

## Shooting the Messenger

### A Critique of Australia's Internet Content Regulation Regime

Heath Gibson

#### EXECUTIVE SUMMARY

With the expansion of the Internet into society, media reports of pornography, paedophiles and racist web sites have induced government regulatory measures across the globe. The aim of this *Issue Analysis* is to foster better understanding of how public policy should react to the challenges of the Internet. It specifically considers the effects of the recently passed *Broadcasting Services Amendment (Online Services) Act 1999* (OSA) upon Internet content and usage. The paper argues:

- Introducing a new censorship scheme for the Internet may be an inefficient use of resources in attempts to reduce the distribution of child pornography.
- Difficulties arise when attempting to determine what Internet material is offensive to community standards.
- The compliance cost of the new legislation to the Internet industry could be as high as approximately \$150 million.
- The OSA creates inconsistency in ratings classifications between the Internet, films and books, and is likely to result in tighter controls on Internet content than those affecting conventional media.
- It may be impractical and beyond the resources of non-professional content providers to obtain expert advice as to the likely rating that their web-sites will receive.
- The OSA Code of Conduct may make the OSA workable for some industry participants, but also imposes significant new burdens upon content providers and Internet users; it also discourages the provision of Internet content by non-commercial providers.

The author concludes by suggesting that the OSA should be subject to further examination to identify more possible weaknesses and detrimental side-effects. *It would be a great loss to Australia, he contends, if the economic, political and personal promise of the Internet was watered down or lost because we failed to understand the issues fully before regulating it.* ■

## **I: INTRODUCTION AND BACKGROUND**

The Internet is a network of computers connecting millions of individuals, organisations, companies and governments across the globe. Originating in the United States, it has grown to become a truly global network. From its initial role as a military and academic research network, the Internet now provides a wide range of information and entertainment services.

In Australia, the Internet was previously dominated by educational institutions but has since grown to include a much broader range of users. In Australia, 23 per cent of households now have access to the Internet and 41 per cent of Australian adults accessed the Internet in the last twelve months (ABS 1999). Adults still dominate Internet usage with 72 per cent of Internet users aged between 20 and 50. Only 2 per cent of Australian Internet users are aged less than 15 (WWW.Consult 1999). Research, however, indicates that 55 per cent of Australian children have access to the Internet either at home or elsewhere such as at school (Waltermann and Machill 1999: 5).

The Internet is thus increasingly becoming a part of everyday life. As its expansion continues, public policy in relation to the Internet should be driven by informed research on the relevant issues. The aim of this paper is to foster a stronger understanding of one particular issue: the regulation of Internet content and the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) (hereafter referred to as the OSA).

### **The push for content controls**

As this expansion of the Internet into society has taken place, reports in the conventional media of pornography, paedophiles and race hate web sites have induced action within governments across the globe. The typical response has been a race to react to the apparent public outcry. Whilst defenders of the Internet attempt to promote its benefits, Lambert points out (1997: 3; 1998: 52) that these stories are not nearly as newsworthy as stories of bomb-recipes and out of control pornographers.

Three streams of argument have emerged in support of stronger controls on Internet content. These concerns will be dealt with briefly here.

#### *Protecting children*

Announcements regarding content regulation in Australia have argued the need to introduce legislation in order to protect children (DCITA 1999a; DCITA 1999b). This need was also a recurrent theme amongst the submissions by censorship supporters to the 1999 inquiry into content regulation by the Senate Select Committee on Information Technologies (Senate Submissions 1999).

A possible drawback of direct censorship legislation, however, is its side effect of reducing adults to reading and viewing only what is suitable for children. It is interesting to observe how this issue was dealt with in the United States. The *Communications Decency Act* represented the first attempt by the United States government to impose Internet censorship. In striking down the *Communications Decency Act*, the US Supreme Court stated that it was inappropriate for government to 'reduce the adult population . . . to . . . only what is fit for children' (*Reno v ACLU*). Despite Australia's lack of an explicit constitutional guarantee of free speech, the judgements in this case should not be disregarded. It provides a comprehensive review of both the technical, legal and ethical challenges involved in regulation of the Internet.

#### *Child pornography online*

Another issue often raised concerns the use of the Internet to transmit child pornography. Halting the distribution of child pornography and reducing the incidence of child abuse is a worthwhile goal. Opponents of centralised censorship legislation typically share this goal of eliminating such material from the Internet.

What is at variance between 'pro' and 'anti' censorship groups is the favoured approach. Opponents of censorship typically prefer use of existing laws for addressing child pornography online. At a protest against censorship in May 1999, a representative from Electronic Frontiers Australia (EFA) stated:

if you find evidence on the Internet of genuine crimes such as child abuse or drug-smuggling, then you should report it to the police, to the NSW child

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protection unit or the drug squad. But that has nothing whatsoever to do with this Bill [the OSA]. (Yee 1999)

Two important questions are therefore raised by the OSA's introduction. These are whether the OSA is necessary to address child pornography on the Internet, and whether it improves on the current mechanisms for dealing with child pornography.

Existing laws are already being used to prosecute those who download and distribute child pornography. This would suggest that the OSA is not necessary to achieve these aims. Section 85ZE of the *Crimes Act* (Cth) 1914 had, for example, previously been used by the federal police to prosecute persons making offensive material, such as child pornography, available over the Internet. Changes introduced as part of the new censorship scheme, however, operate to exclude Internet services from 85ZE and makes the states responsible for the prosecution of matters previously dealt with by this provision of the *Crimes Act* (Cth).

Whether the OSA improves on current arrangements is also debatable. Web sites such as crime-stoppers (<http://www.crimestoppers.net.au>) already offer Internet users the capacity to contact police about the possible presence of child pornography. Other sites, such as PedoWatch (<http://www.pedowatch.org>), provide tips for Internet users on how to identify and report child pornographers using the Internet.

Introducing a new censorship scheme may therefore be an inefficient use of resources in terms of reducing the distribution of child pornography. An education campaign to inform Internet users about current arrangements, coupled with additional funding and training for online police investigations, may prove a more efficient use of resources.

### Community standards

Another factor driving the push for Internet censorship is the desire to ensure that the Internet conforms to community standards.

Yet arguments relating to community standards are challenged by the very diversity and global nature of the Internet. Attempts to determine a common Australian community standard would present a challenge in a society as culturally diverse as Australia. As a global medium, this problem is magnified. Furthermore, the diversity of the Internet may make it inappropriate for the government to attempt to impose ill-defined Australian community standards on Internet users and their associated virtual communities.

Closely related to this is the challenge of determining what is offensive to community standards. Certain material, such as information on birth control, prison rape and AIDS prevention, may be considered offensive in some communities (Akdeniz 1997: 1003), while being viewed as essential information in others. Safe sex information in particular is likely to have to be explicit if it is to be effective (Kidman 1996: 101).

### A brief history of Australian 'content regulation'

In the Australian context, various state governments have introduced, or attempted to introduce, censorship laws to control the flow of information on the Internet. At the Commonwealth level, the primary piece of Internet content regulation is the OSA.

Table 1 provides a summary of the major reports and investigations into online media carried out by the Commonwealth.

Year	Publication	Organisation
1993/4	Report: Regulation of Computer Bulletin Board Systems	DOCA
1995	Content Regulation of On-Line Information Services	DOCA
1995	Report on Regulation of Computer On-Line Services Parts 1 & 2	SSCCS
1996	Investigation into the Content of On-line Services	ABA
1997	Report on Regulation of Computer On-Line Services Part 3	SSCCS
1997	Principles for a Regulatory Framework for On-line Services in the Broadcasting Services Act 1992	DOCA
1999	Broadcasting Services Amendment (Online Services) Bill 1999	SSCIT

**Table 1:** Government and Parliamentary Content Regulation Investigations

**Introducing a new censorship scheme may . . . be an inefficient use of resources in terms of reducing the distribution of child pornography.**

## Principles for a regulatory framework

Perhaps the most significant of the above events was the release in 1997 of a paper entitled 'Principles for a Regulatory Framework for On-line Services in the Broadcasting Services Act 1992' (DOCA 1997).

This paper laid out a broad framework for content regulation of the Internet. It proposed a system of content regulation based on industry codes of conduct overseen and enforced by the Australian Broadcasting Authority (ABA). The intention of the new regulation was to ensure that:

Material accessed through on-line services should not be subject to a more onerous regulatory framework than 'off-line' material such as books, videos, films and computer games . . . (DOCA 1997a)

A study of the 1997 DoCA proposal can be found in Gibson (1998).

## Enter the OSA

An outline of the proposed scheme was revealed in March 1999 (DCITA 1999b), and the OSA was introduced into the Senate on April 21st.

### Timeline of Events

- 3 April 1999: Advertisements placed requesting submissions to an inquiry.
- 21 April 1999: Broadcasting Services Amendment (Online Services) Bill 1999 introduced in Senate.
- 23 April 1999: OSA referred to SSCIT with report due 11 May 1999.
- 27-29 April 1999: Verbal evidence presented by selected participants.
- 30 April 1999: Written Submissions to SSCIT officially close.
- 3 May 1999: Continuation of verbal evidence.
- 11 May 1999: Report Delivered. Majority (government) report supports OSA. Labor report proposes several amendments. Senator Harradine supports stronger measures. Democrats oppose the legislation.
- 26 May 1999: OSA passed by Senate.
- 30 June 1999: OSA passed by House of Representatives.
- 20 December 1999: ABA accepts IIA Code of Conduct content regulation modules.
- 1 January 2000: OSA comes into effect.

**Table 2:** Timeline of Events: The *Online Services Act* – An Outline of its Operation and Associated Issues

The OSA was presented as a measure which

enacts a regime which balances the need for the Government to meet legitimate community concerns about the publication of illegal and offensive material online, that is commensurate with the regulation of conventional media, while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy. (Alston 1999)

### *Australian Hosted Content*

For content hosted in Australia, if the content is or would be rated RC or X using the OFLC *film guidelines* (OFLC 1999), the content is considered 'prohibited content'. On receipt of a take down notice from the ABA, Internet Content Hosts (ICH) must remove the prohibited content. For content that would be rated R, access must be restricted using an approved restricted access system. Content that is R rated that is not restricted via an approved restricted access system must be removed.

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If the intention of the legislation is to be forward thinking and ready to deal with the possibility of greater Internet convergence with television like media, the unclear status of 'live' content such as streaming video, real time audio and live chat is a further complication. In the second reading speech, for example, it was stated that:

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Ephemeral content, such as newsgroups, chat rooms and real time services such as streaming video and audio, is also excluded, except to the extent that they are stored or archived . . . (Alston 1999)

This would suggest that this content is not subject to classification. A closer examination of the legislation, however, reveals that whether these types of services are subject to complaint and classification will ultimately depend on whether they are defined as 'Internet content' under the OSA (Schedule 1 Clause 4).

The definition of 'Internet content' excludes 'ordinary electronic mail' and 'information that is transmitted in the form of a broadcasting service.' Newsgroup postings are thus not excluded from classification and complaint, nor are archived email postings which are stored and available for retrieval.

A possible means for the ABA to influence the conduct of these types of 'live' Internet services may be through the provisions of the OSA which enable the ABA to make an 'online provider determination'. These are rules which apply to the supply or hosting of Internet services by ISPs and ICHs (Schedule 1, Clause 80[1],80[2]). It is possible that the ABA could place restrictions on these types of services by establishing guidelines for ISPs and ICHs supplying these services.

### *Overseas Internet Content*

For content which is located outside of Australia, Internet Service Providers (ISP) are to block access to this content if it would be classified X or RC under the OFLC films guidelines. The methods of blocking are to be in accordance with the procedures established by an industry code of practice. The ABA retains, however, the power to dictate an industry standard under certain situations (Schedule 1, Clause 68-71). If no code exists and no standard has been determined, the ABA can order ISPs to take all reasonable steps to block access, having regard to what is commercially and technically feasible (Schedule 1 Clause 40(3)a). This order to block foreign content is known as a 'standard access prevention notice'.

This casts some doubt over government claims that they do not intend to dictate any particular technical solution. The provisions allowing the ABA to dictate an industry standard and to determine what constitutes reasonable measures clearly creates a provision for doing just that. One of the major concerns of ISPs and interest groups is the possibility that the ABA will mandate the use of ISP level Internet filtering technology.

Whilst the legislation may not make filtering mandatory, it clearly encourages filtering. An ISP is not required to comply with a standard access prevention notice if they have in place a recognised access prevention arrangement. The legislation provides two examples of acceptable access prevention arrangements—filtering of content using regularly updated software, and offering a family-friendly filtered Internet service (Schedule 1 Clause 40[6]).

Whether the requirement to filter will ultimately be enforced is likely to depend on the IIA code of conduct and its implementation. Although the adopted version of the IIA code (IIA 1999b) would appear for the time being to have avoided the government exercising its power to enforce a particular technical solution, the IIA code does require ISPs to make filter software or a filtered Internet service available to users. This is already proving a boom for those filter software companies who are on the IIA's list of approved filters (Needham 2000).

### *Complaints Based Mechanism*

The OSA establishes a process where a person may complain about prohibited or potentially prohibited content which is hosted by an Australian ICH, or can be accessed via an Australian ISP. The scheme has been promoted heavily as a complaints based and complaints driven system (Alston 1999; DCITA 1999a, 1999b, 1999f). But there is also provision for the ABA to initiate its own investigations of Internet service providers and Internet content hosts (Schedule 1 Clause 27).

### *NetAlert*

The OSA creates the framework for the establishment of a community and industry body, based in Tasmania (DCITA 1999c), to carry out a range of functions. Originally referred to as Netwatch, and subsequently formed as NetAlert (DCITA 1999g), its functions

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include:

- assisting in the preparation of complaints about offensive content;
- advising parents on the use of filter technology;
- conduct of research and development of filtering and labeling technologies;
- public education campaigns to explain the operation of the OSA and the functions of NetAlert; and
- active monitoring of online content.

Thus, 'NetAlert' is likely to become the first point of contact for anyone wishing to make a complaint about Internet content. Although the ABA is ultimately responsible for the receipt of complaints and investigating ISPs and ICHs, it is likely that complaints and investigations will also be handled by 'NetAlert'.

### *State Laws for Content Providers*

Responsibility for content is intended to rest with the actual content originator/provider. To this end 'it is anticipated that the States and Territories will enact complementary legislation creating offences for the publication and transmission of objectionable material by end-users' (Alston 1999). An example of the type of complimentary legislation is the draft provisions put forward by the ACT Attorney General's Department (ACT AG 1999) as a model for uniform state legislation. The provisions of the draft legislation are designed to comply with the OSA and make it an offence to provide content that is prohibited by the OSA.

### *Cost of the OSA*

In order to implement and operate the OSA, the ABA has been allocated a budget of \$1.95 million for the 1999/2000 budget period (DCITA 1999c), and \$1.9 million per annum thereafter (DCITA 1999e) to help fund NetAlert and to pay for the cost of having Internet content rated by the OFLC.

NetAlert has also been allocated an additional \$3 million from the Telstra 'social bonus'. It should be noted that this is only the budgeted cost to the government of the operation of the scheme. Estimating the indirect cost is more problematic. The most current estimate of the compliance cost of the legislation to the Internet industry comes from telecommunications consultant Paul Budde: \$150 million (1999: 24).

## **II: ISSUES RAISED BY THE OSA**

### **Regulation of Commensurate Media**

One of the first issues raised by the OSA concerns whether or not it increases or decreases consistency with existing censorship schemes in Australia. As noted, one of the OSA's aims was to introduce a system of regulation that is commensurate with the regulation of conventional media (Alston 1999).

#### *Is the Internet Like Pay-TV?*

One view is that the form of media most equivalent to the Internet is pay television and therefore Internet regulation should be consistent with pay-TV and similar narrowcasting services (DCITA 1999d: 5-6). The choice of narrowcasting is justified on

the premise that access to online content is less discretionary than access to conventional content in hard copy form. (DCITA 1999d: 7)

This justification can be criticised on a number of grounds. First, the Internet consists of a variety of technologies and services, only some of which could be considered equivalent to narrowcasting of pay-TV. Unlike pay-TV, most web content is not automatically sent to the users computer and requires an active request by the user to obtain a particular type of content.

The most likely exception to this is certain forms of 'push-technology' which will automatically transmit content to a computer. Data-casting offers another possible exception. But depending on the form which it eventually takes, it too may require some active steps to access content.

One area that may be cause for concern is the increasing prevalence of unsolicited commercial email, known in Internet jargon as 'spam'. The virtual equivalent of junk mail, some spam advertising pornographic services may be received by a user. Yet

singling out pornographic spam for a response may be less effective than developing measures to combat spam in general. Furthermore, since most spam comes from outside Australia, domestic laws prohibiting the sending of advertisements for adult web sites are unlikely to have an impact on the level of spam received by Australian Internet users.

### *Restricting Children's Internet Activity*

The second justification offered above by DCITA relates to the ease of access by children. Here one should note that most schools currently offering Internet access offer only filtered access: that is, the Internet access which they provide to students is already filtered for suitability by the ISP providing Internet access to the school. In the home, parents who are concerned about their children accessing the Internet have a number of options.

First, they may choose not to provide their children with the password to their Internet provider—thus excluding them from any use when there is no parent to supervise. This is reinforced by the most recent version of the IIA Code which prohibits Internet access accounts being made available to persons under 18 years of age except where parental permission is granted (IIA 1999b).

Parents can also choose from a wide range of end user filter programs which can monitor and restrict the content viewed by their children. In addition, services such as Kidz.net (<http://www.kidz.net.au>) offer access to a network of child friendly content with access to the Internet at large restricted by a password.

The decision to adopt the narrowcasting model banning all X rated material and prohibiting R rated content not protected by Personal Identification Numbers (PINs) would seem to be unduly restrictive in light of these alternatives.

### *Commensurate Media: The Internet, Films and Books*

As discussed earlier, Internet content will be rated using the classification guidelines which apply to film and video (OFLC 1999). This results, however, in Internet content being subject to a content regulation regime which is stricter than that applied to conventional media forms such as videos and print publications.

The X classification is a classification which currently only applies to video tapes. Material receives an X classification where it contains 'real depictions of actual sexual intercourse and other sexual activity between consenting adults, including mild fetishes' (OFLC 1999: 12). Internet content which would be classified X under the film and video guidelines will be prohibited from being hosted within Australia; ISPs will be expected to take reasonable measures to block access to this material where it is hosted overseas.

Equivalent material in video tape format is legally available from the Australian Capital Territory. Thus, certain content will become prohibited when made available via the Internet, but will continue to be legally available in video format.

A second inconsistency arises from the differences in the guidelines for the classification of publications and films. Under the guidelines for publications, photographs of sexual activity will typically result in a Category 2 Restricted (R2) classification (OFLC 1999a: 15). But under the guidelines for film and video tapes, this receives an X rating. The result is that material classified R2 in print is legally available in most states, but will become prohibited content if the same material is published online. Thus, rather than bringing the Internet into line with existing media, content legally available in print form will be subject to tighter restriction on the Internet than in hard copy form.

The OSA also requires that access to R rated material hosted in Australia be subjected to a restricted access system. A key feature of the classification scheme for films is the classification criteria based on the treatment of adult themes (Graham 1999).

To avoid receiving an R classification, 'the treatment of [adult] themes with a high degree of intensity should be discreet' (OFLC 1999: 10). This is a potential cause for concern as adult themes are defined quite broadly to include:

Issues dealing with aspects of adult life that are potentially harmful to minors, or disturbing. Adult themes may include verbal references to and depictions associated with issues such as suicide, crime, corruption, marital problems,

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emotional trauma, drug and alcohol dependency, death and serious illness, racism, religious issues. (OFLC 1999: 15)

It is possible that Internet sites which attempt to deal with these issues in a manner which is not discreet could be required to control access using a restricted access system. Indeed, the ABA web site advises Internet users that they may lodge a complaint with the ABA about content not protected by a restricted access system 'which deals with issues or contains depictions which require an adult perspective' (ABA 2000).

Furthermore, restricted access systems on the Internet typically operate by requiring a user to submit their credit card details as payment for subscription to an adult identification service. Under this system, adults who do not have a credit card, or are unwilling to disclose their credit card details due to security concerns, are denied access to that material. Other forms of restricted access systems, such as requiring users to obtain a PIN number or supply extensive personal details, are also likely to generate privacy concerns. These concerns have also been raised by the online civil liberties group, Electronic Frontiers Australia (EFA), in relation to the ABA's proposed restricted access system (EFA 1999).

### *Unduly restrictive*

The choice of narrowcasting as the commensurate media, when combined with the restrictive nature of the OFLC Film Guidelines, is therefore likely to result in tighter controls on Internet content than on conventional media. This is despite the availability of filters products to assist parents excluding children from accessing inappropriate content. It also ignores that most access to the Internet requires users to submit a password.

### **Openness in Censorship Decisions**

There is a lack of openness in the classification process. In particular, concern has been raised (Newton 1999) in relation to Schedule 1 Clause 21 of the OSA. This section relates to decisions of the OFLC classification board and exempts the OFLC from complying with certain sections of the *Classification (Publications, Films and Computer Games) Act* (Cth) 1995 when dealing with Internet content. Three particular exemptions give rise to concerns about the accountability of OFLC censorship as well as the treatment of Internet content in comparison to traditional media.

The first exemption relates to s10 of the Act; this requires classification decisions by the board in relation to publications, films and computer games to be given in writing. Closely associated with this is the exclusion of s25 of the Act, which mandates the issuing of a classification certificate for each publication, film or computer game classified by the OFLC. Thirdly, the OFLC is exempted from the provision requiring it to make classification certificates available to persons prepared to pay the required fee (s27 of the *Classification (Publications, Films and Computer Games Act)*).

The effect of these exclusions is that, classification and censorship decisions relating to Internet content may be less accountable than those made in relation to conventional media. The requirement that OFLC decisions be made in writing and that a classification certificate be issued provides a means of verifying and recording the decisions of the OFLC. It should therefore be treated as a serious cause for concern that the same level of accountability and protection will not be applied to Internet content as is applied to more traditional media.

Furthermore, in order to avoid over-cautious and unnecessary self-censorship by content providers and the Internet industry, it is important that decisions of the OFLC in relation to Internet content are made available. The lack of such records could particularly hinder the ability of the Internet industry and content providers to observe how the OFLC applies the film guidelines to different forms of Internet content such as text, static images, animations and interactive content. It is therefore important that some form of record keeping be introduced to allow members of the Internet industry and the public to monitor the decisions of the ABA and OFLC in relation to Internet content.

### **Content Providers and the Impact on Content Diversity**

Under the OSA scheme, State governments will become responsible for introducing complementary laws that impose obligations on content providers and persons who



upload or access Internet content (Schedule 1 clause 1(3)a). The IIA Code, produced to comply with the OSA, also contains provisions requiring ISPs to inform customers that they must not 'place on the Internet, obtain through the Internet or transmit using the Internet, Prohibited Content or Potentially Prohibited Content' (IIA 1999b).

Whilst making content providers on the Internet responsible in the same manner as more traditional media may appear justified on the grounds of consistency, it fails to appreciate one of the key features of the Internet—namely, just who the content providers on the Internet are.

Despite the increasing role of commercial content providers and professional on-line media developers, there remains much content which is provided by individual Internet users, hobbyists, non-profit groups and other amateur and non-commercial content providers. The continued growth of free web space providers such as GeoCities (<http://www.geocities.com>) and Angelfire (<http://www.angelfire.com>), and the bundling of web hosting space with most home Internet access packages, should be seen as an indicator of the continued growth in content provision by these groups.

In the case of Internet content, it is unclear whether content providers will be able to submit content to the OFLC for prior classification and if so, what fees they will be required to pay. It may also be impractical and beyond the resources of non-professional content providers to obtain expert advice as to the likely rating their web site will receive. When combined with the possibility of jail terms or fines for breaching censorship guidelines, these factors could produce significant barriers to competition in relation to Internet content provision

## **Voluntary takedown**

The OSA also creates other disincentives to the development and hosting of Internet content within Australia. These arise because of the incentives within the OSA scheme which encourage ICHs to comply with ABA take down orders prior to the issuing of a decision by the OFLC.

The OSA provides protection for content hosts and services providers against civil proceedings for acts done in respect to complying with take down orders or approved industry codes (Schedule 1 clause 88).

Schedule 1 Clause 33 allows the ABA to revoke an interim take down notice issued to an ISP, prior to the OFLC classifying the content, where an ICH voluntarily withdraws the material and agrees not to host it. This provides an ICH with an incentive to remove the material without having it classified by the OFLC and officially classified as prohibited content. Because this is done in compliance with the censorship scheme, a content provider who believes their content is not prohibited content, has no redress against an ICH who withdraws the content

Since the content has been removed voluntarily and not as the result of a classification decision by the OFLC, the content provider is unable to appeal against the classification (since no classification decision has been made) and would appear to be denied any legal redress against an ICH who chooses to remove voluntarily content prior to classification. This threat of privatised censorship could potentially create further disincentives for content providers to host their content in Australia rather than in the US.

## **Content Outflow and the Data Deficit**

Because of the relative ease in transferring the hosting of Internet content from one country to another, imposing strict controls on content hosted within Australia is likely to lead to the outflow of content previously hosted in Australia. This has a number of implications for Australian ISPs and, subsequently, for Australian Internet users.

First, relocation of content will mean a loss in revenue for Australian ICHs. Australian providers of web hosting for small scale content providers already face competition from US based companies which provide free web space in exchange for placement of advertising. In the case of larger scale operations, ICHs face a direct loss of revenue when paying content providers take their content to a foreign ICH. Although no data currently exists on the extent of content which has relocated as a consequence of the OSA, it is reasonable to argue that some content outflow will occur due to the relative ease of data transfer and the lower regulatory burden in countries such as the US.

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**In order to avoid imposing controls on the Internet which may stifle its growth and future economic benefits, proposals to place controls on the Internet should be treated cautiously.**

## **The 'Data Deficit'**

Closely related to content outflow are the consequences of having to import content which was formerly hosted in Australia and the resulting impact upon our 'data deficit.' The data-deficit is the difference between the amount of data which exits Australia (analogous to content exports) and the amount of data which enters Australia from the rest of the world, primarily the US (content imports). Increasing our data imports weakens Australia's bargaining position in relation to international interconnection agreements. Under current arrangements

Australian carriers are currently forced to buy content from US carriers, but must give Australian content to the US carriers for free. One of the justifications for this is that traffic is [approximately] 70:30 in the US carriers' favour. (Scott 1999)

Thus a policy which increases our data imports and worsens our data deficit could undermine attempts to negotiate interconnection arrangements which lower the price paid by Australian carriers and ISPs for Internet traffic. This in turn denies Australian Internet users the possibility of lower access prices. Whilst the size of the data-deficit is not the only factor contributing to the maintenance of current interconnection arrangements, a government policy which widens the data-deficit may hinder attempts to alter current agreements and subsequently lower the price of Internet traffic.

## **Impact on Small ISPs and Competition**

Just as compliance with censorship imposes a burden on content providers that leads to the creation of barriers to entry and a reduction in content diversity, it could also be argued that the same issue arises in relation to ISPs. It has been argued (Budde 1999: 24) that whilst larger Internet providers will be able to absorb the increases in costs associated with the OSA scheme, many smaller ISPs will not. This suggests that censorship compliance costs may form a barrier to entry and competition in the provision of Internet services.

If these barriers to competition are significant, the reduction in competition and the higher costs faced by the remaining ISPs could slow the fall of access price, or possibly even produce a rise in the price of Internet access. Budde argues (1999: 24) that regional areas will be particularly adversely affected. This is a valid concern as ISPs in regional areas may not have the large customer base of city based ISPs across which the costs may be spread. Smaller ISPs contributing to competition in these areas could be forced out of business by the burden of complying with the OSA.

## **The IIA Code of Conduct**

A detailed examination of the pre-adoption version of the IIA code for content regulation is contained in Gibson (1999a). Given the minimal changes between the pre-adoption version of the IIA code and that accepted by the ABA, many of the points raised are worth consideration. The examination of the IIA code in Gibson (1999a) attempts to encompass not only the implications of the IIA Code for ISPs and ICHs, but also to highlight the possible impacts of the code on other stakeholders such as end users and content providers.

The content regulation provisions of the IIA code reflect the difficult negotiating position of the IIA, which was faced with determination of industry standards by the ABA if it failed to produce an acceptable code. The code appears designed to mitigate the effects of the OSA on ISPs and ICHs. Examination of the code reveals that the final impact on ISPs and ICHs will be difficult to determine until an indication is given of how a number of key provisions are to be interpreted and implemented. But while the code may make the OSA 'workable' for some industry participants, it also imposes significant new burdens on content providers and Internet users. Several provisions of the code significantly increase the obligations of content providers and may discourage the provision of Internet content, particularly that provided by non-commercial providers.

### **III: Summary and concluding comments**

Addressing the concerns of some sections of the community in relation to the Internet requires a thorough examination of all available options. In order to avoid imposing controls on the Internet which may stifle its growth and future economic benefits, proposals to place controls on the Internet should be treated cautiously.

Protection of minors from harmful material online may be best done by parents. Although the regime established by the OSA does provide some support for parental empowerment and education, it also imposes unduly restrictive controls on the content able to be viewed by adults.

With respect to the presence of child pornography online, existing criminal laws already provide an avenue for the prosecution of persons involved in these activities. An alternative approach to the introduction of broad based censorship laws would be to refine existing criminal codes to ensure they can accommodate changes in technology. Educating Internet users about existing reporting mechanisms may also be an effective alternative to introducing new reporting mechanisms.

Problems also arise when relying on censorship laws to attempt to impose community standards on the Internet. The global nature of the Internet and the diversity of interests represented on the Internet make it difficult to impose a particular definition of community standards on the Internet. It is also difficult to impose potentially ill-defined Australian community standards on the diversity of virtual communities represented by the Internet.

The OSA should be subject to further examination to identify possible weaknesses and detrimental side effects. Among the issues requiring study are whether the OSA imposes an unduly restrictive regulatory regime which is based on inappropriate choice of comparative media. Additionally, the potential lack of openness in relation to Internet censorship decisions should be addressed. This is necessary to provide the Internet industry and users with observable precedents that can guide future behaviour, and to ensure that the same accountability for censorship decisions applicable to more conventional media is applied to the Internet.

An analysis should also be undertaken to assess the OSA's impact on content providers. The presence of a large number of amateur and non-commercial content providers on the Internet must be recognised in any content regulation scheme. Enforcing a content regulation scheme which creates barriers to entry in content provision, and which reduces the degree of competition amongst content providers, may reduce the diversity of Australian content provided on the Internet. A restrictive content regulation regime may also produce a content outflow that worsens Australia's 'data-deficit' and could have an impact on the ability of Internet providers in Australia to negotiate better priced access to international Internet traffic.

Lastly, the impact of compliance costs on the ISP/ICH industry should not be ignored as it may impact upon the level of competition in these industries and hence on the prices and services which consumers receive. Particular attention should be given to evaluating the likely impact on Internet access in regional and rural areas where small ISPs may become not economically viable as a consequence of the content regulation scheme.

The Internet represents a tremendous challenge to policy makers and society at large. It offers incredible opportunities but at the same time poses new risks and forces traditional assumptions about media regulation to be questioned. It would be a great loss to Australia if the economic, political and personal promise of the Internet was watered down or lost because we failed to understand the issues fully before regulating it.

**The bibliography for this Issue Analysis is available from  
<http://www.cis.org.au/Issue Analysis/ia10/ia10refs.html>**

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