FORUM: REGULATING THE INTERNET - CENSORSHIP?

AUSTRALIA'S INTERNET CENSORSHIP REGIME: HISTORY, FORM AND FUTURE

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This paper explores the history and implications of the *Broadcasting Services Amendment (Online Services) Act*. While the legislation was pushed through the Federal Parliament during the first half of 1999, political debate surrounding Internet content regulation has been gestating for a number of years, with a series of false starts and non-decisions. In discussing the introduction of the legislation it is important to consider the political difficulties associated with developing a considered response to the problems of online content: the limitations of applying Australia's complex system of censorship to new media forms and the tendency by policy makers to opt for opportune political point scoring over sound policy development. Because of these factors the final legislative response was an uneasy combination of Federal and State legislation that remains heavily dependent on authority delegated to the Internet industry. Some of the problems of the legislation are presented, not simply in terms of limitations of the Government to censor online content, but also in the loss of control of policy development into the private sector.

Introduction

The announcement[1] of the *Broadcasting Services Amendment (Online Services) Bill 1999* (BSA (OS)) largely came as a surprise to the

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technical, business and social interests who had been debating the thorny problem of Internet censorship for nearly five years. While online libertarians had consistently opposed any form of regulation, and religious and children's media groups called for tough action against online pornography, key industry groups like the Internet Industry Association (IIA) considered the Government had previously committed itself to a "light touch" regulatory model for Internet content.

This commitment, announced in 1997,[2] stressed the limited ability of industry members to directly censor online content, instead opting for industry-sponsored codes of practice. Thus, Internet Service Providers (ISPs) believed that they would not face unreasonable commercial loss when complying with any new government legislation. Instead, the industry, user groups and free-speech advocates were about to enter an intense period of political conflict that would show just how far the political debate over Internet regulation had *not* come since the Senate called, in 1995, for blanket prosecution of those accessing R rated, or greater, material[3] on Australian computer networks.

The key source of dispute about the proposed legislation centred on the treatment of offshore material. While the Minister announced the legislation was to contain many of the legislative and co-regulatory components foreshadowed in 1997 (such as industry codes of practice and a complaints hotline managed by the Australian Broadcasting Authority) the Government had taken a wholly new approach to the issue of offensive material located on offshore servers: it would be banned, and blocked by ISPs. For the industry this approach, while largely unworkable and unlikely to achieve the level of child protection called for by government, was seen as financially prohibitive and likely to limit the development of the Internet in Australia. As the political debate intensified, the Government stood firm on its proposed content blocking provisions. However considerable ground on this issue was conceded at the last minute via a series of amendments that effectively negated the content blocking

[1] Department of Communications, Information Technology and the Arts, "Internet content regulation", Media Release, 19 March 1999.
[2] Department of Communications, Information Technology and the Arts, Principles for a Regulatory Framework for On-Line Services in the Broadcasting Services Act 1992, 13 August 1997.
[3] Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on the Regulation of Computer On-line Services*, Part 2, November 1995.

provisions of the legislation. Overall, the legislative outcome was complex, partially because of the clumsy political posturing required to promote the legislation as tough on pornography, but also because of Australia's complicated censorship system that necessitates a joint approach between the Commonwealth and the States.

To understand the politics behind the debate and the final form of the legislation it is important to examine: first, the historical background of the case; and second, the regulatory landscape within which censorship operates in Australia. By examining the political and regulatory factors that influenced the development of the BSA (OS) we can explain the complex shape of the regulatory regime as delegated legislation, but also the shortcomings of the system for Internet censorship that will affect future political and legislative developments in this area.

A History of Internet Censorship in Australia

While computer networks have existed in Australia since the 1950s, concern about the content of these systems emerged onto the political agenda after the decision by Australian Attorneys-General to regulate the supply of violent and sexually explicit computer games in the early 1990s. In 1994, a Federal Task Force examined the availability of restricted computer games on Bulletin Board Systems[4] (BBSs), but noted the practical difficulties associated with monitoring and controlling online information by the System Operator and the limited size of the technologies reach. The Task Force recommended the use of a self-regulatory model for BBSs, with emphasis on a complaints-based procedure, mediated by the Office of Film and Literature Classification (OFLC)[5]. The timing of this report was unfortunate, attracting limited attention and little action by the then Labor government. With the emergence of the Internet as an increasingly "mainstream" use of computer technology, concerns about online content were quickly transferred to the emerging technology of the Internet, a technology with a far greater potential scope for adoption by Australians.

[4] Desktop based computer systems linked to a small number of direct line modems. These systems were popular with computer enthusiasts during the late 1980s and early 1990s and provided facilities for exchanging files, electronic mail and chatting. The development of the Internet has reduced the number of these systems in operation today, however they can still be found in all major capitals of Australia.

[5] BBS Task Force, Regulation of Computer Bulletin Board Systems, AGPS, Canberra 1994.

As initial wonderstruck media attention to the Internet and World Wide Web died down, a number of news stories started to present a less savoury picture of the Internet's content. The most influential piece of this type was *Time* magazine's cover story of July 1995, called "Cyberporn"[6], graphically depicting the Internet as a stalking ground for paedophiles[7]. This, and similar domestically produced pieces[8], can be seen as a catalyst for a prolonged period of community concern that invoked a fast legislative response to the problem of regulating the Internet. Calls for regulation reached a peak in 1996 with the New South Wales Government announcing its intention to regulate offensive material ahead of any national strategy[9]. This draft legislation, after being leaked on to the Internet, met with severe resistance from activating groups of computer enthusiasts[10], who had adopted the approach that the debate was simply an issue of censorship and attempted to counter the view that any government intervention was required.

While Australia's civil liberties bodies have been unable or unwilling to engage with censorship issues on computer networks, the newly formed Electronic Frontiers Australia (EFA)[11] rushed into the breach, co-opting interested protesters from Internet newsgroups and accelerating their campaign against regulation, culminating in a march on the NSW Parliament in May. This reaction, against a token, populist policy response, forced the State Government to back down, with other jurisdictions publicly coming out opposing the legislation as technically ill-considered[12]. In June the Australian Broadcasting Authority released a report[13] that presented, for the first time, a

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[6] P Elmer-Dewitt, "On A Screen Near You: Cyberporn", Time, http://www.parthfinder.com/time/magazine/domestic/1995/950703/950703.cover.html, Vol 146, No. 1, 3 July 1995.

[7] The article featured an artist's impression of a man luring a child into an ally with computer screen displaying apiece of candy.

[8] Examples include: J Beun-Chown, "Virtual Nightmare: The Computer Net That Can Trap Your Kids", *New Weekly*, 13 February1995; C Hackett, "Warning on Internet After Blast", *Advertiser*, 4 May 1995; P Mickelburough, "Push to Ban Cyber Porn", Herald Sun, 14 June 1995; M Hele, "Police Raid Home Over Internet Porn", *Courier Mail*, 25 August 1995; A Wakeley, "Danger of a Window Without Curtains", *The Age*, 24 April 1996 at 15.

[9] J Davidson, "NSW Moves on Internet Porn Laws", *The Australian Financial Review*, 3 April 1996 at 3. It should be noted that the NSW Government denies this was the case.

[10] M Lawrence, "Censorship Fight Hots Up", *The Age*, 18 June 1996 atC1.

[11] Based on a similar organisation in the United Sates: the Electronic Frontiers Foundation.

[12] Canberra Times, "ACT Govt Baulks at Internet Porn Plan", *The Canberra Times,* 10 July 1996.

[13] Australian Broadcasting Authority, *Investigation into the Content of On-line Services*, ABA, Sydney, 1996.

detailed overview of the nature and dynamics of the policy area and recommended a more considered regulatory model based on community education and empowerment, and industry co-regulation. Faced with this seemingly authoritative document, further moves for rapid legislation evaporated. The rush to regulate had ended, and a consolidation phase began.

With the release of the ABA report, and the increasing importance of Internet technology as both a new communications medium in Australia and an expected source of valuable economic growth, industry and user groups began to feel that policy makers might just be able to understand the implications and complexity of the technology. The emergence of the Internet Industry Association at this time provided a focal point for commercial interests supplying Internet services to develop draft codes of practice in line with an anticipated self- or co-regulatory scheme administered by a Federal agency, with the ABA the most likely candidate. In mid-1997 the Federal Government did the expected, announcing a detailed set of principles for the regulation of Internet content in Australia[14].

The government's principles, which it took to the 1998 Federal election, reflected most of the recommendations of the ABA report. The framework presented a light regulatory approach, focusing only on material that would be considered illegal *within* the Australian jurisdiction. Essentially, the Government, in accepting the technical view of the virtual impossibility of centrally censoring the Internet, avoided the question of restricting Australians' access to illegal and pornographic material hosted overseas, the vast majority of "questionable" and illegal material travelling via the Internet. While the IIA did not favour service providers being required to determine the acceptability of material located on their servers, the general thrust of the announcement was one that industry could abide by[15]. This acceptance was helped by the favoured role the Association would play in developing the codes of practice that would form the core of regulation local ISPs would have to comply with. Additionally, given the requirement for some form of take down procedure to be included within industry codes of practice, the Industry was looking forward to a clarification of their legal liability when removing content placed on the Internet by one of their users.

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[14] Department of Communications, Information Technology and the Arts, n2.

[15] R Cousins, Submission on Principles for A National Approach to Regulate Content of Online Services, http://www.dca.gov.au/nsapi-graphics/?Mlval=dca_dispdoc&pathid=%2fpolicy%2fsubs%2fcousins%2ehtm, 10 August 1997.

This period was not entirely without conflict as users and industry groups clashed with the *Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies* over their June 1997 report[16]. This report included recommendations for increased criminal sanctions and random police inspections of computer systems[17]. While the Committee had relaxed some of its views on a strict legal approach to the issue of online content, the adversarial nature of the Committee's conduct, and the presence of conservative Senators like Brian Harradine and John Tierney served to make the Committee, rather than the Government, the chief point of hostility among industry and user groups. While the progressive view presented by the ABA and 1997 Principles served to calm the debate to an uneasy peace, the presence of the Committee (sometimes referred to as the "porn" or "morals" committee) allowed groups like the EFA to maintain their campaign (and membership) focused against any government moves towards online censorship.

A Legislative Muddle: The Bill, the Backlash and the Back Down

On 19 March 1999, nearly a year and a half after the release of the Government's principles for Internet content regulation, Senator Alston announced his intention to bring a Bill before the Parliament that would regulate access to material rated R, X and Refused Classification (RC) under the existing OFLC standards. Additionally, the Minister announced[18]:

> "The regime also provides for self-regulatory codes of practice for the online service provider industry, to be overseen by the ABA. These codes of practice must include a commitment by an online service provider to take all reasonable steps to block access to RC or X material hosted overseas, once the service provider has been notified of the existence of the material by the ABA."

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[16] Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, Report on the Regulation of Computer Online Services, Part 3, http://www.aph.gov.au/senate/committee/comstand_ctte/online3/, 26 July 1997.

[17] S Creedy, "ISPs Scorn 'Narrow' Porn Report", *The Australian*, 1 July 1997 at 31.

[18] R Alston, Internet Content Regulation, Press Release, http://www.dcita.gov.au/nsapi-text/?MIval=dca_dispdoc&ID=3648, 19 March1999.

It was this announcement that would spark widespread criticism, and action by industry and EFA[19]. Essentially, the Government had announced that it would require some form of Internet filtering based upon an official black list of restricted sites maintained by the ABA. This approach had not been taken by any established democratic nation, placing Australia into an exclusive group that included mainland China, Saudi Arabia and Iran.

The timing of the announcement was such that almost the entire board of Electronic Frontiers Australia were soon to be in Canberra. However, the EFA were unable to meet with the Minister, with the Internet Industry Association being the only group able to gain personal ministerial access. The Executive Director and Chair of the IIA met with Senator Alston and his principal Information Technology adviser within days of the Government's announcement, seeking clarification on some of the issues of the announcement and stating their objections to the proposed content blocking provisions of the Bill[20]. Essentially, while the IIA was happy that the Government had managed to avoid becoming technically prescriptive in developing the regulatory framework, the organisation expressed the view that the proposal would be expensive for ISPs to operate and dramatically degrade the performance of the network as a whole. For ISPs to maintain filtering of their clients' Internet feed, they would be forced to invest in new equipment to administer the provisions. Additionally, they argued, the approach would be largely ineffective, given the dynamic nature of Internet content and the ease to which censorship methods could be evaded using existing technology[21]. While the ISP industry includes many large multi-national companies, the Bill would fall hard on the majority of the six hundred ISPs in Australia that were small businesses with slim profit margins.

Leading towards the introduction of the legislation, the Minister went on the offensive, arguing that action was required because of

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[19] Electronic Frontiers Australia, ACTION ALERT - Australian Internet Censorship, aus.censorship, 31 March 1999.

[20] Department of Communications, Information Technology and the Arts, Report of Meeting with Senator Richard Alston: Minister for Telecommunication and the Arts, 24 March 1999.

[21] Such as the movement of restricted material to new Internet addresses (URLs), the use of specialised web-servers that masked the user and the origin of the material, sending Internet material within other "legitimate" packets (tunnelling), encrypting information, using non-standard port numbers and the use of email resenders. CSIRO, Blocking Content on the Internet: a Technical Perspective, prepared for the National Office of the Information Economy, June 1998.

community concern regarding the nature of Internet content and the pervasiveness of the Internet as a medium in Australia. Additionally, he moved to cast the proposed legislation into positive light, arguing that the Government was not intending to "censor" the Internet, but simply "regulate" it. In *The Australian* he stated[22]:

> "This announcement was greeted by parents with relief; by extremist, freedom-of-speech-at-all-costs groups with claims of censorship; and by the Internet Industry with concern whether the proposed regime would be technically feasible and would impose onerous burdens, thus inhibiting the development of the online economy...
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> "The extremists are entitled to their views. But if their arguments are carried to their logical conclusion, there would be no protection online for children from makers of snuff movies, paedophiles, drug pushers and other offensive or disturbing material."

The Minister clearly had his political strategy aimed at presenting the legislation as a means of protecting children from criminals and pornographers. For those who failed to support the Government because of free speech concerns, they were simply extremists who should be discounted from the debate.

In reality the BSA (OS) was everything the free speech "extremists" would oppose. The legislation included the mandatory use of some form of content blocking at the ISP level for all Internet accounts[23], regardless whether the user would be a child or an adult. By utilising the Office of Film and Literature Classification as the means of judging the acceptability or otherwise of material[24], the Bill was squarely aimed at the portrayal of violence, incitement to engage in criminal activity, and erotic and pornographic material[25]. The effect of the legislation on groups like the EFA was to produce the criticisms foreshadowed by the Minister, with Electronic Frontiers Australia calling the legislation "draconian" and even bringing the mainstream

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[22] R Alston, "Regulation is Not Censorship", *The Australian*, 13 April1999 at 55.
[23] *Broadcasting Services Amendment (Online Services) Act1999* (Cth) s40.
[24] *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) s30 (2),(3),(5).
[25] As based on the R, X and RC ratings utilised by the Office and specified in the legislation. Office of Film and Literature Classification, *Guidelines For The Classification Of Films And Videotapes (Amendment No. 2)*, Office of Film and Literature Classification, Sydney, 15 May 1999.

(or "offline") libertarian organisations into the debate for the first time[26]. In pre-emptively attacking the EFA, the Minister stated[27]:

> "Certain elements of the Internet industry are today reporting as threatening to "disrupt" the Government's Internet content regulation regime ... Any attempt to interfere with these protections will have the effect of making it easier for paedophiles, drug-pushers, racists, and criminals to pollute the Internet."

The Minister managed to provoke the EFA into reacting in the way he anticipated. The next day the Executive Director of the EFA fired off his rejoinder, calling the Minister either" naive or stupid"[28]. Politically he was neither, and the EFA had played straight into the argument presented by the Government. By illustrating that they were unwilling to engage in debate over the details of the Bill, the Minister could be justified in ignoring the organisation.

During this debate the Government, with support from independent Senators and the Opposition, moved to re-establish the *Senate Select Committee on Information Technologies*[29]. This Committee was essentially an extension of the Community Standards Committee[30], ostensibly established to finalise an outstanding report. With the first reading of the Bill on April 21, the role of this Committee was amended to review the legislation and report to the house by May11[31]. These changes occurred rapidly, with meetings of the Committee agreeing on longer reporting dates just days before the Government changed it position, forcing the Committee to sit and report within weeks [32]. Certainly the timing of the legislation was critical, as the Bill in its original form was unlikely to meet with approval from the Democrats following the change of Senate composition[33], and Senator Harradine's position on Internet content

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[26] T O'Gorman, "Big Government, Small Minds", *The Australian*, 4 May 1999 at 58.
[27] R Alston, "Alston Concerned by Threats to Internet Protections", *Press Release*, 19 April 1999.
[28] Electronic Frontiers Australia, "Senator Alston - Naive or Stupid?" *Media Release*, 20 April 1999.
[29] Parliament of Australia, Senate Official Hansard, 25 March 1999.
[30] Albeit with different terms of reference. However the Committee has, to date, pursued many of the same themes of the Community Standards Committee.
[31] Parliament of Australia, Senate Official Hansard, 22 April 1999.
[32] Parliament of Australia, Senate Official Hansard, 23 April 1999.
[33] Australian Democrats, "Your Government Knows Best", *Media Release*, 18 March 1999.

regulation clearly favourable to action in some form[34]. Therefore the Government had to move before the Independent Senator was no longer holding the balance of power.

With the Government's legislation on a strict timetable, the inquiry was less about examining the substantive merits of the legislation than an extension of Parliamentary debate over the Government's position. Government members used the forum to attack opponents of the legislation, and the Labor (and to some extent the Democrat) Senators took the opportunity to attack the Bill, the motivations of the Government and the conduct of the inquiry itself. In calling mainly technical and commercial witnesses the hearings quickly deteriorated into a hostile debate between Government Senators (mainly Senator Tierney) and some of the witnesses[35]. The results of the Inquiry process simply served to reiterate the basic political composition of the Committee. Government Senators recommended the Bill be approved without amendment, Labor and the Democrats criticised the Bill as poorly drafted and ineffective, and Senator Harradine stating support for the legislation, while criticising the relative weakness of the provisions and the suitability of the ABA as the appointed regulator[36].

Regardless of the report and the Minster's statement that the Bill would not be substantially modified following the decision of Senator Harradine to reject the Government's GST package[37], the Government moved a series of amendments in the second reading process[38]. While the majority of the amendments moved to clarify the Bill, they included a number of significant concessions to the Internet industry that would effectively change the entire character of the proposed law. The significant changes were twofold. First, in requiring content blocking of overseas material, the Bill incorporated the need for the

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[34] Network Ten, Meet the Press: Interview with Senator Harradine, (transcript), http://203.147.194.81/webCh10/admin/tvhead/microsite/ShowPage.asp?ModuleInfoID=1108, 23 May 1999.

[35] Especially the Australian Computer Society (Andrew Freeman), Electronic Frontiers Australia (Greg Taylor) and the Australian Libraries Information Association (Jennifer Nicholson). Parliament of Australia, Senate Proof Committee Hansard: Senate Select Committee on Information Technologies, 28 April 1999.

[36] Senate Select Committee on Information Technologies, Broadcasting Services Amendment (Online Services) Bill 1999,Parliament House, May 1999.

[37] R Yiacoumi, "No Change to Porn Bill, Says Alston", *Newswire,* http://newswire.com.au/9905/nocha.htm, 17 May 1999.

[38] In fact the Government moved two sets of amendments to the Bill. One set [ref.: Parliament Document ER239], containing the concessions to industry were prepared in time to have a supplementary explanatory memorandum printed prior to the Committee State of the Senate and the second [ref.: Parliament Documents ER244, ER246-8] being provided on loose sheets without memorandum.

ABA to consider the technical and commercial feasibility of the action.[39] Second, the Bill gave the ABA the capacity to provide ISPs with *exemptions* from mandatory content blocking of overseas sites should they utilise an "designated access-prevention arrangement", either on a case by case basis,[40] or where the industry has an established code of practice incorporating a technology that meets with the approval of the ABA[41]. This second modification to the legislation was a significant change in the effect of the Bill, allowing ISPs, through a code of practice, to have existing content blocking arrangements (such as America Online's Parental Controls,[42] or the provision of pre-filtered Internet bandwidth offered by companies like Clareview Internet) incorporated into the code of practice. By not specifying blocking at the ISP level, end-user filtering products[43] (such as Net Nanny) could be included in the codes, providing ISPs with a means of meeting the legislative requirement of the new law without having to engage in costly installation of proxy servers to filter material or the purchase of upstream filtered bandwidth from a larger competitor. In fact, ISPs need not purchase the software at all, but could necessitate their customers do so in their Terms of Service, a nice legislative "out" for the industry.

These amendments were adopted in consultation with both the Australian Information Industry Association (which specialises in representing companies who supply computing equipment) and the IIA. They were aimed at blunting the direct commercial loss associated with the content of the original Bill and some of the concerns raised about its effects on electronic commerce[44]. While the Government also

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[39] Which was discussed in the original Bill's explanatory memorandum but not included in the Bill itself. *Broadcasting Services Amendment (Online Services) Act1999* (Cth) s40 (2)(a), *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) s47 (2)(a).

[40] Based on the improbable requirement for the technology, ISP and individual user(s) registering and being provided a written authorisation by the ABA.

[41] *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) s40 (4), *Broadcasting Services Amendment (Online Services) Act1999* (Cth) s60 (3)-(5), (6)(a)(b).

[42] Which includes restrictions to a white site (material guaranteed only for children that is vetted by the company) and the option of filtered feeds or unfiltered feeds depending on the user of the product. D Ritz and C Veriga, Proof Committee Hansard Senate Select Committee on Information Technologies, *Testimony,* 3 May 1999.

[43] Software that runs on the user's desktop, filtering Internet content against a list of banned sites maintained by the company, through the exclusion of pages containing certain words, or a combination of both.

[44] Both in terms of the loss of investment within Australia by international firms utilising network technology and the effect of service degradation on commerce over the Internet (e-commerce). P Upton, Proof Committee Hansard Senate Select Committee on Information Technologies, *Testimony*, 28 April 1999.

explicitly excluded "ordinary" electronic mail[45] from censorship,[46] the amendments were never going to satisfy the libertarians because of their fundamental opposition to the legislation as a whole. Hence, while online libertarians continued to harass the Government over the legislation, the acceptance of the Bill by the IIA meant the Government could move confident that it was not acting in a way that would limit commercial developments in the field. In essence, therefore, the Government had moved dramatically from its original position on the legislation, bowing to the weight of pressure from the industry on the basis of purely commercial concerns, while continuing to ignore the free speech groups who were unwilling to engage in the dialogue of amendment, rather than blanket opposition.

The Labor party too was unwilling to definitively oppose the Bill, continually supporting the *intent* of the legislation, while attacking its content and moving amendments. Calling this strategy "damage control" the Opposition was unwilling to reject the Bill outright, possibly because of potential political damage of being painted as both pro-pornography and anti-children. Indeed, on 22 April 1999, the Leader of the Opposition, Kim Beazley had, on Perth radio 6PR stated that the uncontrolled growth of information on the Internet had probably contributed to a massacre of school children in the US state of Colorado:

> "There are opportunities now for people to put out good and bad propaganda, to be encouraging people to do dreadful things, to become totally egocentric, totally unprepared to assist their community with decent relationships..."

His remarks indicated mixed feelings about the Bill within the shadow cabinet. In the end, however, under the shadow of the Democrats negotiating with the Government on the GST and the full-sale of Telstra, the Opposition was never put to the test. Media coverage of the legislation was contained largely to the computer sections of the daily papers and the Government had the whip hand over public opinion: it was for child protection online and their political opponents were against child protection online.

On 27 May 1999, the *Broadcasting Services Amendment (Online Services) Bill* was passed by the Senate with Senators Harradine and

[45] However the Bill specifically included Newsgroups and may cover mailing lists.
[46] *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) s2, s3.

Colstons' support. Over the following two days, Electronic Frontiers Australia mounted street protests in Perth, Sydney, Adelaide and Brisbane. However the legislation had passed its acid test and passage through the lower house was guaranteed.

Charting the Legislative Territory

While the BSA (OS) is the result of a brief, but intense period of political debate and conflict and can be identified as the basis for Internet censorship in Australia, the Act is only one part of a complex pattern of legislation and codes that will make up the entire regime when it comes into force on January 1st 2000. Effectively the entire regime will be composed of: *The Broadcasting Services Amendment (Online Services) Act*, the Internet Industry Association's *Code of Practice*, a schedule of Content Control Options under this Code, and State and Territory content enforcement provisions. Of each of these elements, only the BSA (OS) has been enacted to date. The explanation for this relatively complex system of laws and codes relates to the structure of the Australian Constitution that limits the jurisdiction of the Federal Government as a national censor and to the political manoeuvring behind the legislation itself.

In identifying the underlying structure of the regime, it can be argued that the BSA (OS) was designed around a number of principles[47]: first, that Internet censorship was to be developed consistent with current media regulation practices, using pre-existing classification methods and labels; second, the powers of existing Federal agencies were to be expanded to cover Internet issues, rather than the creation of a new specialised body; third, the approach would be co-regulatory, with significant parts of the regulatory process undertaken by private enterprise; fourth, that the Internet was to be considered in the same manner as a narrow cast medium, and; finally, jurisdictional responsibility for enforcement of the prohibition against the transmission of restricted material would be deferred to the States and Territories, rather than attempting to extend section 85ZE of the Commonwealth *Crimes Act*[48] in line with Constitutional control of telegraphic and like communications by the Federal Government.

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[47] Some of these were explicit (such as parity between media forms, and co-regulation over direct intervention). Parliament of the Commonwealth of Australia (the Senate), 1999, Broadcasting Services Amendment (Online Services) Bill 1999 Explanatory Memorandum.

[48] Improper use of telecommunications services.

Because of the Government's desire to include the Internet into the existing Australian system of censorship, the legislation retains many of the limitations presented by the Constitution for the Federal Government to act unilaterally on censorship issues. The present system of censorship for printed publications, films and computer games is based on a co-operative agreement between the Federal Government, States and Territories[49]. Through the Office of Film and Literature Classification, the Federal Government classifies material, while the States and Territories determine what level of classification is acceptable for sale or distribution within their jurisdiction. This practice was adopted in 1984,[50] with the decision to shift the rationale on which Australian censorship was based from that of blanket prohibition, to classification of materials for the mature individual to decide upon for themselves,[51] free from unsolicited material that might offend them. The process is complex, with relevant Commonwealth, State and Territory censorship Ministers using inter-governmental committees to decide upon uniform standards and procedures. That the system is not without tension is illustrated by the fact that most of the states and territories still reserve the right to maintain their own censorship procedures[52].

While the enforcement of printed matter classifications has remained a State and Territory matter largely subject to police enforcement, broadcast media is a Federal concern. The broadcasting market is unique, with a strictly limited number of commercial interests engaged in the provision of these services, and the loose, almost lax manner in which broadcasting has been able to regulate its own affairs[53]. Broadcaster regulation, through the licensing of stations, has the advantage of essentially doing away with the need for a complex arrangement of regulatory mechanisms to ensure compliance, but failed to provide the Government any better means of controlling the media proprietors than via the use of the "deplorable word": either the acceptance of a breach of standards or the total removal of the

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[49] Parliament of Australia, Report of the Joint Select Committee on Video Material, Volume One, AGPS, Canberra, 1988.

[50] In an informal manner, the current system was only formally finalised in 1996 with the introduction of the *Classification (Publications, Films and Computer Games) Act 1995*. The initial stages of the development included the use of the Australian Capital Territory as a testing bed for classification and expanding the system to the other States and Territories over time.

[51] Australian Law Reform Commission, Censorship Procedure, *Discussion Paper 47,* March 1991.

[52] Western Australia, Tasmania, South Australia, and the Northern Territory.

[53] JJ Bailey, "Australian Television: Why it is the way it is", *Cinema Papers,* Vol. 23, September-October 1974 at 511-15.

stations licence[54]. This system, however, has continued to function with radio and television stations actively and passively engaging in the censorship of their material, or through the use of self-regulatory groups such as the Federation of Australian Commercial Television Stations (FACTS) that place limited control on the activities of broadcasters or advertisers[55]. Under the current *Broadcast Services Act 1992*, the Australian Broadcasting Authority has limited powers to oversee the development and adherence to codes of practice in regards to broadcast content, in line with a set of principles laid down in the legislation.

In placing the BSA (OS) within this system, and using television as the basic model upon with the legislation was drafted, the nature of the legislation is explained. Essentially industry codes of practice are based on the ABA's experience with the FACTS code and commercial compliance, with the use of the OFLC to classify material a recognition of the limited capacity of ISPs to oversee material, and make expert judgements of its acceptability. The legislation contains components plucked from pay-TV regulations (such as the acceptance of R rated material that is restricted to subscribers who prove themselves over 18[56]). Leaving prosecution of the suppliers of restricted content to the States reflects the lack of Commonwealth involvement in the policing of content issues, with the States and Territories currently drafting criminal provisions for enactment by their various legislatures. These provisions are specifically aimed at prosecuting individuals and organisations that place R, X and RC material online. Thus, while the BSA (OS) provides the ABA with the power to order removal of material deemed unsuitable by the OFLC, the States and Territories will be responsible for the expensive process of prosecuting those who placed the material online in the first place. What remains uncertain, however, is whether jurisdictions like the Australian Capital Territory (which earns valuable income from the sale of X rated video cassettes) will bother with criminal laws, when the ABA will, in theory, be removing offending material anyway.

From a purely political perspective the BSA (OS) attempted to achieve two dissimilar aims: to provide the appearance of tough action against online pornography, while not placing significant compliance

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[54] Joint Committee On Wireless Broadcasting, Report of the Joint Committee on Wireless Broadcasting, Commonwealth Government Printer, Canberra, 1942.
[55] Additionally, broadcasting, as a "mass" medium is subject to commercial considerations that encourage conservatism in broadcasting.
[56] *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) s4.

costs on industry. The former motive related to the capacity of the Government to act, given the limited time that they would have a conservative occupying the balance of power in the Senate, and the limited prospects for new censorship laws under the Democrats (who likely would have preferred the type of educational and informational campaign associated with "big government"). The timing of the legislation also related to the complex debates that surrounded the advancement of the GST and, while it is highly unlikely that either the Government or Senator Harradine engaged in the crass process of vote-buying over the New Tax System, the advancement of socially conservative legislation would not have hurt relations with the Tasmanian Senator during the tax or Telstra debates (the Telstra sale included $3 million for the establishment of a Tasmanian-based education and research and development fund related to the legislation, called "Netwatch"[57]). The Government did not move to negate the content filtering aspects of the legislation until after the Independent Senator had explicitly rejected the GST package, but it had committed itself to the line that the legislation was tough on pornography, and retained this line while cutting the legislation's main clauses away through amendment. Regardless that the legislation had been seriously reduced, the Senator had little option but to support the Bill: his time in the balance of power was rapidly slipping away and rejecting the legislation at this point would possibly negate the chance for any legislation to be introduced in the future.

The amendment process quickly brought the Internet industry onside, an industry that includes some of the largest computer and communications companies in Australia and overseas (Telstra, Ozemail, AT&T, Apple, Cisco Systems, Cable and Wireless Optus, America Online, News Limited)[58]. While the IIA did not announce that it was happy about the outcome, it could be privately pleased with the final result. Pragmatically the law was one it could abide by and, most importantly, would not likely effect its commercial interests in a significant manner. While the politics of amendment served to appeal to the constituents the Government was after, the process produced a rather complex law, containing cascading requirements for ISPs and Internet Content Hosts, depending on the existence of codes of practice and decisions made by the ABA. As the BSA (OS) abrogates

[57] S Devic, "Accessing the Future: The Telstra Social Bonus", *Data: Communications Newsletter,* Department of Communications, Information Technology and the Arts, September 1999 at 13.
[58] IIA, "The Following Members Organisations are Pleased to Support the IIA...", http://www.iia.net.au/members.html, 1999.

responsibility of the ABA to act when acceptable industry Codes have been adopted, in essence these codes effectively become delegated legislation under the new legislation. While the Act does not specify the IIA as an industry body to form a code of practice under the Act, the organisation has a wide membership, and an advanced code that contains many of the desired provisions of the BSA (OS). Clearly, the IIA has been the preferred organisation to develop a code of practice, having favourable access to government policy makers, bureaucrats and Ministers. However, in strong-arming the IIA into producing its code of practice (a result that might have been achieved without the need for a legislative stick), control over the regime is lost down to an interface between the ABA, a statutory authority, and the private sector. It is unsurprising therefore, that the "for adoption" IIA code of practice is almost indistinguishable from a piece of legislation[59].

Everyone's a Winner?

In passing the *Broadcasting Services Amendment (Online Services) Bill* into law, the Federal Government achieved a significant political victory: it can claim that it has taken positive steps towards protecting children online. In doing so, it gains the ability of being able to claim future growth of the Internet in Australia as a justification and endorsement of its strong, moral stand, regardless that growth to date does not appear to be limited by concerns over content, but because of factors associated with cost, and lack of interest in the medium[60]. In producing a piece of legislation that fails to intervene significantly in the commercial activities of ISPs, the Government can be confident that it has not damaged future development of ISPs or electronic commerce. Because of the threat of take down, Australians who place potentially restricted material online are likely simply to move this material to offshore servers, reducing the administrative load of the ABA[61]. Thus, as a policy response, the legislation remains a largely

[59] http://www.iia.net.au/code.html

[60] The Australian Bureau of Statistics reported in 1998 that the two major impediments to uptake of the Internet where cost (30%) and lack of interest (29%). ABS, *8128.0 - Household Use of Information Technology, Australia*, http://www.abs.gov.au/websitedbs/D3110122.NSF/66b4effdf36063e24a25648300177cd5/38835b1394cc4bbc4a256620000a4174?OpenDocument, 11 June 1998.

[61] Although it is likely that the ABA may be initially swamped with complaints, as free speech advocates attempt to demonstrate the limitations of the Authority. While the legislation allows the organisation to ignore complaints it considers vexatious, frivolous or not in good faith, its officers will still have to handle these complaints in some form. Should the number of genuine complaints be large, the ABA may find its budget

symbolic approach to the question of Internet content: big on rhetoric, but light on action. The States and Territories too can be pleased with the result: a potentially problematic political issue has been resolved outside of their jurisdiction. While they are likely to implement legal sanctions against those who place objectionable material online, and foot the bill for investigation and enforcement, they can be confident that the ABA will have the task of taking down the offending material, and thus the number of prosecutions is likely to be limited.

For the IIA, the legislation provides it with a political-legal status unmatched by rival organisations[62]: it owns the process of Code development that allows it to *write law*. While the ABA has to approve these Codes of Conduct prior to implementation, the under-funded Authority (the ABA received a poultry amount of additional funding to manage the legislative regime[63]) will suffer considerable difficulties in matching the technical, financial and commercial expertise the IIA will be able to muster in defending its proposed Code of Conduct. As the proposed codes must, through amendment, meet the requirements of technical and commercial feasibility, the industry association has the whip hand in justifying its position: after all the ABA does not run an ISP. As the ABA has the power to force non-member ISPs to adhere to the industry code or an alternative provided by the ABA (with the former most likely), IIA members will not be disadvantaged against competitors who are non-Code subscribers. Additionally, IIA members will have a legitimate voice in determining changes to the code that non-members will not. Thus, in endorsing a role of the IIA (rather than encouraging proliferation of competing industry bodies), the Government has followed the broadcast paradigm, with the IIA to become the online version of the Federation of Australian Commercial Television Stations.

In developing the code, the IIA has also moved to defer recognition of acceptable access-prevention arrangements to a

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stretched because of the costs associated with purchasing classification rulings from the OFLC.

[62] Such as the Western Australian Internet Association (WAIA). The WAIA has had a code of conduct for some years (http://www.waia.asn.au/Documents/CodeOfConduct.html), however this code is unlikely to meet with the approval of the ABA in its current form. The WAIA has historically held similar positions to that of Electronic Frontiers' Australia, partially because of its shared Board composition (Kimberley Heitman).

[63] Of about $1.9million per annum. This amount includes money for staff, an education campaign, the maintenance of a hotline, research and money that must be paid to the OFLC in exchange for classification services. G Grainger, Senate Proof Committee Hansard: Senate Select Committee on Information Technologies, 27 April 1999 at 4.

schedule,[64] rather than including these technologies into the Code itself. This move allows the IIA to introduce new content blocking technologies into the Code, without going through the lengthy process of community, government and industry consultation and discussion outlined in the document[65]. While this is a logical way to handle technological changes that move faster than (even delegated) legislation can be amended (this being the original basis behind the decision not to place technical requirements in the *Broadcasting Service Amendment* Legislation), it places the effective "sharp end" of the Code further from government and ABA control. As one of the immediate effects of the BSA (OS) will be to encourage those who keep restricted content to move this offshore (and therefore out of the responsibility of the ABA and ISPs to take the material down), determining what content blocking arrangements will be endorsed by the ABA will be critical to the profitability of ISPs. As the issue relates directly to compliance costs, the view that end-user filtering (either provided by the ISP or purchased by the user) will serve the industry best in escaping costs associated with the legislation.

What is clear, therefore, is that while many of the political interests in the Internet censorship debate were catered for in the development of the BSA (OS), either in a symbolic or practical manner, users have remained shut out of the process. While the Internet Society of Australia (ISOC-AU) claims to represent the interests of Internet end-users, the organisation was largely ignored in the political debate, lacking either the zealous commitment of the online libertarians to run a concerted campaign, or the financial clout of industry associations[66]. Coupled with this, the organisation's focus remains uncertain, with internal debate over the expansion of ISOC-AU into an alternative industry association during 1999[67]. While ISOC-AU engaged in debate over the legislation, the organisation's arguments were nearly indistinguishable from that of the EFA,[68] a group that was seen to dominate debate over free-speech issues. While the IIA lobbied on behalf of industry in a pragmatic manner, end-users needed a

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[64] n59 at 12B.3

[65] n59 at 15.8

[66] Additionally the organisation only managed to appoint a full –time Executive Director (Tony Hill) in early September 1999.

[67] S Hayes, "Rival Takes on IIA Over Censorship", *The Australian*, 28 June 1999 at 33-4. The organisation later backed away from this option, however, should it modify its constitution to allow corporate membership, its claim to be a user body will be further eroded.

[68] ISOC-AU, Submission to Select Committee on Information Technologies, http://www.isoc-au.org.au/Submissions/ISOC-AU_response.html, 30 April 1999.

representative body that would engage with government over the subject of the legislation, rather than higher principles that were never going to effect the development of policy. Without this voice, it is Internet users, especially those with limited technical skills and assertiveness, who will fail to gain any benefit from the introduction of the legislation. Indeed, in the final analysis, the Australian Consumers Association, expanding its interest into the field of Internet services,[69] may overtake ISOC-AU as the key user representative group in Australia[70].

The Future of Internet Censorship in Australia

The BSA (OS) presents some difficulties for future governments. While the Federal Government would consider the issue of online content largely resolved, community concerns about online gambling and harassing communication (such as hate speech[71] and spam[72]) may force a reconsideration of Internet content regulation back onto the political agenda. At the time of writing the Senate Select Committee on Information Technology is about to convene hearings on the problem of online gambling. This inquiry is motivated by public concerns about the increasing pervasiveness of gambling in Australia (and its associated social implications) and the findings of the Productivity Commission's inquiry into the Gambling Industry[73]. While the Commission's view that "managed liberalism" for the virtual gambling industry will provide a means for Australians to access reputable managed services through the promotion of State licensing of regulated operators, this approach is highly unlikely to provide a

[69] M Bun, Senate Proof Committee Hansard: Senate Select Committee on Information Technologies, 3 May 1999 at 198.
[70] Indeed the IIA Code of Practice identifies the ACA, rather than ISOC-AU, as the body to provide representation for consumers on the Codes Administrative Council (n53 at 15.1 c) illustrating how quickly ISOC-AU are being marginalised in the policy-making process, and possibly as punishment for criticising the IIA.
[71] The Executive Council of Australian Jewry had been consistently calling for action against hate speech and sites on the Internet for a number of years. The organisation has taken Internet site maintainers before the Human Rights and Equal Opportunity Commission over vilification charges. L Moldofsky, "Vilification Charge Against Adelaide Institute Website", *The Australian Jewish News*, 13November 1998 at 6.
[72] Unsolicited Bulk email (the term spam refers to the expression "Shit Parading As Meat"). Already a new lobby group, the Coalition Against Unsolicited Bulk Email (CUABE.AU) has been formed to lobby government to outlaw the practice of sending bulk email in Australia. The organisation is still in its formative stage at the time of writing, however. Nua Internet Surveys, Australia Launches Anti-Spam Organisation, http://www.nue.ie/surveys /?=VS&art_id905354708&rel=true, 17February 1999.
[73] http://www.pc.gov.au/inquiry/gambling/draftreport/

solution for problem gamblers[74]. As licensed operations would likely include requirements for operators to enforce bans against those identified with gambling problems, the compulsive nature of problem gambling will simply mean that these individuals will be driven towards offshore gaming operations: by nature unregulated and possibly disreputable and unethical. What the Senate Committee may discover, is that the BSA (OS) provides little scope for directly tackling the use, by Australians, of offshore virtual casinos.

In taking such a strong political stance on the issue of Internet censorship in the BSA (OS) debate, the Government is unlikely to admit that the policy provides few means for controlling this new phenomena. To do so would be to concede that the arguments presented by the opposition and a wide range of technical pressure groups were correct and that the BSA (OS) provides little of the stated protection for Australians living in the online environment. By promoting themselves in terms of a blanket division between pro- and anti- child protection, the future of the political debate over Internet censorship is likely to continue in this mould. For future governments to revisit the issue, they will need to overcome the simplistic way that the policy debate has been presented to date, an approach that may prove difficult while their political opponents see value in taking the easy political strategy of calling the other soft on the issue of Internet content.

Conclusion

This overview of the *Broadcasting Services Amendment (Online Services) Act 1999* shows that the introduction of the Federal Government's Internet censorship legislation has had a long and complex history. From a limited level of knowledge about the impact and capacity of emerging computer network technology in the early 1990s, the Government has moved through a number of hard legislative stances to produce a final law which, while complex and confusing, takes a commercially mild approach to the problem of Internet content in Australia. While the current nature of the legislative response reflects many of the limitations of the overall shape of Australia's censorship regime, political rhetoric and short term gain motivated the development of a relatively hollow piece of legislation that removes responsibility for online content down into the private sector. While the outcome is unlikely to impede the development of Australia as an "online" society, the legislative schema

[74] n73 at 17.

provides Government with limited actual capacity to act while binding the current Government from moving on pressing issues such as hate speech and gambling. Because the political debate has been heavily salted with the rhetoric of child protection and the lurking menace of online paedophiles, the political prospects for future meaningful reform of this legislation remain doubtful.