcasters may provide as many multi-channels as their spectrum capacity allows. Depending on the standards and compression technology chosen, it may be possible to provide more than one HDTV multi-channel. If more than one HDTV multi-channel is provided, the national broadcaster is required to nominate which of these HDTV channels is to be the ‘designated’ HDTV service to which the HDTV quota obligations then apply.

At least one year before the end of the simulcast period, the Minister must conduct a review of the regulation of SDTV and HDTV multi-channels. The review must consider whether and how captioning, Australian content and children’s television standards and code of practice should apply to multi-channels.

HIGH DEFINITION TV

National broadcasters and commercial television broadcasting licensees are required to provide a HDTV multi-channel, but the programming on that multi-channel is no longer required to be (although it is permitted to be) a simulcast of the SDTV and analogue service.

The requirement to transmit 1040 hours per year of HDTV programs or 1040 hours reduced on a pro-rata basis continues. For existing licensees (with the exception of licensees operating in Mildura/Sunraysia), the HDTV quota must be met from 1 January 2007 until the end of the simulcast period. For licensees operating in Mildura/Sunraysia, quota obligations commenced on 1 January 2008. For commercial television broadcasting licences issued after 1 January 2007, the HDTV quota commences on the day two years following the commencement of a service provided under the licence.
The ongoing obligations in the regulations to keep records in relation to HDTV transmissions and to regularly report to the ACMA, will continue.

Unless specific regulations are made, commercial television broadcasters in remote licence areas are not subject to HDTV quota obligations. However, if quotas are imposed by regulation, there is no requirement on the broadcaster to provide simulcast programming on the HDTV service.

ANTI-SIPHONING

The current anti-siphoning list that began on 1 January 2006 will continue until 31 December 2010. An anti-siphoning event is an event specified in the anti-siphoning list.

During the simulcast period, a commercial television broadcaster must not televise the whole or part of an anti-siphoning event on an HDTV multi-channelled commercial broadcasting service, unless:

- the whole or part of the event has been previously televised on the core service;
- the event is televised simultaneously on the core service and the HDTV multi-channel; or
- the broadcaster televises the part of the anti-siphoning event in a news or current affairs program.

During the simulcast period, a national broadcaster must not televise the whole or part of an anti-siphoning event on an SDTV multi-channel, unless:

- the whole or part of the event has been previously televised on the simulcast service;
- the event is televised simultaneously on the multi-channel and the simulcast service; or
- the national broadcaster televises the part of the anti-siphoning event in a news or current affairs program.

Subscription television broadcasting licensees are subject to a licence condition that the licensee cannot acquire rights to events on the anti-siphoning list unless:

- a national broadcaster has the right to televise the event; or
- a commercial television broadcasting licensee (other than a licensee operating under a licence issued under subsection 40(1) of the Broadcasting Services Act 1992 (the BSA)) covering more than 50 per cent of the population has the right to televise the event.

CHANNELS A & B

The amendments provide for the allocation of two datacasting transmitter licences (DTL) (Licence A and Licence B) for 10 years, with the possibility of a further five-year renewal. Each licence will be for 7 MHz that nominally provides coverage across all of Australia. Neither channel will be permitted to be used for commercial television services or fixed subscription broadcasting services.

Licence A must be used for the transmission of free-to-air narrowcasting, datacasting or community television services that can be received on a Domestic Digital TV Receiver (DDTR). It may not be controlled by a commercial television broadcasting licensee or a national broadcaster. The allocation of the licence will be by auction and may include conditions for participation. Licence A is subject to an annual licence fee based on revenue. Services delivered using Licence A must commence within one year after its allocation or as notified in writing by ACMA.

Licence B is being held out as a platform for a wider range of services, with an emphasis on mobile television. The control limitations for Licence B depend on whether or not the relevant service provided is capable of being received on a DDTR. If the licence is used to transmit certain types of services to in-home devices – that is, to an integrated digital TV receiver or standard set-top box connected to a TV – restrictions similar to the Licence A restrictions will apply. That is, the licence may not be held by an incumbent broadcaster nor be used as a subscription/pay-TV service. Licence B is also prohibited from being used to transmit a datacasting service capable of being received by a DDTR if the service is a BSA-exempt re-transmitter service.

However, if Licence B is used for mobile or handheld video services, it may offer subscription services in the relevant licence area. Further, commercial television broadcasting licensees and national broadcasters may control a Channel B DTL licence, provided it is not used to provide services to a DDTR. Services delivered using Licence B must commence within 18 months after the allocation of the licence or as notified in writing by the ACMA. Applicants for Licence B are also required to submit an access undertaking and have it accepted by the ACCC prior to applying for a licence.
The Rudd Government has made no announcement in relation to the allocation of Licence A and Licence B.

SECTION 40 LICENCES

The amendments provide for the allocation by ACMA of commercial broadcasting licences operating in spectrum outside the broadcasting services bands (BSB) (section 40 licences). These licences will be allocated on the basis of one licence per service. As such, broadcasters providing a commercial television broadcasting service under such a licence are not authorised to multi-channel. These licences are also subject to the condition that the licensee only provide the licence in digital mode.

Certain standard licence conditions and program standards for commercial television broadcasting licences do not apply to section 40 licences.

AMENDMENTS COMMENCING ON 1 JANUARY 2009

MULTI-CHANNELLING

During the simulcast period, an existing commercial television broadcasting licence will authorise the licensee to provide the core service (which is either simulcast in analogue and digital mode or is the initial SDTV service provided by a licensee allocated a licence after 1 January 2007), an HDTV multi-channel, and an SDTV multi-channel.

Licences allocated on or after 1 January 2009 will authorise the transmission of two SDTV multi-channels and an HDTV multi-channel. These licences will be digital-only licences and they will not have simulcast obligations (or a 'core' channel). One of the SDTV multi-channels will be designated as a 'primary' multi-channel, which will be permitted to premiere anti-siphoning content (in the same way as a 'core' channel).

After the simulcast period, both existing and new commercial television broadcasting licences will authorise the licensee to provide one or more HDTV multi-channels and one or more SDTV multi-channels. This means that the only limitation on the number of multi-channels that may be provided from the end of the simulcast period is the capacity of the spectrum. The broadcaster will still only be authorised to use a single 7MHz of spectrum to provide its services.

ANTI-SIPHONING

A review of the anti-siphoning regime must be conducted before 31 December 2009 and is timed to occur before the current anti-siphoning list expires on 31 December 2010.

A commercial or national television broadcaster must not televise an anti-siphoning event on a secondary television broadcasting service in the licence area, unless:

- the anti-siphoning event has previously been televised on the core/primary service;
- the anti-siphoning event is being televised simultaneously on the core/primary service and the secondary SDTV multi-channel; or
- only part of the anti-siphoning event is being televised on the secondary television broadcasting service and it is being televised in a news or current affairs program.

A commercial or national television broadcaster must not televise an anti-siphoning event on an HDTV multi-channelled service in the licence area, unless:

- the anti-siphoning event has previously been televised on the primary service;
- the anti-siphoning event is being televised simultaneously on both the primary service and the HDTV multi-channelled service; or
- only part of the anti-siphoning event is being televised on the secondary television broadcasting service and it is being televised in a news or current affairs program.

LOOKING AHEAD

THE DISCUSSION PAPER – TECHNICAL STANDARDS, INDUSTRY CODES AND INDUSTRY STANDARDS

Despite the structured introduction of amendments to the BSA, the detail of the practical ways in which digital television will be regulated remains unknown. Hopefully, this detail will be illuminated by the development of technical standards, industry codes and standards, as provided for by Part 9A and Part 9B of the BSA. The intention of the powers granted to ACMA under these parts is to drive digital take-up and to minimise the impact on consumers caused by the transition to new types of services and equipment.
Under Part 9A of the BSA, ACMA may determine technical standards:

- relating to the transmission in digital mode of television broadcasting services and datacasting services using the broadcasting services bands; and
- for domestic receivers capable of receiving television broadcasting services and datacasting services transmitted in digital mode using the broadcasting services bands.

ACMA has already used these powers to determine a standard for digital transmission in standard definition mode.

Under Part 9B, ACMA may register industry codes of practice that have been developed by bodies or associations that represent particular sections of the industry. ACMA may also request that certain codes be developed. ACMA may also determine industry standards in the absence of, or following, the failure of industry codes, or if there is a failure to comply with a request for the development of a code. While there is no direct means of enforcing a registered industry code, failure to comply with an industry standard made under Part 9B may result in civil penalties. ACMA will consider each code lodged on a case-by-case basis, taking into account the stated intention of Parliament that industry bodies should generally be placed in a position where they can regulate their own affairs.


The Discussion Paper indicates that ACMA will be likely to consider regulatory intervention where:

- there is clear evidence that intervention in the form of codes or standards will benefit consumers, drive the take-up of digital services or address demonstrated market failure;
- the benefits of intervention outweigh any potential burden (administrative or financial) on industry; and
- market forces alone will not resolve the issue that is the subject of the regulation, within a reasonable timeframe.

ACMA has stated that the following are areas where industry-designed codes would be welcome, however the list is not exhaustive. These are:

- the labelling of domestic equipment to help consumers better understand the capabilities of digital television equipment;
- technical transmission/receiver standards;
- logical channel numbering, which aims to ensure that the numbering of channels is consistent with industry brands and marketing;
- electronic program guides;
- application program interfaces, which allow for the embedding of software in television systems to provide for interactive experiences; and
- conditional access systems, which enable a television service provider to allow or deny access to a user of a particular broadcast service.

**CONCLUSION**

The introduction of digital television in Australia has been accompanied by a complex regulatory regime, structured to begin incrementally in order to drive its uptake. The commercial viability and timing for the auction of Licence A and Licence B and the technical requirements yet to be set out in the relevant standards and codes are two of the most significant remaining unknowns in this new regulatory environment.
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