

REGULATING INTERNET CONTENT: A CO-REGULATORY APPROACH

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I. INTRODUCTION

There is a public perception in Australia that, along with the many advantages of the Internet, there are also risks for users. Risks include the distribution of illegal content, such as child pornography and material providing detailed instruction in crime and/or violence, as well as the exposure of children to content that is unsuitable for them. Research in Australia and overseas suggests that there is widespread community support for a range of regulatory responses to these risks.¹ It seems that Australians also believe that industry, government and Internet users all have a part to play in the appropriate supervision and selection of Internet content.² The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) ("*Online Services Act*") provides a national, uniform and coordinated approach to the regulation of Internet content in Australia.

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1 Research conducted by the Allensbach Foundation for the Bertelsmann Foundation into attitudes to Internet content regulatory initiatives in Germany, the USA and Australia. Newspoll conducted the Australian component of the research between 8 and 11 June 1999. A total of 1200 telephone interviews were conducted with a national representative sample of people 18 years of age or older. The full report entitled *Risk Assessment and Opinions Concerning the Control of Misuse on the Internet* can be found at <<http://www.stiftung.bertelsmann.de/internetcontent/english/frameset.home.htm>> at 1 February 2000 (Copy on file with author).

2 *Ibid.*

II. POLICY DEVELOPMENTS IN AUSTRALIA REGARDING REGULATION OF THE INTERNET

The Australian Broadcasting Authority ("ABA") has been responsible for the regulation of broadcast media in Australia since 1992. It first began looking at online services, including the Internet, in 1995, when it received a Ministerial direction from the then Minister for Communications and the Arts.³

A. The 1996 Report by the ABA on its First Investigation into the Content of Online Services

The ABA canvassed the views of industry, community groups, Internet content providers and government bodies to determine the best way to strike a balance between protecting children from inappropriate content and dealing with illegal content (such as child pornography), whilst maintaining the interests and freedoms of adults, along with the interests of a viable new industry. The ABA's first Online Services Report, completed in July 1996, made some 40 recommendations. Key recommendations included:

- the development of industry codes of practice by Australian online service providers within a substantially self-regulatory regime;
- the introduction of a complaints handling process specifically designed for online services;
- the establishment of a task force to consider the development of Internet content labelling schemes compatible with the Platform for Internet Content Selection ("PICS"). This technology provides tools enabling parents and supervisors to restrict children's access to unsuitable material; and
- the introduction of community education initiatives to assist the Australian community to maximise the enormous educational and other opportunities presented by online services.

Following on from the ABA's Report, on 15 July 1997, the Minister for Communications and the Arts and the Attorney-General announced 47 principles for a national approach to regulating the content of online services. At the heart of these principles was the view that "material accessed through online services should not be subject to a more onerous regulatory framework than 'off-line' material such as books, videos, films and computer games".⁴

B. The Report of the Children and Content Online Task Force

In August 1997, the ABA received a second Ministerial direction to continue investigating matters relating to future regulatory arrangements in Australia for the content of online services. The ABA formed a Children and Content Online

3 The Hon M Lee MP, Minister for Communications and the Arts.

4 Senator the Hon R Alston, Minister for Communications and the Arts, "Joint Media Release", Media Release, 15 July 1997, available at <www.dca.gov.au>.

Task Force (“Task Force”) to assist in its work. Reporting to the ABA in June 1998, the Task Force endorsed the following principles:

- (1) Children should be encouraged to use the Internet because it offers them access to a range services that can be educational, entertaining and exciting, and allows them to be socially interactive.
- (2) Adults should be free to access material online that they are legally entitled to view in other media, including material not suitable for children.
- (3) It is desirable to minimise children's exposure to unsuitable material online.
- (4) Parents and other adults with responsibility for children are usually in the best position to determine the appropriateness of content for children in their care, having regard to age, values and the special needs of the child(ren).
- (5) Direct supervision of children and the setting of house rules or guidelines are the best ways to ensure that Internet use in the home is a rewarding and safe experience.
- (6) Filtering, rating and labelling systems should be encouraged to support and supplement the management of children's use of the Internet when direct adult supervision is not possible.
- (7) The use of filtering software, rating and labelling should not create a significant barrier to the expression of diverse opinions and content on the Internet.
- (8) The use of filtering software, content labelling and rating must be voluntary for users and content providers.
- (9) The primary responsibility for content on the Internet must reside with the content provider.⁵

C. UNESCO

The United Nations Educational, Scientific and Cultural Organisation commissioned the ABA to conduct a pilot study into the Internet and international regulatory issues in December 1996. The study included:

- a brief overview of the issues arising in the online environment, particularly as they relate to the content of online services;
- a discussion of recent technical developments such as the PICS and the emergence of labelling schemes;
- an overview of regulatory developments in Australia, Singapore, Malaysia and the United Kingdom; and
- the identification of areas of potential international cooperation.

⁵ Australian Broadcasting Authority, *Report of the Children and Content Online Task Force*, June 1998, available at <www.aba.gov.au/what/online>.

An ABA report based on this study was published in 1997.⁶

III. A CO-REGULATORY SCHEME FOR INTERNET CONTENT

A. Overview

The co-regulatory scheme established by the *Online Services Act* addresses risks associated with content that is illegal and/or unsuitable for children through a range of regulatory responses. Based on the development of industry codes of practice and an ABA operated complaints hotline, the scheme aims to allay community concerns about the Internet and encourage its use. While the legislation applies to the activities of Internet service providers ("ISPs") and Internet content hosts ("ICHs") only, the Government has stated that it will be encouraging the States and Territories to develop uniform legislation complementing the *Online Services Act* and covering the activities of Internet users and content creators.⁷

The ABA is overseeing the implementation of the scheme in partnership with industry and the community. In performing its role, the ABA is guided by the principles, laid down in the Act, of minimising the financial and administrative burdens on industry and encouraging the supply of Internet carriage services at performance standards that meet community needs.

The regime is complaints-based. A framework is established in which people concerned about particular Internet content can make a complaint and have that complaint investigated, but the ABA is not required to proactively search for and deal with all Internet content that may be prohibited. The ABA's complaints online hotline has been operational since 1 January 2000, the date on which its power to investigate complaints commenced.

Prohibited content is defined in the Act as material that has been classified by the Classification Board as either 'RC' (Refused Classification, ie material that is illegal in any medium) or 'X' (ie sexually explicit material).⁸ Also prohibited is content hosted in Australia that has been classified 'R' (that is, material considered unsuitable for people under 18 years of age because of violence, language, sexual content, adult themes or for some other reason) that does not have an adult verification mechanism to restrict access.⁹

The action to be taken in relation to prohibited content that is subject to complaint differs depending on whether the content is hosted in Australia or hosted overseas. If it is hosted in Australia, the ABA is required to issue take-

6 Australian Broadcasting Authority, *The Internet and Some International Regulatory Issues Relating to Content: a pilot comparative study commissioned by the United Nations Educational, Scientific and Cultural Organisation*, October 1997, available at <www.aba.gov.au/what/online>.

7 Senator Ian Campbell, Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts, Second Reading Speech, Broadcasting Services Amendment (Online Services) Bill 1999 (Cth), Australia, Senate 1999, Debates, vol S195, p 3958.

8 *Broadcasting Services Act* 1992 (Cth), Schedule 5, s 10 (as amended by the *Online Services Act*).

9 *Ibid.*

down notices to the ICH.¹⁰ If it is hosted overseas, the ABA will notify ISPs, who are to take action in accordance with their codes of practice.¹¹ If content is hosted overseas and is sufficiently serious (for example, illegal material such as child pornography), the ABA will refer the material to the appropriate law enforcement agency.¹²

ABA decisions under the regulatory scheme are subject to judicial review processes, in particular, review by the Administrative Appeals Tribunal.¹³ While industry bears the costs of compliance, the ABA bears the costs of classification.

B. Codes of Practice

An example of the co-regulatory nature of the scheme is the registration by the ABA of three codes of practice outlining the obligations on ISPs and ICHs in relation to Internet content unsuitable for children or potentially offensive to reasonable adults. The codes were developed by the Internet Industry Association (“IIA”) and apply to all ISPs and ICHs in Australia. In registering the codes, the ABA was satisfied that the IIA had undertaken appropriate community consultation and that the codes contained suitable community safeguards.

Compliance with industry codes is enforceable by the ABA. An ISP or ICH that fails to follow an ABA direction to comply with an industry code will be guilty of an offence under the Act.¹⁴

C. Blocking of Overseas Content

One aspect of the new legislation that has been the subject of considerable comment is that relating to the blocking of prohibited content that is hosted overseas. In the first instance, this matter is to be dealt with by industry codes of practice. The second IIA code for ISPs (“Content Code 2”) outlines the procedures ISPs are to follow in relation to content hosted overseas. Content Code 2 requires ISPs to provide their customers with one of the approved filters listed in the code.¹⁵ Approved filters include client-side filter products and filtered Internet services.¹⁶ However, ISPs are not required to supply certain end-users with one of the approved filters if access by the end-user is subject to an alternative access-prevention arrangement specified in the code.¹⁷ Provision is also made for the ABA to notify the makers of approved filtering software of prohibited or potentially prohibited Internet content hosted outside Australia that

10 *Ibid*, s 30.

11 *Ibid*, s 40.

12 *Ibid*, s 40(1)(a).

13 *Ibid*, s 92.

14 *Ibid*, s 66.

15 Clause 6.2.

16 A client-side filter is software run on a user’s own computer. Filtered Internet services are provided by ISPs. Filtering products or services generally check requests by users against a provided filter list or white list. The user’s request is either allowed or prevented.

17 Content Code 2, cl 6.4.

has been the subject of a complaint.¹⁸ The makers of approved filters will review their filter lists in the light of these notifications.

If a code of practice had not been registered, and in the absence of an industry standard, the ABA would have had to issue access-prevention notices in relation to prohibited content hosted overseas subject to complaint. These notices would have directed all ISPs known to the ABA to take all reasonable steps to prevent end-users from accessing that content.¹⁹

In determining whether particular steps were reasonable, regard would have been given to their technical and commercial feasibility. The matters set out in Schedule 1, cl 4 of the *Online Services Act* would have informed the issue of reasonableness. These include:

- avoiding the unnecessary imposition of financial and administrative burdens on ISPs and ICHs;
- the accommodation of technological change;
- the encouragement of the development of Internet technologies and their application;
- the practical provision of services to the Australian community; and
- the supply of Internet services at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community.

D. Other Functions of the ABA

In addition to its complaints handling role, the ABA has a range of other functions relating to the regulation of Internet content including:

- monitoring compliance with codes of practice;
- advising and assisting parents and other carers of children in relation to the supervision and control of children's access to Internet content;
- conducting and coordinating community education programs about Internet services;
- carrying out research into issues relating to Internet content and usage;
- liaising with regulatory and other relevant bodies overseas about cooperative arrangements for the regulation of online content; and
- informing itself and advising the Minister on technological developments and service trends in the Internet industry.

The ABA sees the performance of these functions as critical to the overall success of the regulatory regime and is pursuing initiatives in relation to each function.

Complementary to the role of the ABA, is the establishment of a community advisory body, NetAlert. Among other things, the body will monitor material

18 *Ibid*, cl 6.1.

19 Note 8 *supra*, s 40(1)(c).

online and advise the public of options, such as filtering software, that are available to address concerns about online content.

IV. INTERFACE BETWEEN THE ABA, LAW ENFORCEMENT AGENCIES AND OTHER REGULATORY BODIES

The ABA is particularly aware that, in the case of some illegal material (such as child pornography), it is not solely a matter of offence to a user who may come across the material on the Internet. Such images are inseparable from the issue of child abuse. Therefore, when it receives information about child pornography, for example, a priority for the ABA will be the identification of any child at risk by appropriate law enforcement agencies. To this end, the ABA will establish procedures ensuring that when Internet content of a sufficiently serious nature is reported to the ABA, the appropriate government authority will be notified as a matter of urgency. The ABA also intends to directly notify overseas regulatory and other bodies, such as other hotline services, about Internet content of a sufficiently serious nature hosted in other countries, subject to appropriate arrangements with Australian police.

V. CONCLUDING REMARKS

Responsible online content regulation will help to create an environment in which the Internet's positive opportunities and advantages are able to be nurtured, developed and accessed by a growing number of citizens, while allowing the proper concerns of current and future users to be addressed. However, the Internet presents some enormous challenges in relation to content, and debate continues as to appropriate responses by governments. Even with the assistance of detailed research and policy work, there is no universal consensus about these matters, as demonstrated by the range of views emanating from the Internet Content Summit held in Munich in September 1999.²⁰ Australia has adopted one approach to the issues of 'illegal' content and content which may be unsuitable for children. The ABA will work with industry, law enforcement agencies, community groups, parents and caregivers to ensure that this approach is practical, proportionate, and workable in the new communications environment.

20 The summit was hosted by the Bertelsmann Foundation.