

## THE GOVERNMENT'S REGULATORY FRAMEWORK FOR INTERNET CONTENT

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The Government recently introduced a regulatory framework for Internet content. This was achieved partly through amendments to the *Broadcasting Services Act 1992* (Cth) made by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) ("*Online Services Act*"), which commenced on 16 July 1999. Two essential elements of the legislation are a complaints system, which became operative on 1 January 2000, and provision for the development of industry codes of practice.

Amongst the mass of information on the Internet, there is material that would be illegal or restricted in other media. A recent study by the NEC Research Institute, for example, found that of the approximately 600 million World Wide Web pages open to the public, 1.5 per cent are focused on pornography, that is, some 9 million pages, much of which is at the hard core end of the spectrum.<sup>1</sup> There are genuine community concerns about this material. For example, a recent survey conducted by the Bertelsmann Foundation found that 76 per cent of Australian respondents believed that there are risks associated with Internet usage.<sup>2</sup>

The existing classification system for film, television, and other media was established to provide guidance to the community, and particularly to concerned parents, on the suitability or otherwise of content. Based on contemporary community standards, this system is well understood and accepted within our

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1 S Lawrence and L Giles, "Measuring the Web: the Size of the Web and Search Engine Coverage", NEC Research Institute, *Measuring the Web*, <<http://www.neci.nj.nec.com/neci-website/lab-tour/lab-tour.html>> at 1 February 2000 (Copy on file with author).

2 "Risk Assessment and Opinions Concerning the Control of Misuse of the Internet", Self-Regulation of Internet Content, Bertelsmann Foundation, User Survey, <[http://www.stiftung.bertelsmann.de/internetcontent/english/framset\\_home.htm](http://www.stiftung.bertelsmann.de/internetcontent/english/framset_home.htm)> at 1 January 2000 (Copy on file with author).

society. Given the legitimate and increasing community concerns about the offensive nature of some online material and the easy accessibility of that material, the Government considered it a logical step to legislate to extend the classification system to the Internet.

## I. THE GOVERNMENT'S APPROACH

In seeking a solution to the problem of offensive and illegal content online, the Government has steered a middle course between heavy handed prohibitions that could hinder industry development and a *laissez-faire* 'do nothing' approach which would mean that community standards applicable to other media would not apply to the Internet. Solutions should aim to enhance the enormous potential of the Internet to inform, educate, entertain and conduct business by ensuring that the online environment is as safe as possible. This is important both to current users of the Internet and to non-users who are presently deterred from getting online by fears that they (or their children) will come across harmful material.

The Government's solution is based on a number of essential criteria. First, the requirement of a national, uniform regulatory framework and the avoidance of regulatory fragmentation as the States and Territories enact varying laws. Second, the need for the framework to apply those standards of content control to the Internet as apply to conventional media. Third, it was necessary that the scheme recognise the specific characteristics of the Internet and the degree of responsibility, and therefore liability, which should attach to various players for the provision of Internet content. Fourth, the requirement that the framework meet the legitimate concerns and interests of the community while ensuring that industry development and competitiveness are not stifled by over-zealous laws, or inconsistent or unpredictable regimes. Finally, the belief that the framework should not rely on regulation alone and the recognition that user education in management of the Internet by families is an essential complementary component.

In the context of these criteria, the Government has chosen a co-regulatory approach: industry self-regulation within a legislated framework. This approach has the core elements of a complaints hotline administered by the Australian Broadcasting Authority ("ABA"), industry codes of practice, and user empowerment through education.

The United Nations Educational, Scientific and Cultural Organisation recently held a world summit entitled the "Internet and New Services". A Summit meeting paper produced by a French Government agency, Conseil Supérieur de l'Audiovisuel, based on the written and oral contributions of more than 60 countries, concluded that co-regulation presents as the most suitable solution to a range of Internet issues.<sup>3</sup> The paper also indicates that many countries agree that

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3 The homepage of Conseil Supérieur de l'Audiovisuel is located at <<http://www.comt.fr/csai>>.

broadcasting regulations developed for television and radio are the best basis for the development of a legal framework for the Internet. Thus, the Australian scheme, based on co-regulation and existing classifications, is consistent with international opinion on the issue.

## II. THE COMPLAINTS PROCESS

Since 1 January 2000, any person has been able to complain to the ABA about prohibited content online.<sup>4</sup> For Australian hosted content, “prohibited content” is material which is Refused Classification (‘RC’), rated ‘X’, or ‘R’ rated and not protected by adult verification procedures.<sup>5</sup> For material hosted overseas, the prohibited categories are ‘RC’ and ‘X’.<sup>6</sup> It is also possible to make complaints about breaches of industry codes or ABA standards.<sup>7</sup>

Internet content is defined by the *Online Services Act* as information that is stored and accessible to the public.<sup>8</sup> The legislation does not apply to private or restricted distribution communications, such as intranets, or live communications, such as Internet telephony, chat rooms and streamed audio and video. Nor does it apply to ordinary emails. However, s 85ZE of the *Crimes Act 1914* (Cth), regarding offensive or harassing use of a telecommunications service, will continue to apply generally to communications that are private or not in a stored form.

The framework created by the *Online Services Act* explicitly recognises that Internet service providers (“ISPs”) and Internet content hosts (“ICHs”) cannot be expected to be aware of all material accessed through their service, and cannot reasonably be held responsible for offensive material unless it is brought to their attention. Unlike the broadcasting regulatory model, where broadcasters are the first port of call for the resolution of complaints, Internet content complaints will be adjudicated directly by the ABA. It would be unreasonable to expect ISPs and ICHs to adjudicate complaints about material for which they are not responsible.

There is no requirement for ISPs and ICHs to monitor or classify content. They will not be liable for prohibited content accessed through or hosted on their systems unless the content has been specifically determined to be in a prohibited category and the ABA has directed that action be taken following a complaint. ISPs and ICHs will be protected from civil proceedings (for example in respect of breach of contract or defamation) in relation to action taken to comply with ABA notices.<sup>9</sup>

Continuing industry development is promoted by the legislation, which provides for regulation in a manner encouraging the supply of Internet carriage

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4 *Broadcasting Services Act 1992* (Cth), Schedule 5, s 22(1) and (2) (as amended by the *Online Services Act*).

5 *Ibid*, s 10(1).

6 *Ibid*, s 10(2).

7 *Ibid*, s 23.

8 *Ibid*, s 3.

9 *Ibid*, s 88.

services at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community. This ensures that regulation of Internet content does not result in a degradation of network performance to a point where the Internet no longer meets the needs of the community. Further, the legislation is designed to keep industry compliance costs to a minimum.

### III. CODES OF PRACTICE

A central feature of the new scheme is that organisations representing sections of the Internet industry may develop industry codes of practice that must be registered with the ABA in order to become effective. If no industry codes are registered, or if a code is deficient, the ABA may determine mandatory industry standards.<sup>10</sup>

On 16 December 1999, the ABA registered three codes of practice developed by the Internet Industry Association ("IIA") in consultation with the industry and interested members of the public. Community groups, including the recently established community advisory body NetAlert, were also consulted. An important outcome of this process of code development and registration is industry certainty. The codes offer a workable and technically feasible solution to the complex issue of managing access to online content.

The codes contain three fundamental components: procedures to be followed by ISPs and ICHs when notified of prohibited online content by the ABA; additional protection of minors by ensuring that persons under the age of 18 years cannot open an Internet access account without the consent of a parent, teacher or other responsible adult; and the facilitation of end user empowerment. In relation to prohibited online material hosted in Australia, ICHs must remove that content from the website or database or,<sup>11</sup> in the case of 'R' rated material, put in place an adult verification procedure when notified of the prohibited content by the ABA.<sup>12</sup> The problem of prohibited overseas-hosted content is addressed by the codes through alternative access prevention arrangements. Under the legislation, ISPs will be exempted from ABA notices in relation to prohibited overseas-hosted content where an effective alternative arrangement is in place to prevent access by particular end-users.<sup>13</sup> Such arrangements might include services providing access to a cache of material intended as 'family friendly' and secure networks operated on behalf of schools.

Based on an independent study undertaken by the CSIRO on available filter products and services,<sup>14</sup> Schedule 1 of the codes outlines those products and services meeting the requirements of an effective alternative arrangement. ISPs will be required not only to provide one or more of these products to their customers, but also to update their products and services to filter any additional

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10 *Ibid*, ss 68-71.

11 Content Code 3, cl 7.9(i).

12 *Ibid*, cl 7.9(ii).

13 Content Code 2, cl 6.4.

14 *Blocking Content on the Internet: a Technical Perspective*, June 1998.

material classified as prohibited by the ABA. Further, ISPs and ICHs will be obliged to provide users with information about the availability, use and appropriate application of filtering software, labelling systems and family carriage services, as well as ongoing support services.<sup>15</sup>

The *Online Services Act* contemplates a high degree of industry self-regulation based on voluntary compliance with the codes. However, it also establishes an effective legal regime should sections of the industry choose not to abide by the codes. The legislative scheme provides for the ABA to direct an ISP or ICH to comply with the registered codes.<sup>16</sup> There is a graduated range of enforcement mechanisms and sanctions to deal with breaches. Contravention of an ABA direction is a criminal offence with penalties of up to \$5 500 for an individual and \$27 500 for a corporation for each day the contravention continues.<sup>17</sup> In cases of serious, flagrant or recurring breaches, the ABA can apply to the Federal Court for an order that an ISP cease providing a service or an ICH cease hosting content.<sup>18</sup> Consistent with the co-regulatory nature of scheme, the Government intends these sanctions to come into effect only if the industry is unable or unwilling to rectify a breach. The development of such detailed industry codes, in consultation with relevant government agencies, community groups and the public, puts Australia at the leading edge of online content management.

#### IV. COMPLEMENTARY STATE AND TERRITORY LEGISLATION

The Act is just one component of the legislative framework. A second tier will be uniform State and Territory legislation, regulating content providers, that complements the industry focus of the *Online Services Act*. This will ensure that those who have prime responsibility for content are accountable. Publication and transmission of prohibited content by content creators and end-users will be an offence under State and Territory legislation. However, ISPs and ICHs will not be liable for the content accessed through their service where they are not responsible for the creation of that content.<sup>19</sup>

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15 Content Code 1 and Content Code 3.

16 Note 5 *supra*, s 66(1).

17 *Ibid*, s 83.

18 *Ibid*, s 85(1).

19 Proposed new Part of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) circulated for comment by the NSW Attorney General's Department in late 1999 and said to be "draft model State/Territory provisions... prepared... at the request of State and Territory Censorship Ministers".

## V. USER EMPOWERMENT

The Government is conscious that 'user empowerment' – educating and advising the public about ways in which they can manage Internet usage, including that by their children – must be a critical part of any effective framework. To this end, the Government recently established a community advisory body, NetAlert, which will be responsible for researching new access management technologies and running national awareness campaigns to promote a safer Internet experience for young people. NetAlert is currently in the process of establishing an 1800 telephone line and website to provide ease of access. Concerned community members will be able to ask NetAlert for advice about how to manage access to the Internet. This empowerment of Internet users is an essential aspect of the Government's approach and will allow parents to manage use of the Internet and feel confident about their children going online. The Government has provided NetAlert with \$3 million in funding over two years for a national community education program to promote safe Internet content and for research and development grants for the development of filtering software.

The ABA and the industry will also have an important role in educating the community about content management. One example of the ABA's important work in this area is its Australian Families Guide to the Internet website.<sup>20</sup> The industry will have an educational role through the operation of the codes of practice. In addition, the Government recently produced a pamphlet entitled "Families Guide to Managing Access to the Internet".<sup>21</sup>

## VI. CONCLUSION

The Government acknowledges that any prohibitive legislative regime will encounter enforcement difficulties. It would be an abdication of responsibilities, however, to put the whole issue into the 'too hard' basket, particularly given the level of community concerns about the dissemination of illegal and offensive material on the Internet. Nor is it acceptable that standards applicable to conventional media do not also apply to the Internet. The Government believes that the co-regulatory framework, including the industry codes of practice, is a pragmatic and workable approach to regulating Internet content. It will address community concerns without hindering the development of a very exciting sunrise industry with enormous potential to change our lives for the better.

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20 Available at <<http://www.aba.gov.au/family/index.html>>.

21 The pamphlet was first released to the public on 22 December 1999. It is available online at <[www.dcita.gov.au/graphics-welcome.html](http://www.dcita.gov.au/graphics-welcome.html)>.