

## **AUSTRALIA: WHERE FORWARD CO-REGULATION?**

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### **INTRODUCTION**

Regulation of the online environment has become a common problem for many governments around the world. While the motivations for regulation are diverse, in their desire to censor Internet content, English-speaking countries have tended to focus on the moral implications of unfettered communication between computer users. Issues associated with intellectual property protection, harassment, and criminality following behind initial policy positions aimed, largely, at pornography and other morally-unacceptable forms of communication.

In Australia, initial policy debates about Internet content focused almost exclusively on pornography and paedophilia, focusing on conflict between the protection of minors from offensive and morally-degrading material and the freedom of adults to communicate content of interest to them<sup>2</sup>. In 1999, the Federal Government introduced the *Broadcasting Services Amendment (Online Services) Act* prohibiting the unrestricted distribution of material that would be classified 'R' or greater under the existing film and literature classification regime. In 2000, following public debate about the extent of gambling in the Australian community, the government introduced a moratorium on the expansion of online gambling services in Australia, followed in July 2001 by the *Interactive Gambling Act* to prohibit the operation of online casinos within Australia. While initial regulatory proposals countenanced the possibility of strict regulation, each law was curtailed to regulatory regimes that would minimise compliance costs for certain established commercial players.

While the Internet censorship legislation has not had the detrimental effect on freedom of speech that some claimed it would, it is impossible to argue that either regulatory approach has been effective in addressing its core concerns: reduced access to online material or activities deemed morally harmful. While some might posit that this is unproblematic, the underlying concerns about offensive material and misuse of new communications technologies among the wider Australian community have not been resolved. As online technologies become more important in the economic, social, and political life of nations like Australia, the scheduled review of the initial regulatory regime in late 2002 offers the Australian government the opportunity to admit past failures and develop a new approach for online regulation. An alternative model, therefore, is proposed: a co-regulatory regime focused on the development of positive information about effective Internet use, with committed industry involvement, and – importantly – one that recognises and internalises the concept of 'community values'. Community values, it is argued, lay at the heart of public debate surrounding the *Broadcasting* and *Interactive Gambling* debates, but have not genuinely been incorporated into the management of these systems of control. Overall, the

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<sup>1</sup> This paper is a summarised and revised version of a paper to appear in the *Griffith Law Review* in December-January 2002-3.

<sup>2</sup> Young, S (2000), *Reviewing the Law: Assessing Australia's On-line Content Regulations*, Unpublished Paper, September, p3.

participative nature of the Internet – the feature that makes this technology so distinctive and powerful – can be harnessed as a means to balance the competing interests in securing Australia's online future.

## **CO-REGULATION OF THE INTERNET IN AUSTRALIA**

### *Regulation of Online Content*

The aim of the *Broadcasting Services Amendment (Online Services) Act 1999* was for "the control of illegal or highly offensive material published and transmitted through online services such as the Internet ... while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy"<sup>3</sup>. In essence, the law provides for a complaints mechanism maintained by the Australian Broadcasting Authority (ABA), with content review provided by the Office of Film and Literature Classification (OFLC). Content is either deemed prohibited or non-prohibited for the context of censorship. Material classified as RC<sup>4</sup>, X<sup>5</sup>, or R contained within Australia and not access restricted via a technology that vets for children, is prohibited on Internet sites maintained within this nation. For prohibited content contained within Australia, the ABA has the power to issue temporary and permanent take-down notices to Internet Service Providers (ISPs)<sup>6</sup>, and for material held outside of Australia, the Authority refers these URLs<sup>7</sup> to the makers of Internet filtering technologies. Illegal content, such as child pornography, is referred to relevant law enforcement, where practicable<sup>8</sup>. Additionally, the regime established a wholly government-owned company (NetAlert) to provide advice to government, education services for Australians about online content, and review and publish assessments of commercially-developed filtering technologies.

Management of the scheme is described as a co-regulatory partnership with industry, via the Internet Industry Association (IIA)<sup>9</sup>. The *Broadcasting Amendment Act* relies on a limited number of industry Codes of Practice to provide co-operation with the enforcement of take-down notices for domestic content and the provision of filtering solutions for Australian subscribers<sup>10</sup>. The enabling provisions for this are contained within the Act, but administration of the code of practice falls

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<sup>3</sup> Department of Communications, Information Technology and the Arts (2000) *Regulation of Objectionable Online Material*, <http://www.dcita.gov.au/cgi-bin/trap.pl?path=3839>.

<sup>4</sup> Refused Classification (see part 3, section 10(1) of the *Act*).

<sup>5</sup> This includes illegal material, like child pornography, explicit and violent sexual activity, and fetish material, as well as material that instructs in the commission of crime.

<sup>6</sup> ISPs are services that provide access to the Internet to end-users. ISPs can be distinguished from telecommunication carriers, where they are resellers of bandwidth, however some ISPs are also telecommunication carriers (such as Telstra which operates basic telecommunications infrastructure as well as ISP services through its Big Pond brand).

<sup>7</sup> Internet addresses (Uniform Resource Locators).

<sup>8</sup> Penfold, C (2001) 'Nazis, Porn and Politics: Asserting Control Over Internet Content', *Journal of Information Law and Technology*, <http://www.elj.warwick.ac.uk/jilt/01-2/penfold.html>, July 2.

<sup>9</sup> The peak body for the online industry in Australia. The emergence of the IIA as the key industry lobby developed from a number of competing organisations that merged over time to form the organisation. Co-operation with Government on issues like the *Broadcasting Amendment Act* served to cement the organisation in this position.

<sup>10</sup> Filtering solutions provide automated censorship of online content. These are generally based on two methodologies: the first via a "blacklist" of sites deemed unacceptable, the second via automated scanning technologies that analyse content for key words (such as "fuck", "XXX", etc.). A combination of these two methods is also used. The delivery of these solutions can take the form of pre-filtered Internet feeds (blocking access to content from the ISPs machines (proxy filtering), or via a "desktop application", a piece of software installed the users' computers.

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within the control of the IIA, with the ABA empowered to accept industry-developed codes where they meet the aims of the Act<sup>11</sup>.

With specific focus on filtering provisions, the current industry code states<sup>12</sup>:

*In the case of commercial subscribers, the ISP will, as soon as practicable, provide for use, at a charge and on terms determined by the ISP, such other facility or arrangement that takes account of the subscriber's network requirements and is likely to provide a reasonably effective means of preventing access to Prohibited and Potential Prohibited Content. In this clause, provision for use includes:*

*providing appropriate software, including any of the Scheduled Filters; or  
facilitating access to consultancy services with respect to firewalls or other appropriate technology.*

This provision undermines the regulatory intent of the legislation. The *Broadcasting Amendment Act*, as it stands, creates a two-tiered system of content control in line with the limited capacity of Australian regulators to take action against material hosted offshore. Initially, the government identified this weakness and specified ISPs would be required to remove locally-hosted material and block access to offshore sites specified by the ABA. For the industry, this bespoke a system that would require a substantial investment to filter vast amounts of online content, with implications for profitability and the speed of data transfer. Through amendment the Government offered ISPs exemptions from the mandatory filtering of overseas content should they utilise a "designated access-prevention arrangement", on a case-by-case basis or where an established Code of Practice incorporated filtering technologies that meet with ABA approval.

If offshore content remains available to Australians, the strict regulation of content within Australia loses much practical rationale. Table 1 shows the number of complaints received and processed by the ABA for the first year of the regulatory regime. While many of these complaints may refer to multiple 'pages' of content, the number of complaints that resulted in direct regulatory action was extremely low. Thus, while several hundred complaints were referred to international law enforcement and/or the makers of filtering technologies, the year 2000 saw only 67 take-down notices issued within Australia (from 22 complaints). While the costs are not comparative to this reported timeframe, the ABA spent \$294,825 on administration and \$323,494<sup>13</sup> on staff and entitlements (total \$616,319)<sup>14</sup> to maintain the regulatory regime in the financial year 2000-2001<sup>15</sup>, a costly scheme given its real failure to regulate content.

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<sup>11</sup> Where this is not the case the ABA has the power to make and enforce a code itself. This contingency, however, has not yet been seen as necessary by the Authority.

<sup>12</sup> Internet Industry Association (2001) *Internet Industry Codes of Practice: Codes for Industry Self Regulation in Areas of Internet Content Pursuant to the Requirements of the Broadcasting Services Act 1992 as Amended*, Version 6, July 2001. section 6.1.

<sup>13</sup> Included in this cost is the monies paid by the ABA to the OFLC for classification of online content referred from the Authority. In the *calendar year* 2000, the Office charged \$85,040 for classification of online content (OFLC, correspondence: 9/10/01). Interestingly, in this total, only \$7,650 was charged for the classification of off-shore content. As this content makes up the majority of complaints, the limited referral of this content for classification may indicate the ABA saw limited value in rigorously evaluating content that it could not require removal from public display.

<sup>14</sup> The source of these figures is the ABA media liaison, Mr Donald Robertson.

<sup>15</sup> The cash burn rate for the NetAlert advisory group was similarly high, with \$255,430 expended by the advisory group within the first six month of the law's operation (NetAlert (2000) *NetAlert Limited: Report for the Period 6 December 1999 to 30 June 2000*, Hobart.). The costs to consumers (purchase of filtering services or technology) and ISPs is unknown at this time.

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Table 1: Outcomes of ABA Investigations – January to December 2000

	Hosted in Australia	Hosted Outside Australia	Total
Prohibited / Potential Prohibited Content	22	210	232
Not Prohibited Content	58	91	116
<i>Total</i>	80	301	381

source: Department of Communications, Information Technology and the Arts (DoCITA)<sup>16</sup>

Where success can be claimed, however, lies in the referral of content to law enforcement and compliance to the optional filtering requirements of the code of practice. The use of a public complaints system, like the offline counterpart of Crimestoppers, has significant potential to allow potential criminal perpetrators to be identified, adding to the capacities of law enforcement in Australia. This approach, is most likely to propose some value in identifying paedophiles who use online content to establish networks with like-minded individuals or entice victims. With regards to filtering, major ISPs (with the majority of market share) are largely adhering to the provisions of the law and code of practice<sup>17</sup>. Compliance among smaller service providers remains limited however, with DoCITA reporting on a survey by the IIA that compliance among small to medium ISPs was not universal. In the report tabled before Parliament, the Department stated "78 per cent of responses from surveyed smaller ISPs reporting full compliance" [emphasis added]. This remains an ambiguous claim, with compliant companies more likely to report adherence<sup>18</sup>. In addition, the initial request for responses to the survey issued by the IIA contained dubious wording that can be interpreted as encouraging distortion of the results. In his email dated 8 July 2000, the Chief Executive of the Association wrote:

*The ABA has asked us to report to them on the compliance with the IIA content Codes of Practice ... There are political reasons why a positive response will be helpful at this stage...*

Regardless of this, even where companies do provide filtering the question of citizen uptake is an important indicator of demand and coverage. While little research on this issue is available, large ISP iPrimus report that less than ten percent of their consumers have taken up their proxy filtering option<sup>19</sup>.

The issue of minor ISPs compliance, however, remains questionable. In a convenience sample of ISPs servicing the Melbourne area<sup>20</sup>, the majority of small ISPs surveyed did not specify that they

<sup>16</sup> Department of Communications, Information Technology and the Arts (2001) *Six-Month Report on Co-Regulatory Scheme for Internet Content Regulation: July to December 2000*, April.

<sup>17</sup> Of the "Big Six" ISPs operating in Australia (September 2001): America Online (AOL) maintains an in-built system of parental controls aimed at family subscribers, allowing parents to filter children's use of the Internet based on three age groups (Kids Only, Young Teens or Mature Teens), this service pre-dates the Internet Censorship legislation and has origins in the United States where AOL differentiated itself as a "newby" service via segmentation techniques (Braue, D (2000) 'Net Cleanup is Latest ISP Value-Add', *Australia.Internet.Com*, July 7.); iPrimus provide a proxy filtering system that customers opt in or out of using basic browser configuration; Optus provide Windows users with a free copy of a popular desktop based filtering product (NetNanny), while Macintosh users are not catered for; Telstra BigPond provide a 30 day trial of a desktop filter that can then be purchased; Ozemail provide customers with a free copy of the Cyberpatrol desktop filtering application; Dingo Blue sell customers a copy of the Eyeguard application for \$33, and; Pacific Internet does not offer a filtering solution. It should be noted that iPrimus maintains ownership of a number of smaller ISPs (franchise model) that recommend filtering, rather than provide access to the iPrimus proxy server.

<sup>18</sup> That this statistic may substantially overstate the actual rate of compliance is evidenced by the series of workshops run by the NetAlert group to inform ISPs and content hosts of their responsibilities under the Act.

<sup>19</sup> This information was provided by iPrimus by telephone on October 2, 2001.

<sup>20</sup> Taken from a survey of ISPs listed in the Melbourne Yellow Pages during October and November of 2002, based on telephone calls to sales and administrative staff. Three questions were asked: "Are you aware of the Internet content regulations of the Federal Government?", "Do you comply with the regulations?", and "In what way would

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offer filtering or information options to their clients.

**Figure 1: Compliance with the IIA Content Code of Practice**

#	State Awareness	Claim Compliance	Compliance Steps Taken
1	Yes	Yes	Allows no offensive content to be hosted
2	Yes	Yes	Link to pointers for approved filter list
3	Yes	Yes	Allows no offensive content to be hosted, avoid hosting message boards
4	Yes	"Somewhat"	Inform customers who host content online that censorship laws exist and maintain "ruthless" Acceptable Use Policy
5	Yes	Yes	Actively monitor hosted content
6	Yes	Yes	Allows no offensive content to be hosted
7	Yes	Yes	Remove access from customers if complaint registered, filter material hosted on server (manually), actively have hosted material reviewed by OFLC
8	Yes	Yes	All staff aware of content regulations. Advise as necessary clients with children in household regarding filtering, keep an eye on content hosted on site
9	Yes	Yes	No hosting services offered (but planned, to include AUP and manual review of hosted content)
10	Yes	Yes	Monitor users use of online service, attempt to verify identity of users
11	Yes	Yes	Filter content
12	Yes	"Try to"	No material hosted that isn't vetted (no FTP access to server)
13	Yes	Uncertain	Company has control over hosted content – Boutique service
14	Yes	Uncertain	Offer filtering software on demand, check hosted content
15	Yes	Yes	Don't host porn or violence
16	Yes	Yes	Supply links to relevant websites
17	Yes	Yes	Filter online content, audit hosted content, randomly audit content transmitted via service – Corporate service only
18	Yes	Yes	Vet users of the service
19	Yes	Yes	Permit restricted content on hosted sites
20	Yes	Yes	No action taken
21	Yes	Yes	Customers are made aware of what they can or not host on their sites, review material hosts on sites
22	Yes	Yes	Don't host any offensive content
23	Yes	Yes	Vet content to be hosted on server (hosting service only), remove "nasty" content
24	"Generally"	Yes	Don't allow offensive content to be hosted
25	Yes	Yes	Offer desktop filtering package to customers

Overall, while claimed awareness and compliance with the *Broadcasting Amendment Act* is high, where ISPs acted they went well beyond their legal requirements in monitoring and removing content hosted on their servers. In the initial policy debate surrounding the development of this legislation, it was the contention of the industry that ISPs:

- Cannot effectively monitor their hosted content, and
- Do not have the skills to classify online content.

This may well be the case for the major industry players, however, it would appear that among many of the smaller service providers in the marketplace, there is limited understanding of the law, or ISPs themselves deem the law to be deficient in some regards. Regardless of the reasons for this phenomena, it would appear that smaller ISPs have higher regulatory capacity than has been expressed by the industry to date.

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you say you comply with the regulations?".

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In addition to these concerns, the *democratic* quality of the regulations have been queried (a point returned to later in this paper). Young<sup>21</sup> observes problems associated with banned URLs being withheld from public oversight. Where other media forms may be prohibited, explicit and detailed reasons are provided by the Office of Film and Literature Classification for these decisions and the banned material is clearly identifiable. The banning of films such as *Baise-Moi* operates in a more open environment, where public attention is often drawn to the operations of the censorship system. This is less apparent online, given the often smaller nature of content audiences, and the lack of a public spirit of review of the actions of regulators in this area. In the context of the *Broadcasting Amendment Act*, therefore, efforts by the staunchly anti-regulation Electronic Frontiers Australia (EFA) group to access lists of banned material<sup>22</sup> for the purposes of critical review remain rebuffed. The basic *raison d'etre* for this restriction, apparently, is the concern that these inquiries would provide a "roadmap" to illicit online content, however, this argument lacks solid basis. For material that may be classified (rather than refused classification), FOI requests would be the least effective means for any Australian to access online pornography, and the effective secrecy in which the scheme operates does not lead to a culture of democratic review of the operations of the legislation. In addition, more sinister motivations are apparent. The OFLC has stated (correspondence 12/08/02) that:

*In relation to the 2001/2002 reporting period, the annual report for this period is currently being prepared. I can confirm that 3 FOI requests were received in 2001/2002 and of those 1 related to documents regarding material classified under the online regulatory scheme*

While, with regards to their own operations, the ABA has stated (correspondence 02/08/02) that "There has been one such application to the ABA". Thus, even without the FOI exemption being implemented, there have been very few attempts to access information pertaining to restricted online content. As the two FOI inquiries to date have come from the EFA, the FOI exemption would appear – to the reasonable observer – only to limit the attempts of a known critic of the regulatory regime to scrutinise the operations of the Act. This appears, therefore, only to restrict a public interest advocacy group from undertaking democratically-valuable scrutiny of the Act.

With regards to the use of filtering software, a point needs to be made. While the *Broadcasting Amendment Act* embeds the myth of attempting to uphold "community standards" rhetorically, the major effective element of the regime – the distribution of filtering software or services – relies most heavily on filtering products (and blacklists or whitelists) developed and maintained largely by American companies. It is ironic that, while the Commonwealth does not regard the US amendment as acceptable for Australians, it considers US moral values to be entirely transposable into the Australian content. In addition, a number of reports have highlighted inappropriate filtering of material aimed at sexual health and religious issues. Willard observes in part that<sup>23</sup>

*Seven companies have blocking categories where the description for the category provides strong evidence that the company is blocking based on religious or other inappropriate bias. The categories block access to protected material along with material that would be unacceptable in school. In some cases, the category that contains protected material contains other material that would likely meet the definition of "harmful to minors" and thus be required to be blocked under CIPA. The existence of blocking categories where inappropriate bias is blatantly evident raises concerns that these companies fail to understand the constitutional standards regarding student's rights of access to information and that material is also being blocked in other categories on the*

<sup>21</sup> Young, S (2000) *Blinding the Net? Ethics of the BSA Implementation*, A Paper Submitted for ANZCA 2000, June.

<sup>22</sup> The EFA remain in almost complete opposition to the legislation, taking a libertarian approach to the regulation of online content.

<sup>23</sup> Willard, N (2002) *Filtering Software: The Religious Connection*, <http://responsiblenetizen.org/documents/religious2.html>

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*basis of inappropriate bias.*

*Although information about the religious connections can be found through diligent search, such information is not clearly evident on the corporate web site or in materials that would provide the source of information for local school officials.*

These problems are not transparent to Australian users of these products, nor is the fact that the range of content filtered is generally well beyond the classifiable requirements of the OFLC – in effect, reliance on filtering has no regulatory parity with the current classification system in Australia. The ABAs research into filtering technology utilised a methodology that only examined "technical" issues, rather than wider matters of *ad hoc* or systematic bias in the software systems:

*The general approach of the research was to answer the following questions for each of the scheduled filters:*

- *Is it easy to install, configure, use and update?*
- *Is it easy to disable or bypass?*
- *How well does it stop access to undesirable content?*
- *Does it stop access to desirable content as well?*
- *Can it effectively track access?*

The report prepared by the CSIRO for the ABA is not clear with regards to the extent of over filtering of the sub-sample of selected pages by the various products on offer. Overall, NetAlert cannot determine the availability of filters developed and maintained by Australians for local conditions (*i.e.* that contain blacklists or filtering lists specifically developed within Australia). This reflects the limited government attention to a cultural policy for Australians online and a significant abrogation of responsibility for ensuring the *apparentness* of the class of products government is strongly recommending to the Australian public.

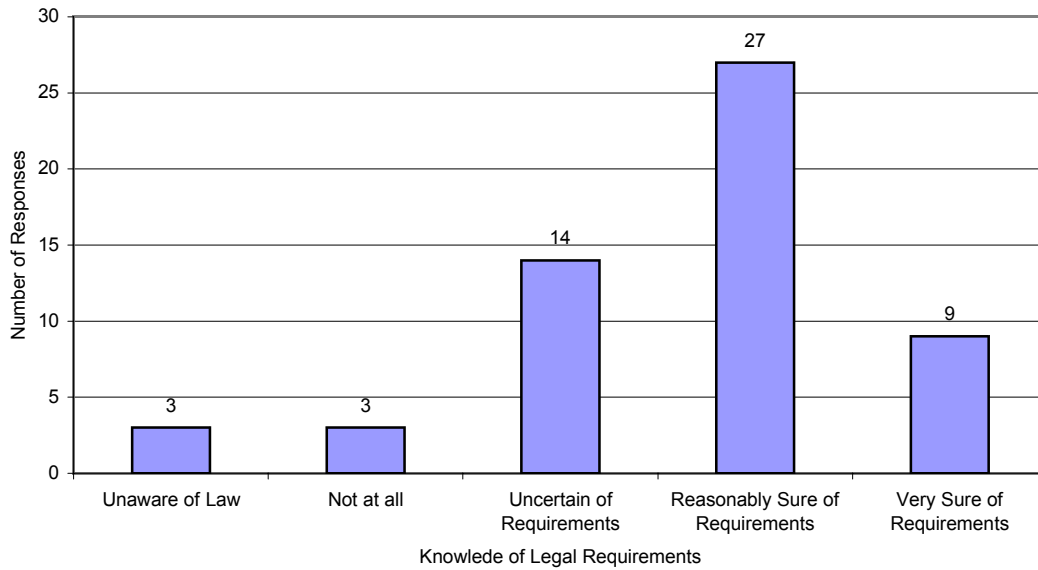
Finally, it is important to consider the impact of the law on the source-origin of much of the content under consideration. While much of the debate surrounding the development and implementation of the *Broadcasting Amendment Act* focused on the impacts of the legislation on ISPs, little attention to date has been paid to commercial operators who generate much of the adult content found online. While international manufacturers and wholesalers of pornographic content remain outside of the scope of the legislation, primary research<sup>24</sup> among Australia's adult industry members reveals the limited impact of the legislation on their online business operations. From a survey of sixty members of the various "adult industries"<sup>25</sup> in Australia who operate websites, in the first quarter of 2002, some two years after the introduction of the legislation, the awareness of the law and its requirements was high (see figure 2). Thus, the promotion and media coverage of the legislation among the commercial operators of adult websites in Australia has been successful in distributing information about legal requirements under the classification regime, and overall, few commercial operators can claim complete ignorance of their new legal requirements with regard to online content.

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<sup>24</sup> For more information on the methodology of this research, see Chen, P (2002) *Adult Industry Censorship Survey 2002*, <http://www.webprophets.net.au/websites/chen/aics/>

<sup>25</sup> The "adult industry" in Australia is seen to include: real sex retailers (brothels and independent sex workers), adult product sellers (adult shops), pornography manufacturers and sellers (film makers, photographers, website operators, movie houses, duplication facilities, and video sellers), and erotic performers (strippers, sexual massage services, and erotic dancers).

Figure 2: Awareness Among Australia Adult Industry Members



Figures 3 and 4 illustrate the impact of the legislation on the business operations of Australia's adult industry. In figure 3, the vast majority of commercial operators have not had (or seen the necessity) to take significant action with regards to compliance under the Act<sup>26</sup>. Where businesses have taken action to change their online practices as a result of the law, a small number have modified their online content, included new warnings for minors, or introduced an Age Verification System to limit access by those under the age of 18, however, the majority have simply evaded the regulatory powers of the ABA, through relocation of their online content outside of the Authorities' legal and practical jurisdiction. As a result of this, as indicated in figure 4, the actual impact of the legislation on the industry most likely to be subject to significant restrictions under the act, is reported as near-universally minor, or as having no impact at all. Only one in thirty respondents reported significant business interruptions as a result of the introduction of the *Broadcasting Amendment Act*.

<sup>26</sup> This may be because the content of their sites would not be classified R, X, or RC under the OFLC guidelines.



Figure 3: Compliance Measures By Australia Adult Industry Members

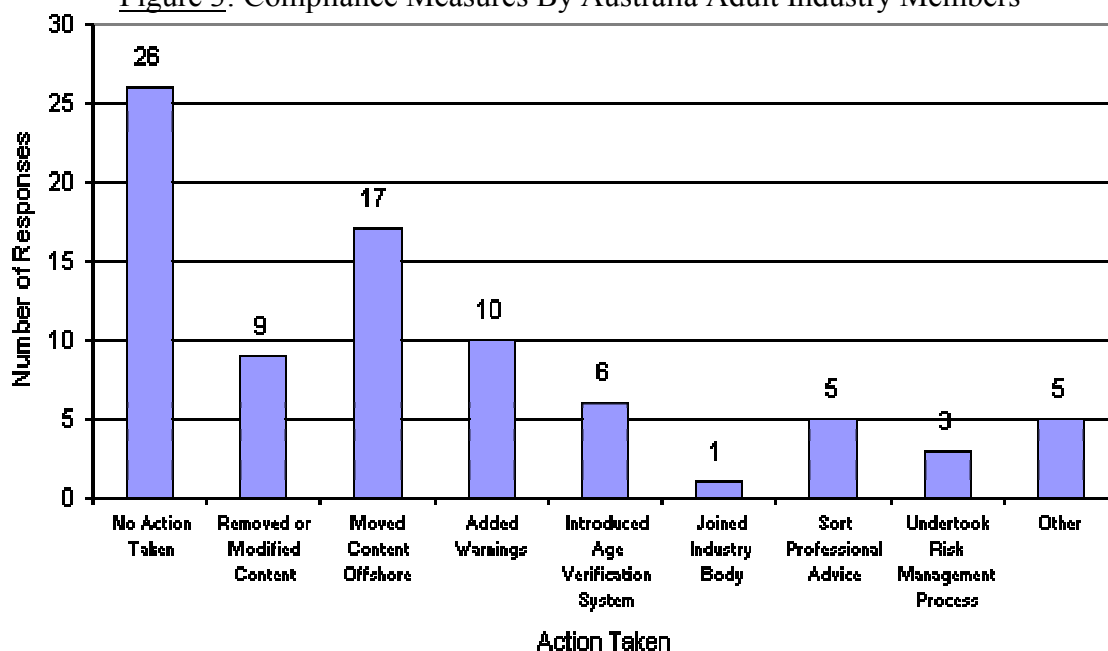
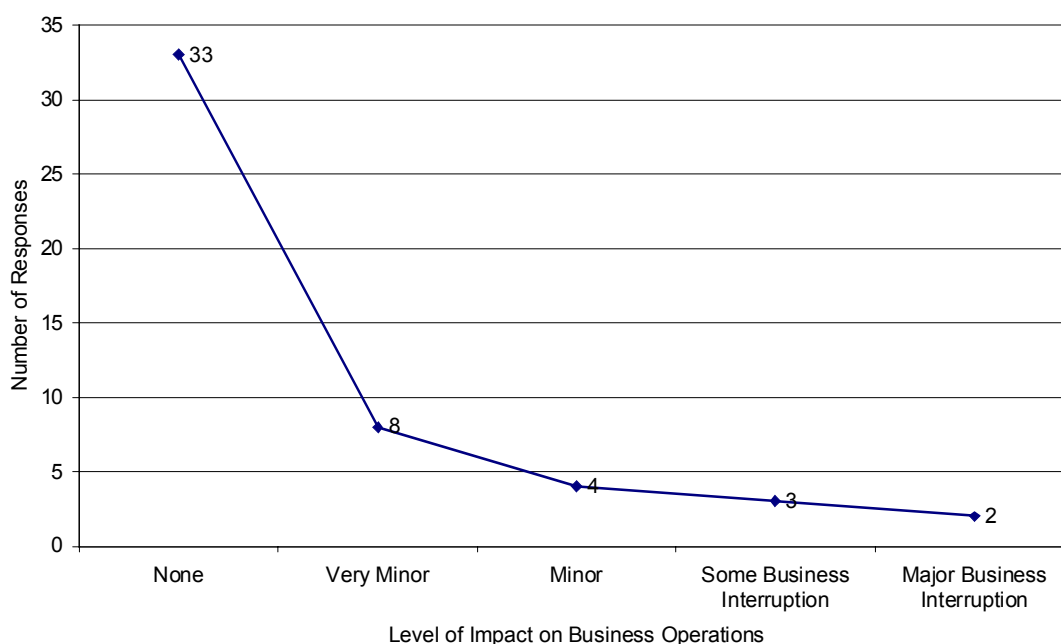


Figure 4: Degree of Impact of Legislation on Australian Adult Industry



### Extending the Regime: The "Regulation" of Online Gambling

As with online pornography, interactive and online technologies can be used to facilitate access to gambling services. In a nation which generated over thirteen billion dollars of gambling revenue in 1999-2000<sup>27</sup>, the issue of online gambling came to the attention of the Commonwealth following increasing evidence about the impact of gambling on the community. In its report on the Australian

<sup>27</sup> Australian Institute of Gambling Research (2001) 'Gambling expenditure in Australia: facts and issues', *AIGR Fact Sheet*, May 4, AGIR, Sydney.

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gambling industry, the Productivity Commission<sup>28</sup> found increased turnover from legal gambling in Australia has been facilitated by the liberalisation of laws, combined with aggressive developments in the technologies used to deliver these services and the number of venues providing these activities. With respect to problem gambling<sup>29</sup>, the Commission estimated that between one and two point one percent of the adult population suffer from severe or moderate gambling problems, with the tendency for these individuals to concentrate their gambling problems on the use of electronic gaming machines, racing, and casino gambling. While overall numbers of problem gamblers are modest, in public health terms, the total impact of these individuals social disfunction is exassibated by network externalities.

While these findings stimulated debates at the state level about the increase of electronic gambling machines, federally the issue of gambling was taken up, first in 2000 with a moratorium on new online casinos in Australia, and then in 2001 with the passage of the *Interactive Gambling Act 2001*. Following the work of the Commission, Federal political debate surrounding the regulation of Internet-based gambling reflected a concern with the impact of electronic gaming machines, and an implication of the "evident" extension of this problem via the Internet. In debate over the initial moratorium on new Internet casinos in 2000 this link was explicit<sup>30</sup>, with the Minister stating in his second reading speech:

*Because this industry is still in its infancy, it is practical for the Commonwealth to take action now. In another year or two the industry may have grown to be too big and established for any government to take action. This is exactly the situation our State and Territory colleagues have found themselves in with poker machines.*

This concern was quickly conflated with the issue of online gambling, One Nation's Senator Harris<sup>31</sup> highlighted the impact of electronic gaming machines, stating:

*We need to target the areas of greatest exposure to problem gambling, and that is very fairly levelled at the sector of the industry relating to poker machines. For example, if a small country town or a moderately sized country town has 400 poker machines, and each one of those machines has somewhere around \$10,000 per month going through it, that is not re-turned as winnings. In a single hotel, \$200,000 can go out of the economy of that area because of poker machines. I believe that is the area we need to address in relation to gambling.*

This view was also reflected by Greens Senator Bob Brown<sup>32</sup>.

Thus, a conflation of social issues confused the issue and the nature of the governmental response: While the Minister for Communications invoked the Productivity Commission's work in delivering the legislation banning interactive gambling before the Parliament<sup>33</sup>, the Commission's findings led

<sup>28</sup> Productivity Commission (1999) *Australia's Gambling Industries: Inquiry Report*, Report Number 10, November 26.

<sup>29</sup> Gambling activities by individuals where a lack of control over the activity is demonstrated, leading to negative personal, familial, and social consequences. The concept of problem gambling remains contested (rational activity versus pathology), however the view that a social problem exists for individuals who appear unable to limit their gambling when confronted by substantial and on-going financial losses is generally accepted by industry, government, and non-government counselling and support organisations.

<sup>30</sup> Senate Official Hansard (2000) *Parliamentary Debates*, 17 August.

<sup>31</sup> "I reiterate: I see poker machines and their spread right throughout the community as something that needs to be hauled in, and the states have not been effective in doing that. One only has to read the articles in the press recently about the impact of pokies on towns like Bendigo and Wagga Wagga and the amount of money that is being taken out of the communities through these machines, non-productively, to understand that we as legislators are required to do something about it." Senate Proof Committee Hansard (2000) *Parliamentary Debates*, 5 December.

<sup>32</sup> Senate Proof Committee Hansard (2000) *Parliamentary Debates*, 6 December.

<sup>33</sup> Department of Communications, Information Technology and the Arts (2001) *Proposed Government Amendments to Interactive Gambling Legislation*, June 19.

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it to recommend only a national regulatory model based on "managed liberalism"<sup>34</sup>: customer protection and harm minimisation through licensing of domestic providers<sup>35</sup>. Under this approach, customers would be encouraged towards domestic providers because of their quality and regulatory assurance, limiting harm associated with unlicensed venues lacking provisions to support potential problem gamblers (limits, self-exclusions, etc.), or whose commitment to pay out wins was questionable<sup>36</sup>. This cautious approach was recommended because of the small size of the current market (less than 2% of the total gambling market in Australia<sup>37</sup>) and the limitation of any ban comprehensively to prevent access to online gambling services.

While a "strong" regime was initially considered that included mandatory filtering<sup>38</sup>, again the Commonwealth chose to amend the legislation to lower the impact of the law on industry. In this case the established racing and sports betting industry<sup>39</sup> were exempted from the ban, reflecting, in an strange way, the Minister's view about the capacity of Government to act against "too big and established" providers, but in the context of a political debate about the social impact of gambling and its spread into non-traditional delivery forms, the amendments exempted significant gambling interests with extant revenue streams that were leveraging these services into the online environment<sup>40</sup>. From the Internet industry, the IIA attacked the proposed approach for exactly the same reason as the online pornography laws: that the laws would have little impact on the access by Australians to the undesirable services<sup>41</sup>. This, combined with technical advice from the National Office for the Information Economy (NOIE) led to a complaints-based regime substantially similar to the *Broadcasting Amendment Act*.

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<sup>34</sup> Hurrell, A, and N Woods (1995) 'Globalisation and Inequality', *Millennium*, 24:3, pp. 447-70.

<sup>35</sup> McMillen, J (1998) *Gambling and Australian Society: Expanding Markets and Issues for Policy Makers*, Paper presented at the conference Gambling, Technology and Society: Regulatory Challenges for the 21<sup>st</sup> Century, convened by the Australian Institute for Criminology in conjunction with the Australian Institute for Gambling Research, Sydney, 7-8 May.

<sup>36</sup> The willingness of unlicensed, offshore casinos based in tax havens to pay wins and provide harm minimisation services has been questioned, with the view that only those facilities required under law to provide these services can be deemed trustworthy. Stackhouse, J (2001) 'Australian Net Gambling Ban Makes No Sense – Gartner', *Computer Daily News*, [http://www.infowar.com/law/01/law\\_040201c\\_j.shtml](http://www.infowar.com/law/01/law_040201c_j.shtml), April 2.

<sup>37</sup> Tasmanian Gaming Commission (2001) *Australian Gambling Statistics*, Tasmanian Gaming Commission, Hobart.

<sup>38</sup> The Prime Minister's stated interest in a ban of online gambling was incorporated into the terms of reference into the feasibility and consequences of banning interactive gambling released by the National Office for the Information Economy in 2000. National Office for the Information Economy (2000) *Terms of reference: Commonwealth study into the feasibility and consequences of banning interactive gambling*, <http://www.noie.gov.au/projects/consumer/gambling/tor.htm>.

Howard, J (1999) 'National Approach to Problem Gambling', *Media Release*, [http://www.pm.gov.au/news/media\\_releases/1999/gambling1612.htm](http://www.pm.gov.au/news/media_releases/1999/gambling1612.htm), December 16.

<sup>39</sup> The full range of exemptions includes telephone betting, sports wagering, telecommunications services provided for gambling activities conducted in public places, lotteries, and contracts under the Corporations law. Internet Industry Association (2001) *Interactive Gambling Bill 2001 Passes Through Senate: Internet Industry Legal Update*, <http://www.ii.net.au/news/010701.html>, June 29.

<sup>40</sup> For an alternative view I have argued that this distinction reflects a normative view of gambling activity that focuses on activities that are "okay" because they are essentially Australian past-times (traditional activities like sports betting) and "not okay" because they are innovative and new (virtual casino games and competitive combat games). Chen, P (2000) 'Online Gambling Ban Reeks of Politics', *The Age*, 12 December.

<sup>41</sup> Internet Industry Association (2001) 'Gambling Law Fails the Test of Good Public Policy', *News Release*, July 2.

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Providing online casino-style gaming to Australians<sup>42</sup> became illegal within Australia with the ABA again handling complaints to be referred to police (for criminal prosecution for providing a prohibited Internet gambling service within Australia or where offshore gambling activities are likely to be illegal in their country of origin) and to makers of filtering products. Overall, the practical effect of the legislation is limited by the regulatory capacity of the ABA to act where gambling services are hosted outside of Australia and filtering remains a voluntary activity by Australians<sup>43</sup>. The question remains, however, why would problem gamblers voluntarily access filtering solutions if self-exclusion options were deemed unsuitable to addressing the problem of misuse of online casinos.

While the established gambling industry was set to benefit, in a small way, from deterrence of competitors, Australia's casino interests – already developing their own interactive versions of traditional casino products were stung by the potential loss of this emerging niche. Overall, however, regardless of the closure of a number of domestic providers, Australian's use of international online gambling services has not abated. Figures from Nielsen Netratings<sup>44</sup> estimate that 700,000 Australians gamble online (approximately 9% of the total online population of Australia), while Hitwise traffic measurement data showed that level of use had been through the substitution of online casinos located outside of Australia for domestic operators during the implementation of the *Interactive Gambling Act*<sup>45</sup>.

## **THE FUTURE OF CO-REGULATION**

### *Sustainability of the Current Regulatory System*

It is necessary to examine the nature of the core co-regulatory framework against the stated aims of regulation, in general terms. In Baldwin and Cave's review of the nature and drivers for government intervention in markets, they identify twelve motivations for regulation<sup>46</sup>:

1. Monopoly tendencies (natural or artificial),
2. Desires to equitably distribute windfall profits,
3. Externalities that are not accounted for in economic transactions,
4. Information inequalities (between firms or to the consumer),
5. Desire to ensure continuity and availability of service,
6. Threats associated with anti-competitive behaviour and predatory pricing,
7. The production of public goods and moral hazard,
8. Unequal bargaining power between parties,

<sup>42</sup> This element of the Act is interesting in its extraterritorial scope. First, the Act specifies that providers of Internet gambling services to Australians from overseas countries can be subject to prosecution under the Act should they enter Australia (a defence can be mounted for not knowing under due diligence that the customer was an Australian, but not ignorance of the law itself); Second, Australian-based operators can continue to service off-shore customers, however; Third, where a country has a similar law, and requests the Australian Government to declare it a designated country, Australian-based operators are similarly bound to citizens in that jurisdiction.

<sup>43</sup> While a number of potential online casino operators moved off-shore (especially to countries like Vanuatu), Fitzsimmons observes that Australia still remains a base of operations for the developers of gambling technologies for online casinos. Fitzsimmons, C (2002) 'Net gambling industry thrives', *IT Australian*, January 15, <http://australianit.news.com.au/articles/0,7204,3596121%5E15317%5E%5Enbv%5E,00.html>

<sup>44</sup> Quoted in Jacobsen, G (2002) "Online Gamblers Facing a Credit Card Ban", *The Sydney Morning Herald*, August 2.

<sup>45</sup> In addition, the magazine 'Gambling Online', a publication aimed at members of the public who use online betting websites, distributes 12,000 copies per issue in Australia (source: Eric Morris, editor, *Gambling Online Magazine*, 30 October 2002).

<sup>46</sup> Baldwin, R and M Cave (1999) *Understanding Regulation: Theory, Strategy, and Practice*, Oxford University Press, Oxford, pp. 9-16.

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9. Scarcity and rationing of scarce resources,
10. Distributional justice and social policy,
11. Rationalisation and coordination, and
12. Long-term market planning.

With regards to telecommunications services in general, wider regulatory activity by organizations like the Australian Communications Authority (ACA) and the Australian Competition and Consumer Commission (ACCC), tend to focus on the issues 1, 2, 5-9, 11 and 12: traditional marketplace activities that attempt to encourage more 'perfect' competition, while balancing market distortion-creating policies aimed at more universal access to services of standardised quality (through mechanisms such as Universal Service Obligations, and guaranteed rights of complaint and redress<sup>47</sup>). As telecommunications and networked information technologies have become more central to the economic and social life of Australians<sup>48</sup>, it is unsurprising that these considerations have been transferred into Internet access provision.

With regards to the regulation of content online (more accurately, the attempted indirect regulation of Australians *behaviour* online), different regulatory motivations come into play from Baldwin and Cave's list. Overall, the stated intention of this form of regulation is associated with distributed justice and social policy – the protection of 'community values' and safety in the online environment. Thus, in the case of the supply of Internet access it is clear that the market operation of ISPs have a range of externalities in the form of negative social and economic outcomes (emotional or psychological damage associated with 'offensive' content of a variety of forms, threats associated with computer virus distribution, fraud and harassment online) for that segment of the community engaged in the online environment, but who lack sufficient skill, wit, or will to safeguard themselves against predatory behaviour. This is not to say that ISPs create these externalities – indeed the comparison with, say industrial pollution (the most simple example of direct externalities associated with economic production), shows how different online externalities are than most other industrial segments – but that, as the most obvious conduit of these externalities, ISPs have become identified as the point of regulation because they are most easily identifiable market players, operate within the legislative environment of Australia, and make profits based on the activities Australians engage in online (either 'good', or 'bad'). In keeping with the analysis of regulation of the problems associated with market activities, however, the structure of the industry, and the institutional framework developed to regulate it was likely to fail: not simply because of the technical incapacity of government to mandate filtering of all online content, but because of the nature of the co-regulatory system itself.

Because of the substantially lopsided nature of the market (a very small number of ISPs dominate the vast bulk of user accounts) and flexible nature of the uses to which online services can be put, clear information inequalities are at work within the ISP industry. Users of different ISP services receive differential access to information about safety online because of the limited capacity for smaller ISPs to develop the range of 'safe surfing' information needed across the variety of areas of concern to government and the public. This problem is exacerbated by a number of features of the existing regulatory system: the small 'regulatory distance' between the core co-regulator and individual industry players, limited 'ownership' of the regulatory system by ISPs, and the inflexible

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<sup>47</sup> Through the Telecommunications Industry Ombudsman scheme – mandated by government, but administered within the private sector.

<sup>48</sup> NOIE places Australia third in a world ranking of Internet take-up and utilisation; National Office for the Information Economy (2002) *Current State of Play - April 2002*, [http://www.noie.gov.au/projects/framework/progress/ie\\_stats/CSOP\\_April2002/index.htm](http://www.noie.gov.au/projects/framework/progress/ie_stats/CSOP_April2002/index.htm)

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nature of the framework to deal with emerging trends and issues.

First, Grabosky and Braithwaite<sup>49</sup> highlight regulatory distance as a determinant in the effectiveness of regulatory processes and structures. Regulatory distance is a compound measure that includes the number of firms being regulated, the social relationship between regulators and industry, and the frequency of contact. The more personal the level of interactions between regulators and their industry, the less likely for regulators to apply formal sanction instead of informal 'correctives'. Overall, the co-regulatory nature of the system for content regulation brings the legislative regulators in close contact with their industry partners. In addition, as the IIA has the core responsibility for developing the operating code of conduct, the sharp end of the *Broadcasting Amendment Act* has zero regulatory distance. As the informal correctives are of negligible impact on industry in the existing co-regulatory environment, there is little motivation for the IIA, or indeed the ABA, to push hard beyond the existing minimum win condition.

Second, there exists no direct responsibility for the co-regulatory approach by industry players. Thus, while the IIA has developed a standard set of safe surfing information that ISPs 'merely have to point users' to (<http://www.iaa.net.au/guideuser.html>)<sup>50</sup>, development and maintenance of this information is simply a compliance measure by industry with little interest, ownership, or active participation in the development of this resource. The compliance-oriented nature of this guide is clear: legalistic, monolingual, and written for a relatively computer-literate audience, the material is more for the consumption of ABA, than members of the public. Two factors motivate this limited ownership: First, there are obvious financial reasons why any industry would restrict their commitment of time and money to the development of materials such as these, where they lie outside of the core business strategy of the firm<sup>51</sup>: user growth in ISP services has been strong over the last eight years, with little evidence that the negative elements of the online environment substantially reduce market growth. This has shaped the developing nature of the ISP market: a growing pie that focuses competition on price and connection quality (reflected in customer 'churn')<sup>52</sup>, rather than emphasis on specific market segmentation or product enhancement marketing strategies<sup>53</sup>. Second, there is limited motivation for ISPs – focused on connection speeds, cost, and reliability issues – to concern themselves with the actual use of online service, except where this provides risks or costs to their existing offering. The second cause limiting industry ownership of the co-regulatory system is the lack of any direct industry financial investment in the regime. In the operations of the ABA and OFLC as direct regulators of content, and the educative functions of NetAlert, the industry has been remarkably successful in evading any financial commitment to these activities. Both activities are funded by Government, rather than industry.

Third, by hiving off different issues pertaining to online content into a variety of legislative responses introduced in an *ad hoc* and somewhat random manner<sup>54</sup>, the co-regulatory approach lacks any capacity to adjust to emerging areas of community concern. Thus, while the *Broadcasting Amendment Act* responded to concerns about pornography during the mid to late 1990s, and the

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<sup>49</sup> Grabosky, P and J Braithwaite (1986) *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, Melbourne.

<sup>50</sup> Internet Industry Association (2002) *IIA Guide for ISPs*, <http://www.iaa.net.au/guide.html>

<sup>51</sup> Thus, for example, the ISP AOL features safe surfing as a core marketing element of its strategy and has invested substantial effort in the development of information and technologies to limit its subscribers' access to negative online experiences.

<sup>52</sup> Productivity Commission (2001) *Telecommunications Competition Regulation: Inquiry Report*, December, Canberra.

<sup>53</sup> Dicken, P (1998) *Global Shift: Transforming the World Economy*, Paul Chapman Publishing, London.

<sup>54</sup> Including the exclusion of other issues of concern, such as hate speech online.

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*Interactive Gambling Act* reacted to concerns about problem gambling, neither of these issues have remained static 'top of mind' problems for the Australian online community over time. While it could be argued that the regulatory system itself has reduced community concern, this is a fallacious argument given the real impact of the regime in limiting content access during its operation. In their report on the use of the Internet in Australian homes, the ABA identified four 'main areas of perceived risk'<sup>55</sup>:

- Financial dangers, e.g. fraud and credit card number theft (54%)<sup>56</sup>;
- Personal data misuse and privacy issues (45%);
- Content exposure concerns (39%); and
- Viruses (21%).

What is clear is that content concerns were only third on the list of 'top of mind' issues associated with the online environment, while gambling was not listed. Importantly, regardless of the level of compliance with the regulatory system, the ABA identified that there is limited community knowledge about what actions to take with regards to material encountered online that was problematic or offensive.

In a recent discussion paper prepared by HREOC<sup>57</sup>, the Commission has identified that, while the *Racial Discrimination Act 1975* prohibits certain kinds of hate speech, the OFLC classification guidelines appear inconsistent with this legislation, limiting the ability of the ABA to remove Australian content that would be penalised under the *Racial Discrimination Act*. The key differences between the two legislative approaches are significant, however. While the *Broadcasting Amendment Act* has low standards of evidentiary proof for government censorship, the *Racial Discrimination Act 1975* – treading cautiously around the question of political speech – is quite stringent in application (the speech must be "public" and a complaint made by an aggrieved member of the slandered group), and also offers the ability for mediation as a dispute resolution mechanism prior to the commencement of formal legal processes. Overall, HREOC see as inappropriate the inconsistency that material that would be illegal under the *Racial Discrimination Act 1975* is not covered by the Act. The failure of the *regime* to specifically address hate speech, however, does not prohibit the use of the Act itself to take action against this material. Where HREOC see this as problematic, however, is in the relatively anonymous nature of some online publication (for the *Racial Discrimination Act 1975* to be applied, the aggrieved party must identify the offender).

In addition, HREOC has noted that:

*... there is very little public education regarding the entitlement of Internet users to complain to the Commission (or other regulators) about racist Internet content. And until recent pronouncements by the Federal Court [the Tobin case, currently subject to appeal]<sup>58</sup> there had been some uncertainty as to whether and how the Racial Discrimination Act would be applied to the Internet. As public education develops in this area, IT sectoral awareness increases and Internet usage continues to expand, the Commission and other regulators may expect to receive increasing numbers of complaints about racial vilification on the Internet.*

Again, highlighting the need for consistent community education about areas of concern regarding

<sup>55</sup> Australian Broadcasting Authority (2001) *The Internet at Home: A Report on Internet Use in the Home*, December, Sydney.

<sup>56</sup> Percentages based on the number of research participants who identified the particular area of concern

<sup>57</sup> Human Rights and Equal Opportunity Commission (2002) *Race Hate and the Internet: Background Paper for the Cyber-racism Symposium*, 22 October, HREOC, Sydney

<sup>58</sup> This case does highlight some of the limitations of the current approach. The Adelaide Institute website has been the focus of attention for many years, and has only recently been ordered to be removed following a two year legal case.

the online environment.

When comparing content regulation and general telecommunications service regulation, therefore, the effectiveness of the co-regulatory system for content has clearly failed to increase consumer confidence, while ACA (which regulates connection quality and infrastructure concerns) research has found increasing levels of customer satisfaction with ISP services<sup>59</sup>. In part, this reflects a clear economic motivation for action in this area (combined with wider political debates about service quality in the lead up to full Telstra privatisation), but also reflects – for ISPs – the use of a co-regulatory approach that includes 'ownership' of service quality regulation: through the Telecommunications Industry Ombudsman (TIO) scheme, ISPs pay, on a per complaint basis, for mediation and dispute resolution with customers. This illustrates that limited interest in the regulatory system is not simply a problem of co-regulation as a generalised mechanism: the TIO has had success in drawing the attention of the ISP industry to areas of concern through pure financial expediency.

Thus, for a number of reasons, the regulatory approach has been substantially sidelined by industry as a 'tick and flick' compliance requirement – with community input largely shunted to symbolic statements by government that something is being done about areas of concern. Overall, the is little tenability of the existing co-regulatory approach: while industry maintains an interest in the retention of the co-regulatory approach because of its negligible compliance costs, the growth phase of the market has now plateaued (based on composite data regarding the uptake of new accounts and the amount of time spent only<sup>60</sup>), with the discovery function of the Internet giving way to more practical concerns about efficient use of online services and the practical purposes to which the technology can be put.

#### *Four Proposed Criteria for Successful Regulation*

Taking the three failings of the regime into consideration – low regulatory distance, lack of industry ownership and commitment to the co-regulation intention, and inadequate value of the current regime in addressing the variety of consumer concerns about the technology – the current approach is limited in its future viability. While technological incapacity for filtering and "strong" regulation has been at the core of the critique so far, it is also important to attack the fundamental myth upon which the regulatory regime is based: that the co-regulatory system, in some way, actually reflects some form of community morals and standards of behaviour.

Clearly, this proposition, as illustrated by the continued use of 'restricted' services by Australians, lacks foundation. "Community" is – as pointed out by Fulcher<sup>61</sup> – an essentially contested concept and one that is either narrowly defined for specific purposes, or too broad for any analytical value. Thus with respect to the vague concept of community and its application to governance, Fulcher argues that government conceive of community on three axes: *perceptual* – the sense of belonging to an area or group that can be defined in some way (self-defining and pluralistic<sup>62</sup>); *functional* – the ability to meet with reasonable economy (for deliberation and social interaction), and; *political* – the

<sup>59</sup> Australian Communications Authority (2002) *Consumer Awareness and Information Needs Survey 2002*, <http://www.aca.gov.au/publications/reports/awareness/report2002.htm#internet>

<sup>60</sup> Market Intelligence Strategy Centre (2002) *Electronic Banking – Media Release*, October 28.

<sup>61</sup> Fulcher, H (1989) *The Concept of Community of Interest: A Discussion Paper Which Explores the Concept of Community of Interest as it Applies to Local Government Boundaries*, South Australian Department of Local Government, Adelaide.

<sup>62</sup> Little, A (2001) *The Politics of Community: Theory and Practice*, Edinburgh University Press, Edinburgh.



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ability for an elected body to reconcile the conflicts of members. With regards to the Australian online community, therefore, only one of the three axes can be realised: the very nature of the technology being employed allows the Australian online population to 'meet' at relatively low cost. The limited shared value system, and incompatibility of users' views over what is or is not acceptable content online, negates the contention that some basic community standard can be developed, and that standard promulgated for all.

Thus, in considering the future of the co-regulatory approach, four key issues need to be identified and resolved:

- *Effectiveness* – unlike the current system, the new approach must address areas of concern to *segments* of the Australian online population (communities of interest);
- *Flexibility* – the regulatory system must be flexible to adapt to a rapidly changing environment that vastly outstrips the capacity for government legislative response in an effective timeframe;
- *Stakeholder engagement* – the industry must have more commitment to the intent of the regulatory regime to ensure compliance is appropriate (; and
- *Positive intervention without arbitrary paternalism* – the public diversity of the Australian online population must be accounted for and internalised.

### *Co-Regulation as a Democratic Solution*

In the development of the current regulatory regime, based within Australian Broadcasting laws, the concept of *regulatory parity* was vaguely adopted in the use of OFLC guidelines for online content. This approach, however, drew together two dissimilar technologies under one umbrella: the one to many model of broadcasting, with the many to many, one to many, one to one, model that is the Internet. Overall, the lack of centralisation of the network limits the capacity to identify any significant choke point where an effective regulatory mechanism can be applied (production, distribution, and consumption being highly pluralistic). This factor, combined with differences in values among the Australian community, calls for the use of self-regulation *by users* to address their online concerns. Thus, to satisfy the requirement for effectiveness, it is users – responding to their own concerns or operating in a specific community of interest – who need to take action, and, as indicated by the ABAs research, who clearly need the information and skills to navigate their online environment effectively. Government role in co-regulation therefore, should be one of direction and support, rather than intervention and mandate. To achieve this outcome, three factors are required: a way to identify what information and training is required, a means of developing the necessary information, and a means of distributing this information.

With regards to identification and distribution, the ease to which Australians online can be contacted and consulted through the medium is remarkable. However, under the current regime, consumers and users are almost completely excluded from direct participation in the regulatory process, and, particularly, in the way the Australian public can identify issues and prioritise government responses. It is clear that the Australian public play only a peripheral role in the co-regulatory system – they make complaints (though the total number of complaints from the total population is low) and receive information (though the effectiveness of NetAlert in this role has been questioned<sup>63</sup> - especially given their limited budget and large potential audience: \$4.5 million

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<sup>63</sup> Senate Environment, Communications, Information Technology & the Arts Legislation Committee (2001) *Answers to Estimates Questions on Notice*, Communications, Information Technology and the Arts Portfolio Department – Broadcasting and Intellectual Property, Additional Estimates 2000-2001, (21-22/2/01).

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over four years to service half the Australian population). Whereas online research can be criticised for its inherent sample bias<sup>64</sup>, the application of electronic democracy in this area of regulation does not encounter these difficulties. Through the medium itself, the online 'community' can determine, rank, receive, and interact with, information that enhances their experience online.

This approach is likely to have a number of characteristics. First, as already indicated, the concerns of the public are going to cross-cut institutional boundaries. State consumer protection agencies, the ACCC, and Treasury are drawn into issues of online commerce, the Human Rights and Equal Opportunity Commission, state indigenous and women's policy units, and law enforcement drawn into issues associated with harassment and hate speech, schools and police drawn in on the protection of minors. At present, a raft of information is developed and distributed by these diverse bodies, with limited co-ordination or determination of their quality or impacts across the whole Australian online population. Second, the emphasis on risks – the "black hat" view of the Internet as a threatening environment – will have to give way to a positive educational experience. Users go online for a variety of reasons – personal or professional – but, as a tool, the Internet experience is fundamentally an instrumental one: thus users need, not dire warnings about the hostile environment they face, but positive *and* protective messages about what can be achieved online (be that political, social, or economic) and how to evade whatever risks may occur in the achievement of personal objectives. Thus regulatory parity is achieved, not with the vastly dissimilar medium of television, but with other participatory activities: driving, personal safety, or social interaction. This "white hat" view (not a utopian vision of the wired society based on technological determinist visions of the elimination of social evil, but a balanced assessment of pros and cons) of a "national policy for the information society" also provides another regulatory benefit in an imperfect marketplace: the ability for government to guide the use of the Internet for positive national purposes; the realisation of the educational, participative, and economic benefits of a networked or information society.

It is not envisaged that a single governmental body should be responsible for the development and implementation of community education programs, but a central clearinghouse of existing and future resources (the "National Online Public Education Clearinghouse"), that has some direct public education role where clear gaps can be identified, such as in emergent areas of concern (hate speech, SPAM), or where information delivered to one segment of the community needs to be conveyed to other groups (information to support parents delivered through the school system).

This approach would be effective in:

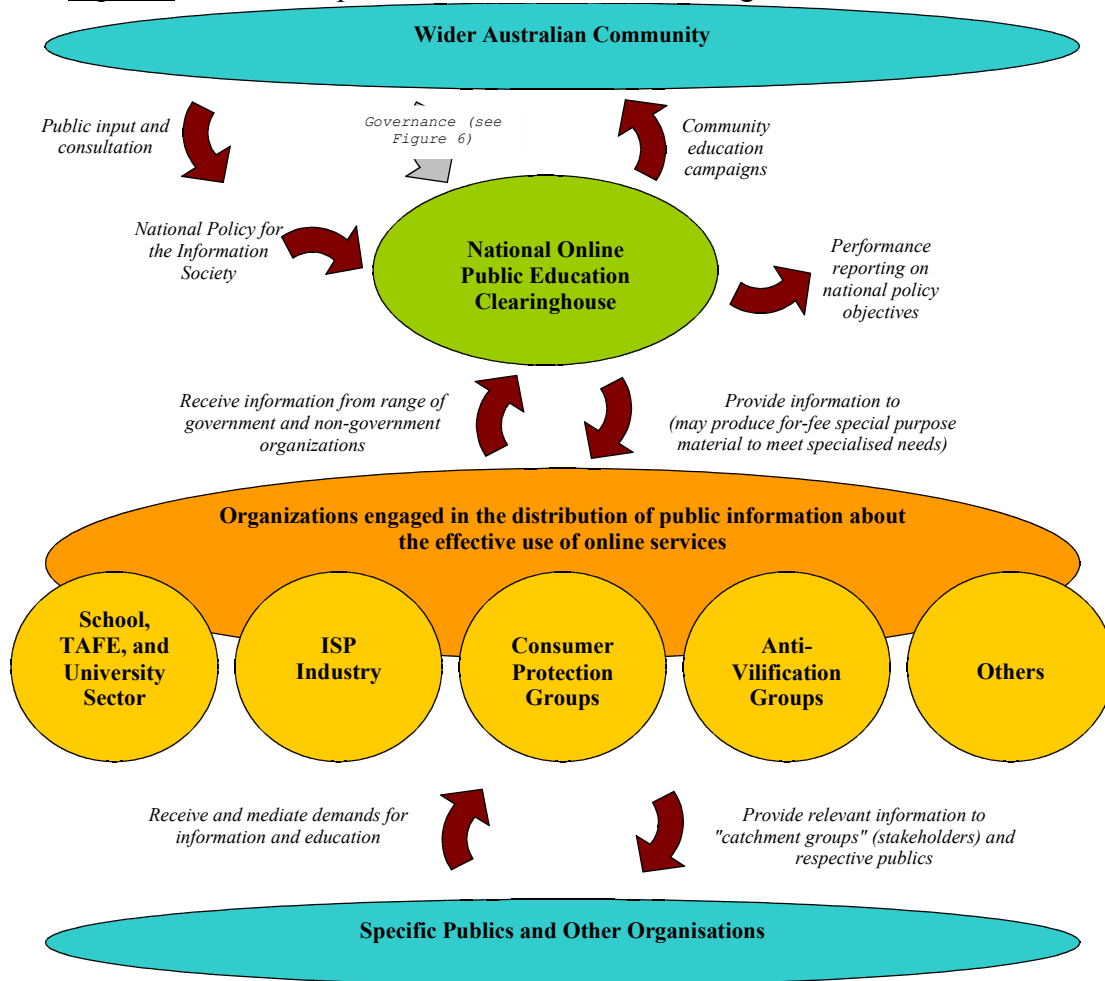
- Centralising the storage of available information, identifying existing informational resources, and distributing this to stakeholders to reduce unnecessary re-discovery (the community and other educational organizations),
- Identifying areas of need for new resources or specific public education campaigns,
- Co-ordinating the educative activities of a range of actors, and
- Providing a locus for the development and implementation (and performance reporting) of the national policy for the information society.

The structure of this approach is illustrated in figure 5.

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<sup>64</sup> Strauss, J (1996) 'Early Survey Research on the Internet: Review, Illustration and Evaluation, *American Marketing Association Winter Educators' Conference Proceedings*, Blair and Kamakura (eds.), American Marketing Association, Chicago, pp. 222-8.

Figure 5: Relationship Between the National Clearinghouse and Other Actors



The value of participatory governance is illustrated by current difficulties associated with determining community values and applying this mythical concept to regulatory processes. For example, in completing the review of the current OFLC guidelines, Brand observed that there are significant limitations in the consultation model used to determine accurate assessments of what – if anything – can constitute an agreed community standard (either for the wider community, or for specific communities of interest). He stated that:

*It is likely that the general community standard is not represented in the public submissions to the review on the basis that methodologically, a volunteer selection for a sample is limited by the motivation extant in the contributors. The most engaged and motivated parties will be compelled to respond to calls for public comment. Having noted this, one gets the sense that in the approximately 2,000 pages of submission material that the breadth and diversity, of community views has been observed. What one may question is the quantity of one view in relation to an opposing view.*

Thus, the first element of the citizens' governance of a future co-regulatory approach would be the use of public involvement in overseeing the application of OFLC guidelines to online content (noting that only RC content has been recommended for removal from Australian servers). This approach would involve citizens' direct engagement with the Office on the development and implementation of guidelines for Internet content, drawing citizens into online panels that can comment on the development and application of the existing guidelines to material hosted online.

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One approach to facilitate this would be the application of online "citizens' juries" who would provide an advisory role to the Office. Wakeford describes [offline] Citizens' Juries as<sup>65</sup>:

*... a panel of non-specialists meets for a total of thirty to fifty hours to examine carefully an issue of public significance. The jury, made up of between twelve and twenty people, serves as a microcosm of the public. Under the model of the citizens jury most commonly used in the UK and US, jurors are often recruited via a more or less randomised selection of people taken from the electoral roll ... To encourage recruitment from as broad a range of backgrounds as possible, various provisions are available including an honorarium payment, crèche facilities, and easy-access jury locations.*

The advantages of this approach are threefold:

1. It increases public participation with the classification process,
2. It provides the Office with ongoing feedback about community views and values – rather than the current approach to have period formalised consultation processes, and
3. Classification decisions could be devolved to citizens' juries to provide Australian online publishers with classification of the content (for the inclusion in metadata tags) at low cost. This approach is used, in different forms, in a variety of open publishing environments (for example: slashdot.org), where system users determine the value of contributions published.

The second element of the citizens' governance would be direct citizen membership of the board of the National Online Public Education Clearinghouse. It would be envisaged that the strategic policy direction of the clearinghouse contain appointed and public members, with members of the public elected from the Internet community via online elections. In addition, the Clearinghouse would require a range of specific subcommittees to examine and advise on:

1. Specific public education campaign development and implementation,
2. The maintenance of the national policy for the information society,
3. Operations of a portal for Australian content online to vastly develop and expand the current Australian cultural and recreational portal (<http://www.acn.net.au/>), maintained by DoCITA<sup>66</sup>, with the aim of making this service a key default site for Australians' gateway into the online environment, and
4. The development of Australia-specific online technologies (filters, search engines, *etc.*).

Thus, public representation on these subcommittees would also be facilitated via eDemocracy and contain a mixture of general community members and technical (IT, education, management, and other) experts.

Finally, as the Clearinghouse would have responsibility for co-ordinating the development of the national policy for the information society, direct public participation in this process would be facilitated through online consultation and participation to:

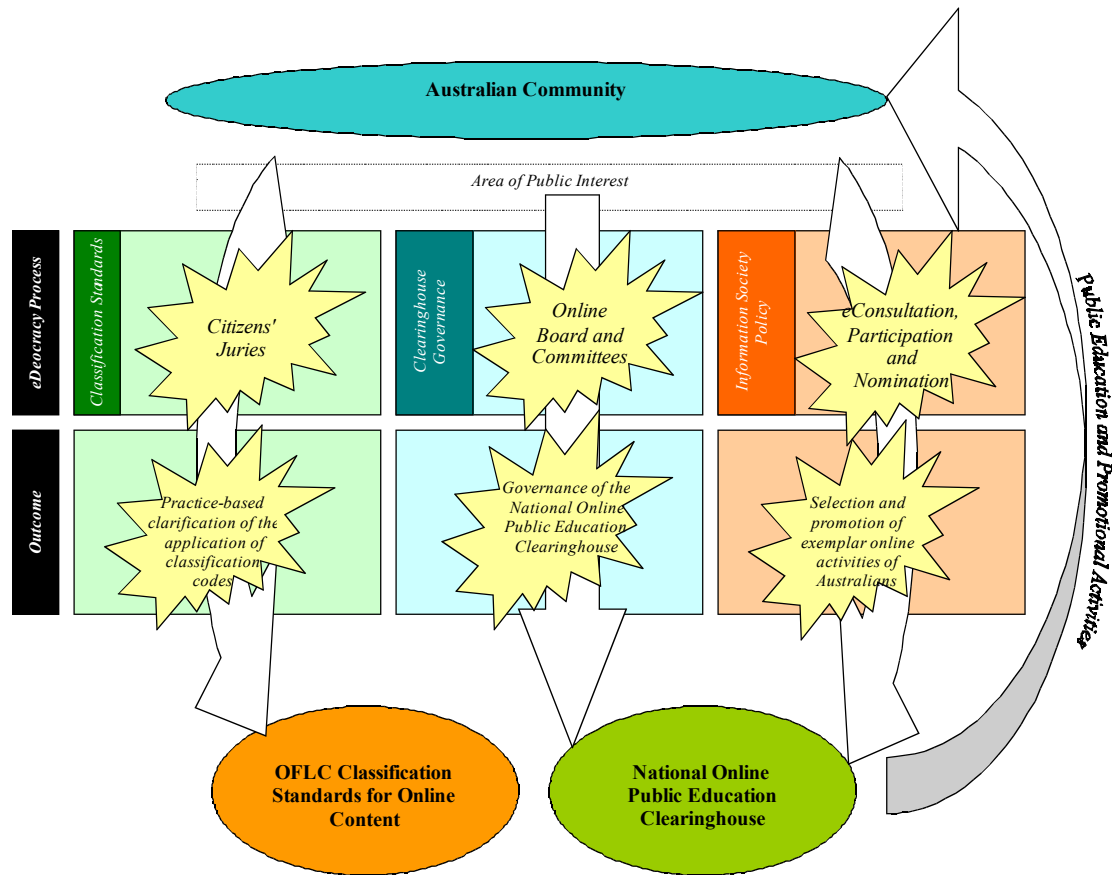
- Develop and agree on the principles of this policy,
- Determine performance indicators for measuring outcomes (similar to the approach used for the *Tasmania Together* strategic framework),
- Nominate "best practice" examines of Australians online endeavours (possibly through a national award system), and
- Promulgate positive use of online services.

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<sup>65</sup> Wakeford, T (2002), 'Citizens Juries: a radical alternative for social research', *Social Research Update*, <http://www.soc.surrey.ac.uk/sru/SRU37.html>.

<sup>66</sup> This portal currently maintains about 2,100 references, compared with Google's index of over 3,000,000 .au webpages.

Figure 6: Public Governance of the Clearinghouse and Related Regulatory Bodies



If the user's role in the co-regulatory system is to be enhanced, then we cannot forget our basic criticism of the industry's participation: lack of ownership. An expanded educative role for the online environment will require the commitment of resources, both from government and from industry. Contribution to the development and distribution of this alternative regulatory system by industry would, both assist in the provision of adequate funding for a large nation building endeavour – the creation of a progressive vision for Australians online that is build from the grassroots up – and reduce the tendency for limited participation in positive regulation by the ISP industry of this country. Two factors motivate this enhanced industry ownership: the desire from industry to see a return on their investment, and the legitimacy of the demand for the information: driven by consumers for consumer interests. Overall, a per-user contribution from ISPs<sup>67</sup> would commit active industry participation in the co-regulatory approach and overcome the free-rider problem associated with this form of regulation: information as a public good.

## CONCLUSION

Pornography may well be a fundamentally exploitative activity, but one that – like cheap coffee, designer sneakers, and third world holidays – many Australians appear to embrace. Likewise, as a nation that mythologises the social (and anti-social) activity of gambling, the tendency for Australians to use new media forms for this activity is not likely to subside. At the most fundamental levels – technical and regulatory design – the control of online content in Australia, from gambling to pornography or hate speech, has not been deterred by the co-regulatory model

<sup>67</sup> While ISPs are not currently licensed by the Commonwealth, the TIO provides a potential mechanism for the purpose of collecting a levy.

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introduced for the *Broadcasting Services Amendment Act*. The limited regulatory capacity of the Australian government, operating in a global medium, is evident in the restricted impact either of the two pieces of legislation discussed can have on the core areas of social concern.

In identifying this problem, it is not necessary to abandon the role of regulation and government in the market for online access. Like any area of market failure, the public will (and should) demand intervention and correction. What must be recognised, however, is that, in advancing the current response to these problems, the public interest has not been upheld. While evidence with regards to service quality shows that co-regulation can be an effective mechanism for industry intervention, there are clear differences between the nature of the problem (specific versus broad and ill defined), and the level of engagement government has required of industry in the online content area. Overall, therefore, the alternative co-regulatory approach advocated in this paper addresses three areas of concern: *flexibility* – in terms of the range of issues that can be addressed by co-regulation; *stakeholder engagement* – for both industry and the wider public and, importantly; *positive intervention without arbitrary paternalism* – the recognition that members of the public have significantly different value systems to legislators and an emphasis on informed, active participation in the online environment. The future of effective co-regulation in Australia lies in individual education and empowerment.



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