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# Technology News

In this newsletter we look at recent legal developments in the telecommunications and technology sectors. On the telecommunications front, we cover unbundling of Telecom's local loop, the three-way operational separation of Telecom and the start of number portability. We also summarise the new Banking Code of Conduct, recent developments in the law relating to unsolicited electronic messages (SPAM) and the progress of the Copyright (New Technologies and Performer's Rights) Amendment Bill.

## Local Loop Unbundling (LLU)

### The Telecommunications stocktake - a recap

In December 2005, the Government announced a stocktake of the telecommunications sector. The remit for the review was to consider developments in the telecommunications sector as a whole, although the primary focus was on the broadband market and New Zealand's broadband performance.

The stocktake found that New Zealand (in December 2005) had approximately 8 broadband subscribers per 100 persons, and was ranked 22 out of 30 OECD countries for broadband take-up. The Government believed that a key reason for this poor performance was the lack of effective competition in New Zealand's telecommunications market. In particular, Telecom's "local loop" (the copper wires from the customer's premises to the nearest exchange) was acting as an access bottleneck and restricting the development of competition.

In 2006 the Government announced that it would regulate to compel Telecom to open up access to its local loop.

### What is local loop unbundling?

Local loop unbundling (LLU) allows competitors of Telecom to use unbundled elements of Telecom's access network to provide alternative telephone or broadband access services to end-users.

The main characteristics of LLU services as described in the Government's May 2006 Stocktake report are:

- Access to the copper local loop provider at both the local exchange (full LLU) and at the street cabinet (sub-loop unbundling)
- A co-location service which allows competitors to install their equipment in Telecom's exchanges and cabinets
- Two backhaul services which allow competitors to connect their co-located equipment (either in the exchange or the cabinet) to their network.

The price for the LLU service will be set by the Commerce Commission based on benchmarking against comparable countries.

On 31 July 2007, the Commission released its draft pricing determination which set the price at \$16.49 per customer per month for urban areas and \$32.20 for rural areas. This report has surprised a number of observers with a lower than expected urban price and different prices for rural and urban networks. Final price determinations are set to be released by the Commerce Commission in November.

On 9 August 2007, Telecom opened its phone exchanges to its rivals initiating the start of LLU in Auckland. Engineers from ihug and Orcon have now begun to install their own equipment in Telecom's Ponsonby and Glenfield exchanges, enabling the companies to offer internet and phone plans independent of Telecom.

## What are the advantages of local loop unbundling?

The aim of LLU is to increase the level of competition in New Zealand's telecommunications market, thereby improving New Zealand's relative broadband performance against the leading OECD countries. There is a large body of opinion that high penetration rates of high speed broadband services will be a key enabler of economic growth. The New Zealand Institute, in its recently released draft *Defining a Broadband Aspiration* identified national economic benefits from fast broadband of \$2.7 - 4.4 billion per annum.

The Government's goal is that LLU will lead to vigorous competition in the market to deliver broadband services. The theory goes that if new entrants can gain a credible market share by using Telecom's (unbundled) network, they will take the next step to invest in their own access networks to deliver even higher broadband speeds to those customers.

## What are the disadvantages of local loop unbundling?

Some telecommunications commentators argue that, while LLU may achieve the immediate goals of increasing competition in the retail market for broadband services, decreasing prices and increasing broadband penetration rates, it will not deliver increased investment in alternative access network infrastructure (because the lower prices of retail services will make that investment less attractive). It remains to be seen whether LLU and the operational separation of Telecom (discussed below) will deliver the benefits to the economy that flow from the widespread availability of cheap high speed broadband services.

## Operational Separation

On 26 September 2007, the Communications Minister, David Cunliffe, issued the Telecommunications (Operational Separation) Determination 2007 that requires Telecom to separate into three or more business units comprising the Access Network Services unit, the Wholesale unit and a Retail unit. The underlying philosophy is that Telecom may not discriminate in favour of its own business units and must supply access to its network and wholesale services on an arm's-length "equivalence of inputs" basis. The determination follows the model used in the UK to separate BT into three units. Telecom now has 20 working days to prepare a separation plan, and effectively a 4 year window beginning on 31 March 2008 to complete the process.

## Number portability

Number portability became a reality on 1 April 2007. It enables customers to retain their existing mobile phone and fixed phone line numbers when they change their service provider. Fixed local line and cellular telephone number portability is regulated under the Telecommunications Act 2001.

Like LLU, number portability was introduced to increase competition in the market, as the need to change phone numbers was identified by the Government as a major barrier to users changing service providers.

However, number portability has been received with some reservations. The number of people porting their phone numbers has been low. This could be due to a number of factors, such as the relative absence of marketing based on the new number portability service and in the case of mobile phone numbers:

- the need to purchase new handsets as Vodafone and Telecom run different cellular networks, and
- the inability to identify which network a mobile phone is connected to from the number prefix (i.e. 027, 029, 021).

This latter difficulty has been addressed in part as both Vodafone and Telecom operate a free service where customers can text a mobile number to 300 and will receive free text notification that the number is or is not active on the Vodafone or Telecom network.

## The Banking Code of Conduct 2007

A new Code of Banking Practice (the **Code**) was recently released by the New Zealand Bankers Association and has been effective since 1 July 2007. It replaces the previous Code of Banking Practice which dates back to December 2002. The Code records good banking practices. Members of the New Zealand Bankers' Association agree to observe the practices contained in the Code as a minimum standard.

The Code has been controversial since its introduction. This is because the provisions around internet banking (contained in part 8 of the Code) impose strict obligations on customers to protect themselves. The more controversial provisions state that a customer who does not have appropriate and up to date protective software including effective virus scanning, firewall, anti-spyware and anti-spam software installed will not be covered for loss. The reason advanced is that customers' computers are not under the control of banks.

These obligations create a risk for the less technologically savvy users of internet banking. However, the Code does require banks to provide information to customers on how best to safeguard their online information and the steps that should be taken by customers to protect themselves and their computers.

The Code is, however, only a minimum standard that banks have to comply with and a number of banks have commented that their decision to comply with this minimum standard or offer greater protection will be made on a case by case basis. It remains to be seen whether all banks will adopt this position.

The Code also introduces the right for banks to request access to customers' computers or devices in order to verify that all reasonable steps have been taken to protect their computer and safeguarded their information in accordance with the Code. Customers are entitled to refuse such access, however this may result in the bank refusing the claim. The Code does not provide any protection for customers' privacy if a bank does request access to the computers. Given the level of personal information stored on a home computer it will be important for the bank and its customer to agree the basis on which access may be granted if a request is made to give some comfort around the class of people examining the computer, information disclosure rights and what details can be examined by the bank.

The Banking Code of Conduct can be accessed at the **NZ Bankers Association** website (just click for a link).

## Unsolicited Electronic Communications Act update

The Unsolicited Electronic Communications Act 2007 (**Spam Act**) came into force on 5 September 2007. To obtain a recap on the requirements of the Spam Act please look at our earlier newsletters of April 2007 and September 2006 (just click for a link).

It is interesting to see how businesses have reacted to the new Spam Act. For instance, just prior to the date it came into force, we saw a surge in emails seeking to confirm consent to send emails. Consent is a fundamental tenet of the Spam Act. While this practice certainly gave comfort that consent exists, given that all the emails began with a statement that the business had inferred consent, the email was not required. In the short time that it has been in effect, there seems to have been a high degree of awareness of, and compliance with obligations under the Spam Act by responsible businesses. However because so much Spam originates from outside New Zealand, we are yet to see a decrease in the total volume of unwanted emails being sent.

## Unsolicited Electronic Messages Regulations 2007

The Unsolicited Electronic Messages Regulations came into force on 10 September 2007. They contain the forms that must be used in enforcement of the Spam Act, such as formal warnings and search warrants. The Regulations state that formal warnings must either be delivered personally, or posted to the person's last known residential address.

These Regulations also provide for the maximum amount of penalties for civil liability events (e.g. one email in breach of the Spam Act) being:

- \$200 per civil liability event for an individual
- \$500 per civil liability event for an organisation.

## The Internet Service Providers Spam Code of Practice

Complementing this new legislation is the Internet Service Providers Spam Code of Practice (**Spam Code**). The Spam Code has been developed by ISPs and outlines their responsibilities under the Spam Act and imposes a self-regulatory model.

Essentially, the Spam Code establishes minimum acceptable practices for ISPs to follow in relation to:

- providing useful information to end users on how to minimise Spam
- dealing with reports from end users and complaints from customers regarding Spam
- interacting with law enforcement agencies on Spam-related matters within the context of the requirement to maintain confidentiality of an end user's personal information and when such personal information may be lawfully disclosed, and
- other technical initiatives.

However, some commentators have labelled it as a purely cosmetic gesture that favours the interests of ISPs. Criticism of the Spam Code has primarily centred on:

- the lack of direct methods of enforcement
- the vagueness of the wording of clauses of the Spam Code and lack of guidance or direction about what an ISP should do in certain circumstances
- the option that an ISP has to take a "no action" stance in a particular situation without breaching the Spam Code
- the lack of a requirement that ISPs should openly demonstrate their compliance with the Spam Code
- the fact that the code is written in passive and ambiguous language.

The Spam Code can be found on the **Privacy Commissioner's** website (just click for a link).

## Breaches of the Australian Spam Act

The Australian Communications and Media Authority (**ACMA**) has recently fined the Pitch Entertainment Group (**Pitch**) \$11,000 for extensive breaches under the Australian equivalent of the Spam Act. To date, this is the largest fine imposed by the ACMA.

Pitch had sent over one million commercial electronic messages to mobile phones without a functional unsubscribe facility and therefore providing no way in which consumers could opt out of receiving further messages. The messages sent by Pitch were promoting its new ring tone club. The ACMA ruled that recipients should have had the option of sending a message back to unsubscribe.

Our Spam Act also applies to mobile phone messages. As this decision shows, it will be important to ensure compliance with the requirements for identifying the sender and providing a free unsubscribe facility in, not just emails, but also text messages. Given the limited size of text messages, it remains to be seen what impact the Spam Act will have on text messages as a marketing tool.

## Copyright (New Technologies and Performer's Rights) Amendment Bill

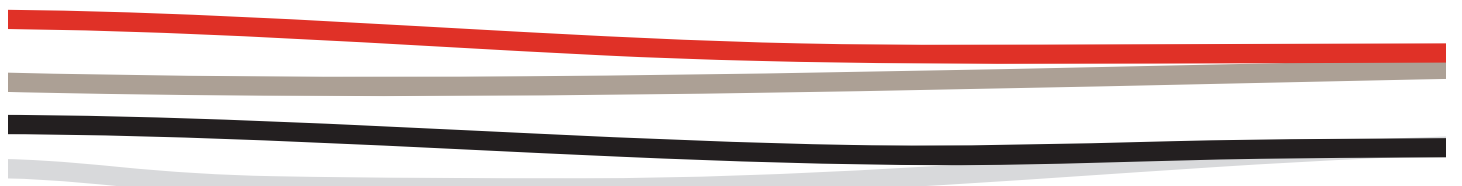
This Bill, which was introduced into Parliament in December 2006, amends the Copyright Act 1994 in view of the development and adoption of new technologies. You can check out more about the bill by looking at our earlier newsletter of April 2007 (just click for a link). The Bill is into its second reading with the Select Committee Report having been released on 27 July 2007.

A number of significant changes have been proposed by the Select Committee:

1. The earlier right to observe, study or test the functioning of a computer program in order to understand the ideas and principles that underlie any element of that program have been reigned in. It is now proposed that this is only permitted by the lawful user while performing the acts of loading, displaying, running, transmitting, or storing the program that the user is entitled to do. Accordingly, the licensor will now be able to control the scope of this right.
2. The conditions applying to format shifting are widened to allow the copy to be used for the sound recording owner's personal use or the personal use of a member of the same household (rather than just the private and domestic use of the owner).
3. The proposed two-year expiry period around this new right of format shifting has been removed.
4. The proposed exemption in favour of ISPs from liability for copyright infringement will not require the ISP to adopt a policy to deal with repeat offenders. As the report notes, ISP's contracts with their customers typically allow action to be taken for this type of behaviour.

The Select Committee also proposes renaming the Bill as the Copyright (New Technologies) Amendment Bill.

We will keep you updated on the Bill's progress through Parliament.



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