

# Internet Censorship: the ABA responds

**In a letter to the Editors, Jon Porter of the ABA responds to the article "Internet Censorship: See No Evil, Speak No Evil, Hear No Evil" published in the last edition of the CLB.**

The co-regulatory scheme established by the *Broadcasting Services Amendment (Online Services) Act 1999* ("Act") addresses risks associated with illegal content and with content that is unsuitable for children, and does so through a range of regulatory responses. The scheme is based on the development of codes of practice by industry and the operation of a complaints hotline by the Australian Broadcasting Authority ("ABA").

Much has been written and much has been said about the regulatory scheme of which some has been misinformed. I'd like to address some of the issues raised in the article "Internet Censorship: See No Evil, Speak No Evil, Hear No Evil"<sup>1</sup> which require clarification.

## ANTI-AVOIDANCE MEASURES

In the article it is stated that:

*"the new anti-avoidance measures will force ISPs and ICHs to scour their sites and networks each day to identify prohibited material. Once they discover any questionable material, ISPs and ICHs will have to decide whether the content is similar to prohibited content - a judgment on which significant penalties hang."*<sup>2</sup>

The co-regulatory scheme is complaints-based - it establishes a framework in which people who are concerned about particular internet content can make a complaint and have that complaint investigated. Under the scheme, ISPs and ICHs are not required to actively monitor or to classify content hosted on their services.

ICHs have a responsibility to remove prohibited content hosted in Australia from their service only once notified by the ABA of the existence of that content. This includes Internet content, notified in a special take-down notice, that is the same as, or substantially similar to, Internet content identified in an interim take-down notice or final take-down notice.

Similarly, it is only when overseas-hosted Internet content is notified by the ABA

to ISPs do ISPs have a responsibility to follow procedures set out in an industry code of practice (or in the absence of a code, an industry standard) for blocking access to that content. This includes Internet content notified by the ABA to ISPs that is the same as, or substantially similar to, Internet content previously notified by the ABA.

The anti-avoidance provisions of the Act specify that ICHs and ISPs are only required to respond to notices issued by the ABA.

Furthermore, there are a graduated range of enforcement mechanisms and sanctions contained in the Act to allow flexibility in dealing with breaches depending on the seriousness of the circumstances.

## COMMUNITY CONCERN

The article also states:

*"[t]here is in fact a number of surveys and polls indicating an ambivalence towards Internet content regulation of the type proposed by the Act."*<sup>3</sup>

Findings from a three country international survey on attitudes to the Internet make clear that there is a high level of public perception that the Internet entails some risks for users and shows that Australians see industry, government and Internet users themselves as all having a part to play in the appropriate supervision and selection of Internet content.

The survey was undertaken in Australia, Germany and the USA by the Bertelsmann Foundation in co-operation with the Australian Broadcasting Authority during June 1999. It ascertains peoples' views on perceived risks associated with the Internet and practical ways of managing these risks. Please find attached a summary of the research findings.<sup>4</sup>

## TECHNICAL AND COMMERCIAL FEASIBILITY

One of the areas of the new legislation that has been subject to considerable comment is the area relating to the

blocking of prohibited content hosted overseas. In the first instance, this matter is to be dealt with by industry codes of practice. It is only if industry codes are not developed and in place by 1 January 2000 or if a registered code of practice is found to be deficient, the ABA will need to move to the development of an industry standard.

In the event that neither a code of practice nor industry standard is in place, the ABA has the power to issue access-prevention notices directing all ISPs known to the ABA to take all reasonable steps to prevent end-users from accessing prohibited content hosted overseas.

In determining whether particular steps are reasonable, regard must be had to the technical and commercial feasibility of taking the steps. The issue of reasonableness will also be informed by the matters set out in section 4 of the Act which 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.

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1. 'Internet Censorship: See No Evil, Speak No Evil, Hear No Evil', *Communications Law Bulletin*, Vol 18 No 2 1999, page 3.

2. *Ibid.*, page 3.

3. The full report contains detailed comparative data for the three countries that participated in the study and can be accessed at the ABA's website.

4. *Ibid.*, page 4.