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Group Consulting Editor
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Group Publisher
Richard Firth

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Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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Strategic Partners



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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

One general chapter. This chapter provides an overview of the EU's digital single market proposals.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 27 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Australia

King & Wood Mallesons

Renae Lattey



1 Overview

- 1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in your jurisdiction, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3–5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.**

Consistent with international experience, Australia's telecoms, audio-visual media distribution and internet infrastructure sectors have in recent years had to grapple with shifts in consumer behaviour driven by technological convergence and the pressure this has placed on legacy platforms. This has raised challenges for incumbents and market entrants alike.

Telecoms and internet infrastructure

Revenue in 2015–2016 from the telecommunications services market has been estimated at AU \$41.3 billion. The two largest providers are Telstra Corporation Limited (“**Telstra**”), the incumbent, and Singtel Optus Pty Limited. Vodafone Hutchison Australia Pty Limited operates Australia's third mobile network. In 2015, TPG Telecom Limited acquired iiNet Limited, becoming the second largest internet services provider. TPG also entered into a AU \$1 billion deal to provide Vodafone with transmission capacity for its mobile network in exchange for network resale rights.

The sector is fully liberalised. The dominant competition policy focus in the sector since the 1990s has been to promote downstream operator access to certain telecoms network services. Under the former Labor Government, policy shifted back towards the public funding of network infrastructure with the formation of NBN Co Limited (“**NBN Co**”), a public company initially responsible for rolling out an AU \$37 billion fibre-to-the-premises (“**FTTP**”) network covering 93% of the Australian population (the “**NBN**”). In support of this objective, in 2012, an AU \$11 billion agreement was finalised between Telstra and NBN Co for the decommissioning of Telstra's copper and hybrid fibre-coaxial (“**HFC**”) network and the progressive structural separation of Telstra. The current Federal Government supports structural separation, but, following its announcement made in April 2014, has transitioned to an ‘optimised multi-technology mix’ (“**OMTM**”) model, which includes a combination of fibre to the node/basement/distribution point (“**FTTN/FTTB/FTTdp**”), FTTP, HFC, fixed wireless and satellite technologies. The renegotiated agreement was finalised in December 2014. In April 2016, NBN entered into a AU \$1.6 billion agreement with Telstra for Telstra to help build out and

extend the Telstra HFC network for NBN. The Government's objective remains for the NBN to provide download data rates (and proportionate upload rates) of at least 25 megabits per second to all premises and at least 50 megabits per second to 90% of fixed line premises, but the OMTM model is expected to save AU \$32 billion. The NBN is targeted for completion by 2020.

The legislation establishing NBN Co allows for it be privatised in the future. Privatisation would require a number of steps, including a declaration by the Communications Minister that the NBN is fully operational and an inquiry by the Productivity Commission.

Australia's telecoms reseller market is competitive, but has no major players, and had an estimated revenue of AU \$9.3 billion in 2015–2016. The major players in the internet service provider (“**ISP**”) market are Telstra (with a 42.8% market share), TPG and Optus. The ISP market's revenue in 2015–2016 is estimated to be AU \$4.8 billion.

Audio-visual media distribution

Revenue in 2015–2016 from free-to-air (“**FTA**”) and pay television has been estimated at AU \$5.7 billion and AU \$5.2 billion, respectively. The industry remains highly concentrated. The three major commercial FTA operators are Seven West Media Limited, Nine Entertainment Co Holdings Pty Limited and Ten Network Holdings Limited. The Australian Broadcasting Corporation (“**ABC**”) is the main public broadcaster, with an 11.2% market share. The leading pay TV operator is Foxtel, which has a 59.3% market share.

Revenue from film and video distribution and radio services has been estimated at AU \$1.8 billion and AU \$1.6 billion, respectively.

In addition to being subject to mergers scrutiny under Australia's general competition law, FTA television and radio broadcasting is subject to specific cross-ownership limitations intended to promote competition and media diversity. In March 2016, the Government announced plans to reform the broadcasting laws by removing specific cross-ownership limitations. Legislation was introduced into Parliament but has lapsed pending the 2016 federal election.

Foreign investment

Telecoms and media industries are open to foreign investment subject to the limitations discussed at question 1.4 below.

(Note: revenue and market share data are from 2015–2016 estimates courtesy of IBISWorld.)

- 1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in your jurisdiction.**

Key among the objectives of Australia's telecoms, media and internet regulatory framework is the promotion of competition and

protecting the rights of consumers. More specifically, telecoms and internet regulation seeks to promote the long-term interest of end-users and the efficiency and international competitiveness of the Australian telecommunications industry, while broadcasting regulation seeks to promote diversity of opinion and the production of original Australian content.

The principal legislation governing these sectors includes:

- the *Telecommunications Act 1997* (“**Telecommunications Act**”), which deals with licensing and the rights and obligations of carriers and service providers;
- the *Broadcasting Services Act 1992* (“**Broadcasting Services Act**”), which regulates broadcasting (including digital television services), subscription services, online content (for internet service providers), narrow-casting and datacasting;
- the *Radiocommunications Act 1992* (“**Radiocommunications Act**”), which regulates radiofrequency spectrum management and licensing; and
- the *Competition and Consumer Act 2010* (“**Competition and Consumer Act**”), which provides both general competition regulation and a telecommunications-specific competition regulation regime.

The telecommunications and internet sector is also subject to:

- the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (“**Consumer Protection Act**”), which establishes the universal service obligation and consumer protection regulation;
- the *Telecommunications (Interception and Access) Act 1979* (“**Interception Act**”), which regulates interception and law enforcement, and was recently amended to include data retention obligations; and
- the *National Broadband Network Companies Act 2011* (“**NBN Companies Act**”), which governs the ownership, control and reporting obligations of NBN Co.

An inquiry into technological convergence commissioned by the former Labor Government (the “**Convergence Review**”) recommended greater use of platform-neutral regulatory frameworks. A package of reforms based on the recommendations was introduced in March 2013 – however, it failed to obtain Parliament’s support and the current Federal Government has not indicated an interest in progressing the recommendations any further.

The Department of Communications and ACMA recently completed a review of Australia’s spectrum management framework, including the Radiocommunications Act. The Spectrum Review Report, released in May 2015, proposed changes to simplify the spectrum management framework and address the increase in demand for spectrum and market changes. Some of the proposed changes are outlined in section 3. Draft legislation is expected in the second half of 2016, but that may depend on the outcome of the pending election.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in your jurisdiction.

Telecoms, media and the internet are regulated by Australia’s Federal Government. The key regulating bodies are:

- the Minister for Communications (“**Communications Minister**”), who administers the Department of Communications, the Federal Government department responsible for developing and delivering communications policy and programmes. The Department also oversees the universal service obligation arrangements, which primarily

involves the managing of contracts and grants to ensure Australians have universal access to telecommunications services;

- the Australian Competition and Consumer Commission (“**ACCC**”), which is responsible for competition-related issues and some consumer issues;
- the Australian Communications and Media Authority (“**ACMA**”), which is responsible for broadcasting regulation, technical regulation, technical consumer issues, privacy (together with the Privacy Commissioner) and spam. In 2015, The Minister for Communications announced a review of the objectives, structure and operations of ACMA to “ensure it remains fit-for-purpose for both the contemporary and future communications regulatory environment”. A draft report, released in May 2016, proposed certain functional changes including transferring ACMA’s cybersecurity functions to the Attorney-General’s Department; and
- the Telecommunications Industry Ombudsman (“**TIO**”), an independent complaints and dispute resolution body.

Non-government and industry bodies involved in industry self-regulation and co-regulation with the ACMA include Communications Alliance, FreeTV Australia, the Australian Subscription Television & Radio Association and Commercial Radio Australia.

In 2014, the Federal Government released a deregulation roadmap, which had the objective of reducing telecommunications regulation. This has already led to a number of deregulatory measures in the telecommunications sector, such as the phasing out of TUSMA and removal of retail price controls on Telstra.

1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in your jurisdiction?

General

Approval is required for foreign investments above a certain threshold when a foreign person wants to purchase or invest in an Australian company, assets of an Australian business or certain types of Australian land. However, the Federal Government’s policy is to encourage foreign investment in Australia. The Federal Government may reject a proposed investment that is not in the national interest, which takes into account factors such as national security and the “character of the investor”. The Federal Government may impose conditions on its approval to address these concerns.

Telecoms and internet

Under Australia’s foreign investment regime, telecommunications is considered to be a sensitive sector and lower thresholds apply for seeking approval. In addition, approvals may be subject to stricter conditions. Commercial land used in relation to communications is also considered sensitive and acquisitions are subject to lower thresholds.

The Communications Minister may declare that a carrier licence is subject to a condition about the extent of foreign ownership or control of the holder.

Telstra is subject to specific foreign-ownership restrictions. No more than 35% of its shares may be held by foreign entities, and no more than 5% by any single foreign entity. The Communications Minister has stated that the Federal Government may consider changing Telstra’s foreign ownership restrictions in the near future.

NBN Co is required to remain government-owned until various steps have been taken to ensure privatisation is appropriate, and the Communications Minister may prohibit certain private ownership or control over NBN Co.

Media

Federal Government approval is required for foreign investments of 5% or more in the media sector, which is defined for this purpose as “daily newspapers, television and radio (including internet sites that broadcast or represent these forms of media)”, regardless of the target’s value.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Australia has been a member of the WTO since 1 January 1995. Australia has adopted the WTO Basic Telecommunications Reference Paper and made commitments under the Fourth Protocol on Basic Telecommunications.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Electronic communications networks and services are regulated under the legislation mentioned in question 1.2 above. The Telecommunications Act and the Competition and Consumer Act are intended to promote open competition for the provision of electronic communications networks and services by carriers and carriage service providers (“CSPs”).

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The key regulators are the ACCC, which primarily regulates competition and consumer issues, and the ACMA, which primarily regulates technical issues.

These bodies generally act independently of the Federal Government. However, the Communications Minister has residual regulatory powers, including the ability to:

- impose carrier licence conditions, which may be used to regulate specific carriers and carriers generally; and
- direct the ACCC and the ACMA in the performance of their regulatory powers in certain respects.

Industry bodies (comprising members of the telecommunications industry) also develop industry codes and standards that can be registered with, and enforced by, the ACMA under the Telecommunications Act. The TIO deals with consumer complaints about telephone and internet services.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Most decisions made by the ACMA may be appealed to:

- the Administrative Appeals Tribunal, on the merits of the decision; and

- the Federal Court of Australia, for judicial review on administrative law grounds.

While some ACCC decisions may be appealed to the Australian Competition Tribunal on the merits of the decision, there are certain decisions that may only be appealed to the Federal Court of Australia for judicial review on administrative law grounds.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The Telecommunications Act distinguishes between:

- carriers, being entities that own telecommunications infrastructure (generally, line links or certain radiocommunications facilities) used to supply carriage services to the public;
- CSPs, being entities that supply carriage services using a carrier’s infrastructure; and
- content service providers.

These categories are not mutually exclusive, so most carriers are also regulated as CSPs.

Wireless communications are subject to radiocommunications licensing requirements (see section 3 below).

2.6 Please summarise the main requirements of your jurisdiction’s general authorisation.

Carriers must be individually licensed by the ACMA. The requirements for a carrier licence include:

- the applicant must be a corporation, eligible partnership or public body; and
- the applicant must pay an application fee, and may be required to pay an annual carrier licence charge and contribute to levies for certain public interest services.

The ACMA may refuse an application if the applicant is disqualified (e.g. where the applicant’s previous carrier licence was cancelled or licence fees or compulsory levies were not paid).

The Telecommunications Act sets out standard carrier licence conditions that apply to carriers. The Communications Minister may impose further licence conditions on individual carriers, classes of carriers or all carriers.

CSPs and content providers are not required to be licensed, but must comply with certain obligations, most of which are set out in the Telecommunications Act.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

As noted above, carrier licences permit the use of the licensee’s infrastructure to supply carriage services to the public. Carrier licences issued under the Telecommunications Act do not have a stated term, but may be cancelled by the ACMA or surrendered by the licensee. Although there is no express prohibition against the transfer of carrier licences in the Telecommunications Act, the ACMA’s view is that carrier licences are not transferable.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Yes. The Telecommunications Act empowers carriers to enter public and private land to install, inspect and maintain telecommunications facilities, provided statutory notification and objection procedures are followed, including payment of compensation in some cases.

The power to install telecommunications infrastructure is, in practice, limited to the installation of “low impact facilities” (including types of below-ground cabling, public pay-phones and radiocommunications antennae). A recent court case has held that the power to maintain extends to permitting any conduct which makes certain the proper functioning or operation of equipment installed on the land, including drawing power. Carriers may also rely on facility installation permits to install facilities, but this is uncommon. Additional categories of “low impact facility” apply in respect of the NBN.

The power to install telecommunications facilities implicitly confers rights of land tenure upon carriers.

In circumstances where the above powers and immunities do not apply, rights of land access and tenure must be negotiated with the landowner and any relevant authorities and are also subject to state and territory laws.

Access and Interconnection

2.9 How is network-to-network interconnection and access mandated?

It is a standard carrier licence condition that carriers ensure any-to-any connectivity between their own telecommunications network and any interconnected network.

The ACCC may “declare” certain telecommunications services under the Competition and Consumer Act if it considers that the declaration would promote competition, any-to-any connectivity and economically efficient investment in telecommunications infrastructure. Carriers and CSPs are required to make declared services available on request by access seekers and to:

- allow interconnection of facilities;
- take all reasonable steps to ensure service quality and fault handling is equivalent to what the service provider provides to itself; and
- provide billing information to the access seeker.

The ACCC has declared services, including fixed originating and terminating access, local bitstream access, unconditioned local loop services, line-sharing services, mobile terminating access, wholesale ADSL, domestic transmission capacity and local carriage services.

In addition, the Government has enacted legislation requiring that fixed-line carriage services capable of download transmission speeds greater than 25 megabits per second, which come into existence or are altered or upgraded after 1 January 2011, be made available as a basic connectivity service (layer 2 bitstream service) on a wholesale-only basis. This requirement was designed to prevent private operators “cherry-picking” and providing high speed broadband to profitable metropolitan areas, thereby putting the business model of the NBN at risk. A carrier licence condition designed to address certain “loopholes” in the legislative amendment also took effect

on 1 January 2015, and applies to all carriers that own or operate applicable telecommunications networks. The ACCC in a draft decision in November 2015 has also indicated that it intends to declare a superfast broadband access service.

In terms of facilities access, carriers are required to provide access to their passive infrastructure to other carriers. Part 20A of the Telecommunications Act also provides a regime for carriers to access certain fixed-line facilities that are owned by non-carriers.

2.10 How are interconnection or access disputes resolved?

The ACCC may set default “up front” price and non-price terms for access to declared services by making interim and final access determinations and binding rules of conduct. The Communications Minister may also make “Ministerial pricing determinations” setting out principles dealing with price-related terms and conditions of access. However, access seekers and access providers may enter into private access agreements for the relevant services, which prevail over the “up front” terms to the extent of any inconsistency.

A negotiate-arbitrate model continues to exist in respect of facilities access obligations.

2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

NBN Co, NBN Tasmania and any companies over which NBN Co is in a position to exercise control (“NBN Corporations”) must publish a standard access agreement or provide an access undertaking to the ACCC for certain services.

2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and if so, how?

The ACCC may set “up front” price terms for access to declared services (see question 2.10 above). Currently, final access determinations have been made in respect of interconnection services (being fixed originating and terminating access and mobile terminating access). Access providers and access seekers may enter into access agreements that will prevail over those “up front” terms to the extent of any inconsistency.

Anti-competitive pricing is regulated by the Competition and Consumer Act. There are also various provisions in the Competition and Consumer Act designed to promote uniform national pricing of certain services supplied by NBN Corporations.

2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Yes. Since March 2012, Telstra has been subject to a Structural Separation Undertaking, under which Telstra undertakes to structurally separate by 1 July 2018 by:

- progressively disconnecting fixed voice and broadband services from Telstra’s copper and HFC networks as the NBN is rolled out (see question 2.15 below); and
- taking measures designed to ensure interim equivalence and transparency and to ensure that wholesale customers gain access to key input services on an equivalent basis to Telstra’s retail business units during the transition to the NBN.

Operators of certain superfast carriage networks that were altered or came into existence after 1 January 2011 must offer services on a wholesale-only basis, which imposes structural separation on those operators who also wish to offer retail services.

The ACCC is also empowered to make rules requiring certain carriers and CSPs to prepare and provide records to the ACCC, which could include accounting separation, although no such rules are currently in operation.

Although NBN Co is envisaged to be a wholesale only supplier, the NBN Companies Act provides a mechanism for functional separation to be imposed on NBN Corporations in the future if the Communications Minister considers it necessary.

2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

The ACCC has declared an unconditioned local loop service and a line-sharing service, effectively requiring Telstra to provide access seekers with access to its local loop infrastructure. The ACCC has made determinations setting the terms on which access to these services must be provided.

There are no general obligations on cable TV operators to provide third-party access to their facilities. Pay TV operator Foxtel's digital set top box service is the subject of an access undertaking that was accepted by the ACCC in 2007.

2.15 How are existing interconnection and access regulatory conditions to be applied to next-generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

Existing interconnection and access regulatory conditions apply to next-generation networks.

The Government has established NBN Co to build and operate a new NBN on an open-access, wholesale-only basis (subject to certain exceptions), using an 'optimised multi-technology mix' model, which includes a combination of fibre to the node/basement/distribution point (FTTN/FTTB/FTTdp), FTTP, HFC, fixed wireless and satellite technologies. A renegotiated agreement with Telstra was finalised in December 2014, which provides for the purchase of Telstra's copper and HFC assets by NBN Co and the use of certain other Telstra assets. An agreement was also signed with Optus for NBN Co to acquire its HFC assets. There are currently no incentives for the private sector to build fibre access networks. Further, as discussed in question 2.9, there are restrictions on how private operators can sell high-speed broadband (i.e. operators must make it available as a basic connectivity service and must make it available wholesale-only).

In terms of sharing of passive infrastructure, carriers must provide access to telecommunications facilities (including ducts, pits and poles) on request by other carriers. Part 20A of the Telecommunications Act also provides a regime for carriers to access certain fixed-line facilities that are owned by non-carriers to allow for the build-up of fibre networks. Over the last two years, the ACCC has indicated it is considering whether to declare facilities access services. The latest statement on the declaration of facilities access, made in September 2015, suggests that duct access is of particular interest to the ACCC.

Price and Consumer Regulation

2.16 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Where CSPs offer local calls, they must give residential and charity customers the option of untime local data and voice call services. They must also offer untime local voice call services to their other customers.

The Communications Minister also has power under the Consumer Protection Act to issue price controls on Telstra for any carriage or content services. However, the retail price controls imposed on Telstra were repealed in March 2015 and there is no indication they will be reintroduced in the near future.

2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

Yes. Industry codes registered with the ACMA include requirements relating to advertising of services, provision of information to customers, billing processes, credit assessment, transfer of services between service providers, complaints handling, privacy protection, and the provision and promotion of mobile premium services.

The ACMA also requires telecommunications services to enable pre-selection (to change carriers automatically for certain calls or by dialling an override code) and phone number portability.

Numbering

2.18 How are telephone numbers and network identifying codes allocated and by whom?

Under the Telecommunications Act, the ACMA produces a Numbering Plan, under which it allocates and manages telephone numbers and CSP identifying codes.

2.19 Are there any special rules which govern the use of telephone numbers?

The Numbering Plan provides rules on:

- the format of particular types of telephone numbers;
- the requirement for CSPs to provide number portability; and
- the rates chargeable for certain types of calls.

Communications Alliance has also established industry codes dealing with rights of use of numbers and number portability.

2.20 Are there any obligations requiring number portability?

The Numbering Plan requires CSPs to enable number portability for local, freephone and mobile numbers. Carriers and CSPs are required to assist customers to port their number and the incoming provider must provide an "equivalent service" to porting customers as is provided to non-porting customers. The Numbering Plan and Communications Alliance codes set out the procedures for porting numbers.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Radiofrequency spectrum is regulated by the ACMA primarily under the Radiocommunications Act. The Communications Minister also has some powers relating to radiofrequency spectrum planning and allocation.

The use of spectrum for broadcasting services is subject to a separate planning and licensing regime administered by the ACMA under the Broadcasting Services Act.

In May 2015, the Department of Communications outlined its spectrum review proposal to completely re-write the spectrum licensing framework in Australia. This proposal has been largely supported by industry, and a consultation paper was released in early 2016 for a proposed Bill to be introduced before the end of 2016. The proposal is for the current regime to be grandfathered for existing licences and for licensees to be given the option to migrate their licences to the new regime. Some of the proposed changes are outlined further in the sections below.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative ‘beauty parades’, etc.?

The use of the spectrum is authorised by way of licences primarily issued under the Radiocommunications Act.

The ACMA issues licences subject to the spectrum and any relevant frequency band plans. The spectrum and frequency band plans specify how particular frequencies may be used, and are generally consistent with the International Telecommunications Union’s Radio Regulations and Table of Frequency Allocations.

There are three types of licences available under the Radiocommunications Act:

- spectrum licences, which authorise the use of a particular frequency range in a geographical area. Spectrum licences can be issued for a period of up to 15 years and are generally allocated by auction;
- apparatus licences, which authorise the operation of particular devices in a particular frequency range in a geographical area. Apparatus licences may be issued for a period of up to five years, and are generally allocated on application to the ACMA on an over-the-counter, first-in, first-served basis; and
- class licences, which authorise the use of devices under a common set of conditions as “shared spectrum”.

“Beauty parades” are permitted, but have not been a feature of the Australian regime to date.

Parts of the spectrum are designated by the Communications Minister for broadcasting purposes (the “**Broadcasting Services Bands**”). Broadcasters operating in the Broadcasting Services Bands are issued with an apparatus licence, which authorises the operation of a transmitter associated with their broadcasting licence.

The ACMA determines a price-based system to allocate commercial Broadcasting Services Bands licences. Commercial and community broadcasting licences are generally issued for five years.

A key proposal of the Department of Communication’s spectrum review is to consolidate the spectrum and apparatus licence types (including licences for broadcasting) under the Radiocommunications Act into a single type of spectrum licence.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The use of spectrum can only be made licence-exempt for specified defence, intelligence, law enforcement and emergency purposes.

The ACMA may also issue class licences that authorise the use of spectrum by any person, essentially as “shared spectrum” for particular radiocommunications devices, subject to the conditions of the class licence. Class licences cover many important private spectrum uses such as for Wi-Fi and Bluetooth.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Licence fees are payable for apparatus and spectrum licences. The fees vary depending on the type of licence and the method of allocation. For example, fees for:

- spectrum licences allocated by way of auction are made up of the spectrum access charges (determined based on the highest bid at auction), and a spectrum licence tax;
- apparatus licences allocated over-the-counter may be intended to encourage efficient use and recover the ACMA’s administrative costs or are based on opportunity cost; and
- broadcasting licences are based on broadcaster revenue.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

A change in control does not impact a spectrum licence, provided the licensee continues to comply with the spectrum licence conditions. For example, if the change in control results in the licensee ceasing to be an Australian resident for tax purposes or ceasing to conduct business in Australia, in some circumstances, the licence may be suspended or cancelled.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and if so, on what conditions?

Spectrum and apparatus licences may be assigned, traded or sub-licensed by private agreement. However, an assignment or trade only takes effect upon registration with the ACMA.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The key legislation regulating state access to the private communications of individuals is:

- the Interception Act;
- the Telecommunications Act; and
- the *Crimes Act 1914* (Cth) (“**Crimes Act**”) and state and territory crimes legislation.

The Interception Act regulates the interception of and access to the content of electronic communications as well as “telecommunications data” held by a carrier or CSPs by state

authorities. The Telecommunications Act obliges carriers and CSPs to give “reasonably necessary” assistance to authorities for law enforcement and national security purposes – to the extent that this relates to access to private communications, this must be done in accordance with the Interception Act. The Crimes Act deals with, among other things, procedural issues when communication devices are seized pursuant to a search warrant under that Act. State authorities may also have access to private communications on a device seized in accordance with a warrant.

In June 2013, the Parliamentary Joint Committee on Intelligence and Security tabled in Parliament its report on the inquiry into potential reforms of national security legislation. The Senate Legal and Constitutional Affairs References Committee released a report in March 2015 outlining its findings from a review into the Interception Act. Although the representatives from opposing political parties disagreed about the detail of the required amendments, all were in favour of substantially revising the legislation and introducing a single, streamlined warrant regime.

More generally on cyber security, in November 2014, the Government announced a review into improving Australia’s cyber security. The review aims to set out ideas on how online systems in Australia can be made more resilient against cyber attacks.

4.2 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

The Telecommunications Act obliges carriers and CSPs to do their best to prevent telecommunications networks and facilities from being used to commit offences and to ensure that networks are capable of interception for law enforcement and national security purposes. In addition, carriers and certain CSPs must prepare annual Interception Capability Plans to set out how they will discharge their obligations. They must also notify the ACMA of technological changes that are likely to have an adverse material impact on their ability to meet their obligations under either the Telecommunications Act or the Interception Act.

Both the Telecommunications Act and the Interception Act define “communication” broadly and would cover traditional telephone calls, VoIP calls, emails and a range of other communications. The definition of “communication” is expansive and includes all or any part of a conversation or message, whether in the form of speech, music or other sounds, data, text, visual images and signals.

In general, ISPs and VoIP service providers are CSPs and are regulated by the Telecommunications Act, the Interception Act and crimes legislation.

4.3 How does the state intercept communications for a particular individual?

Access to stored content or the interception of an individual’s communications is regulated by the Interception Act. State authorities may obtain a warrant from a court or tribunal, although access to communications without a warrant is also permitted in limited circumstances, such as emergencies. A warrant must specify any conditions or restrictions, the period of time in which it is in force (generally up to a maximum of 90 days) and short particulars of the serious offence alleged to which the warrant relates.

Surveillance of communications falling outside the scope of the Interception Act (e.g. use of listening devices and surveillance cameras) is regulated by Federal, state and territory surveillance legislation.

4.4 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

No law specifically governs the use of encryption. However, under the Crimes Act, law enforcement officers can apply to a court for orders to require a person to give “reasonable and necessary” assistance to officers to access data held in a computer or data storage device.

4.5 What call data are telecoms or internet infrastructure operators obliged to retain and for how long?

In March 2015, the Government passed legislation which requires carriers and internet service providers to record and store certain information about communications for a minimum of two years. The particular information required to be stored is information about the communication (e.g. source, destination, date and time and type of communication), but does not include the contents or substance of the communication. It is possible for this information to be obtained by authorised agencies without a warrant.

The Interception Act also establishes a system of preserving certain stored communications held by a carrier. The data a carrier is required to store has been expanded by recent legislative amendments. An authority may send a preservation notice to the carrier to prevent the communications from being destroyed before they can be accessed pursuant to warrants issued under the Act. The preservation notice is generally in force for as long as the warrant is in force.

Under the Telecommunications Act, carriers and CSPs are required to make a record of certain disclosures made under that Act within five days of the disclosure and to keep that record for three years.

Both the Interception Act and the Surveillance Act require authorities to keep records connected with warrants issued under the Act. There are also annual reporting requirements on carriers and authorities.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Legislation applying to audio-visual media distribution is described in question 1.2 above. The key regulatory framework is the licensing and regulation of broadcasting by the ACMA under the Broadcasting Services Act. Among other things, the ACMA is responsible for:

- planning the Broadcasting Services Bands;
- allocating and administering broadcasting licences;
- administering cross-media ownership and control restrictions; and
- overseeing Australian content programming requirements applying to certain broadcasting licensees.

In June 2015, the Minister for Communications announced a review of the ACMA that will examine its objectives, structure and operation to ensure that it is fit-for-purpose for the communications regulatory environment. The draft report, released in May 2016, proposed clarifying the remit of the ACMA to better fit the evolving communications landscape including non-traditional content services such as streaming video that are regulated differently under broadcasting legislation.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Yes, there are a number of different regulatory regimes for content, depending on the distribution platform.

Content distributed by broadcast media, such as television and radio broadcasting, is regulated by industry codes of practice under the Broadcasting Services Act. There are separate industry codes of practice for: commercial TV networks, commercial radio networks, the national broadcasters (the ABC and the Special Broadcasting Service (“SBS”)) and subscription television. These codes provide rules around what content can be broadcast and at what times; as well as some rules around advertising content.

Content online is also subject to industry regulation under the Broadcasting Services Act. The Internet and Mobile Content Code and Content Services Code impose obligations on content hosts, ISPs, mobile carriers and content service providers, including obligations to provide information to users, establish complaints procedures and restricted access systems, and make filters available.

The Classification (Publications, Films and Computer Games) Act 1995 (Cth) provides for the review and classification of films, publications and computer games. The regime is implemented by legislation in each state, leading to some differences between states. Generally, before films and computer games can be sold in Australia, they must be reviewed, classified and appropriately labelled in accordance with the classification scheme. Depending on the state, content with certain high classifications may not be sold.

Advertising is largely industry self-regulated and content is subject to review by the Advertising Standards Bureau. Apart from regulation applicable to specific distribution platforms and general consumer protection legislation, there is no national legislative regime to regulate advertising.

In 2012, the Australian Law Reform Commission conducted a review into content classification and recommended that the current fragmented and inconsistent classification system be replaced by a unified, medium-neutral system. There has been little movement on this issue since this report.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The following kinds of broadcasting licences are made available under the Broadcasting Services Act:

- commercial free-to-air television and radio broadcasting services;
- community (i.e. non-profit) broadcasting services;
- international broadcasting services delivered from Australia;
- subscription television broadcasting services;
- datacasting services; and
- open narrow-casting services, subscription narrow-casting services and subscription radio services (these services are licensed on a class basis).

Licence conditions vary, and they regulate matters such as Australian content quotas, classifications and advertising.

The Broadcasting Services Act also regulates cross-ownership of television, radio and newspaper assets. A person cannot have control of:

- commercial television broadcasting licences reaching more than 75% of the Australian population (“75% rule”);
- more than one commercial television broadcasting licence in a licence area;
- more than two commercial radio broadcasting licences in a single radio licence area; or
- a commercial television licence, a commercial radio licence and an associated newspaper in the one commercial radio licence area (“2/3 rule”).

The Act also requires that there be five independent media operators in a metropolitan commercial licence area and four independent operators in a regional commercial licence area.

In March 2016, the Government announced plans to reform the broadcasting laws by removing specific cross-ownership limitations including the 75% rule and the 2/3 rule. Legislation was introduced into Parliament but has lapsed pending the 2016 federal election.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Commercial broadcasting and subscription television broadcasting licences are assignable. Datacasting licensees may only assign licences to other qualified entities and must notify the ACMA of the transfer. Community broadcasting licences may only assign licences subject to certain statutory conditions and the approval of the ACMA. International broadcasting licences cannot be assigned.

Where there is a change in control, both the licensee and a person obtaining control must notify the ACMA. As discussed in question 5.3, there are also restrictions on the cross-ownership of media assets.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. ‘mere conduit’ or ‘common carrier’) available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

The Copyright Act provides that a CSP (including an ISP) is not taken to have authorised any infringement of copyright merely because the infringer uses its facilities to do so. However, the legislative protections will not aid a CSP who does more than provide facilities used for an infringement.

CSPs also have the benefit of protections under the Copyright Act, provided they comply with certain conditions. Under these “safe harbour” protections, CSPs will be protected against financial liability for infringements carried out using their services.

The Broadcasting Services Act excludes the operation of state and territory laws which would have the effect of making a person hosting internet content in Australia, or ISPs carrying internet content, liable for such content where they were not aware of its nature.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Rights holders have historically had very few rights against CSPs/ISPs in Australia for copyright infringement by end users.

In July 2014, the Government undertook a public consultation into online copyright infringement. Later that year, the Government wrote to industry requiring rights holders and ISPs to negotiate an industry code to pass on notifications to consumers about suspected copyright infringement, with the Government threatening to introduce a mandatory code if one could not be agreed. In February 2015, Communications Alliance released a draft code that sets out a three-tier system of notices to be provided to end users suspected of copyright infringement. The first notice is an “education notice”, the second notice is a “warning notice”, and the third and all subsequent notices will be “final notices”. Rights holders will be able to request details of recipients of final notices from ISPs and will be able to pursue them for copyright infringement directly. This notice scheme seems to be broadly agreeable to rights holders and ISPs – the key outstanding issue not dealt with in the draft code is around how the costs of implementing the scheme will be apportioned between rights holders and ISPs. As of June 2016, the draft code is yet to be implemented because rights holders and ISPs have been unable to agree on the apportionment of costs.

Also, in June 2015, legislation was passed allowing rights holders to apply to the court to require an ISP to block access to online locations with the primary purpose of infringing or facilitating the infringement of copyright.

6.3 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any ‘net neutrality’ requirements?

There is presently no “net neutrality” regulation in Australia. Internet connections in Australia, including fixed-line connections, generally come with data usage allowances. This has reduced the need for ISPs to seek to recover increasing usage costs from content providers or end users, which has in turn reduced demand for net neutrality regulation in Australia. It is common practice in Australia for ISPs to offer “walled content” or to exclude certain content from data caps (also known as “zero rating”). In light of developments in the United States and the European Union and the dramatic rise in data usage as a result of online subscription-based video streaming services, this is an area that may come under further scrutiny in Australia.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

In 2012, the Federal Government abandoned its plan to introduce mandatory ISP-level content filtering.

Current Federal Government policy is to require major ISPs to block the INTERPOL “Worst-of” list pursuant to their statutory obligations under the Telecommunications Act to assist law enforcement agencies. This is under a broad power in the Telecommunications Act requiring carriers and CSPs to give Government authorities such help as is reasonably necessary to enforce the criminal law. Use of this power has been limited, but in a June 2015 report by the Standing Committee on Infrastructure and Communications this power was identified as a broad and flexible tool in the online environment, perhaps suggesting that its use might become more frequent.

As discussed in question 6.2, rights holders are now able to obtain court orders requiring ISPs to block websites that have the primary purpose of facilitating copyright infringement.

There are no laws in Australia regulating or blocking access to consumer VPN services. Consumers who use VPN services for the purpose of copyright infringement or to access illegal content may be subject to criminal or civil sanction, but the technology itself is not regulated.

6.5 How are ‘voice over IP’ services regulated?

In general, VoIP service providers are considered to be CSPs and are subject to regulation under the Telecommunications Act and the Interception Act. If the VoIP service is a two-way service enabling customers to make and receive calls from users of the PSTN, then it may be considered a standard telephone service and be subject to relevant obligations that flow from this including, for example, obligations around directory assistance, operator services and billing and to participate in the TIO scheme.

**Renae Lattey**

King & Wood Mallesons
Level 50, 600 Bourke Street
Melbourne
Victoria 3000
Australia

Tel: +61 3 9643 4065
Email: renae.lattey@au.kwm.com
URL: www.kwm.com

Renae advises telcos on regulatory and commercial issues, including all aspects of regulated access and large commercial contracts. She was heavily involved in the team advising Telstra on its national broadband network negotiations with the Australian government in 2011 and the 2014 rewrite of that deal. She has also advised Telstra on its involvement in the Australian Government's Mobile Blackspots Programme, operational separation, T3, roaming arrangements, inter-operator arrangements, spectrum licensing and renewal, cable capacity arrangements, numbering and other technical regulation and on its large supply contracts.

Renae has also acted for major telcos in Singapore, Malaysia, New Zealand, the UK and Europe, and has also been involved in World Bank telecommunications projects in developing countries.

Renae's many accolades include being named by leading international survey Best Lawyers as Telecommunications Lawyer of the Year for 2012. She was also awarded the TMT award at Euromoney's 2013 Australasia Women in Business Awards and named in the Guide to the World's Leading Technology, Media & Telecommunications Lawyers as one of the outstanding practitioners in the field of telecoms. In addition, Renae has recently been listed in *Who's Who Legal* for Telecommunications for 2015.

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As the principal external legal advisor for Telstra, Australia's incumbent telecommunications operator, the Australian Office has advised throughout the various stages of telecommunications reform in Australia. The firm also acts for a range of other telecommunications operators outside Australia, including in Singapore and Malaysia.

Lawyers at King & Wood Mallesons have been involved in providing legal and regulatory telecommunications advice to corporates and governments in a number of jurisdictions, including Europe, the UK, Australia, Malaysia, Singapore, New Zealand, China, Hong Kong, the Philippines, Sri Lanka, India and Vietnam.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

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