

## Submission to the Review of the Operation of Schedule 5 of the Broadcasting Services Act 1992

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## 1.0 Overview

The aim of this submission is to review the effectiveness of the *Broadcasting Services Amendment (Online Services) Act 1999* (the "*online content regime*") against two criteria:

- The effectiveness of the regime against its stated intention of protecting Australian children against material that may be offensive to them, and
- The appropriateness of the overall system of regulating online content in Australia.

It is the contention of this submission that the *online content regime* has not been effective and represents a misallocation of public resources. This argument is based on the:

- Limited ability for the regime to realistically limit access to offensive online content covered by the OFLC guidelines,
- Nature of the OFLC guidelines themselves and the exclusion of the public from governance of this system,
- Exclusion of significant areas of concern from the coverage of the legislation,
- Inflexibility of the system to meet new and emerging areas of concern,
- Lack of industry commitment to the regime (reflected in a lack of financial commitment to the regulations and over-regulation in some areas),
- Misapplication of the general structure to other areas of online behaviour, and
- Failure of the government to develop a policy regarding the effective use of online services by Australians.

Overall, the submission recommends that:

- The existing online content regime be substantially modified and replaced with an alternative regulatory structure.
- This regulatory structure include:
  - Community education as its core function and purpose,
  - Significant financial commitment from government and the Internet industry for the funding of this education function,
  - Community participation in the development of information needs and the governance of regulatory structures, and
  - The formation of a national policy for the Australian Information Society.

Specific recommendations made in this submission are designated with an **R** and numbered sequentially.

### 1.1 About the Author

Peter Chen is a lecturer in the Centre for Public Policy, part of the Department of Political Science at the University of Melbourne. He completed his PhD at the Australian National University in 2000, focusing on the subject of domestic Internet regulation, and continues to work on the impacts and nature of the information society in Australia. Peter has worked as an Information Technology consultant in the private sector and local government, and a policy and research officer for the Victorian Police Force.

The views presented in this submission do not necessarily reflect those of the University of Melbourne and its affiliated bodies (public or commercial). The author is not a member of any formal interest group associated with media, information technology, or the online economy.

Further information is available on request.

## 2.0 Operation of the Current Regime

The *online content regime* has been in operation within Australia for almost three years. During this time, the Commonwealth has had time to review the development of the regulatory mechanisms, industry codes of practice, and the operations of the educative elements of the overarching policy framework. In addition, there has been substantial time for the states and territories to implement the draft criminal code elements agreed during 1998-9 for the policing of online content, and the basic elements of the scheme (as it applies to ISPs) has been applied with respect to attempts by the commonwealth to restrict access to online gambling by Australians.

### 2.1 Effectiveness of the Act

There is no reliable information (set against a backdrop of conditions prior to the implementation of the *online content regime*) that can inform the Department as to the effectiveness of the Act in reducing the exposure of minors to content of concern. Overall, research conducted by the ABA<sup>1</sup> indicates a number of factors about the operations of the law to date:

- Community concerns about online activities have not abated, but are not centred around content issue as the primary area of public threat perception (see §3.2), and
- Awareness of the regulatory regime is low (only 3% of surveyed Australians nominated the ABA as regulator).

If children are indeed safer online, it is likely that this is a result of:

- Increased community understanding of the technology (experiential learning resulting in more effective use of online services<sup>2</sup>),
- Use of filtering technologies (see §2.2.1), and
- School-based education (see §4.1).

At present, the education functions of the ABA, industry, and NetAlert (through budgetary constraint) has been focused on the provision of information online. However, the ABA have observed that this medium is of only limited value in communicating the "safe surfing" message to Australians (12%). If the risk elements of the online environment are a limit on take up (through the dramatic increase in usage rates of the Internet over the last ten years does not support this view), then the provision of online information would be of little value.

Overall, as online content of concern is not restricted and remains widespread on servers located outside of Australia, the practical inability for filtering of all online content that may be encountered by Australian children prohibits the government to claim that the modest takedown figures for Australian content have any relationship with improved outcomes for children's online experiences. Indeed, experience of the Australian adult industry (see §2.5.2) illustrates the ineffectual nature of the *online content regime*.

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<sup>1</sup> Australian Broadcasting Authority (2001) *The Internet at Home: A Report on Internet Use in the Home*, December, Sydney.

<sup>2</sup> Market Intelligence Strategy Centre (2002) *Electronic Banking – Media Release*, October 28.

<b>R 1</b>	<i>The practical value of removing R and X material from Australian servers is minor, this requirement should be withdrawn from the legislation</i>
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## **2.2 Effectiveness in Projecting "Community Standards"**

Unlike the view presented in the *Classification (Publications, Films and Computer Games) Act 1995* Australia has no singular identifiable set of national community standards. While the *Review of the Classification Guidelines for Films and Computer Games*<sup>3</sup> states that "further research" is required to determine what these values may be, the report's author states that "it may be most accurate to represent that there does not exist a single community standard, but rather a range of standards depending on the particular sub-community one considers". Overall, the reliance on "community standards" as the basis for a single classification and enforcement system in Australia perpetuates the largely Eurocentric conception of Australia as a homogeneous society that shares a basic set of beliefs and values about what is right and appropriate within its variety of media forms. In a clearly multi-cultural and linguistic society, this 1950s view of Australia can no longer be maintained.

At present, the majority of Australians would make some consistent statements about elements of content (online and offline) that they view as fundamentally abhorrent or objectionable. The exploitative treatment of children and minors, for example, is one element of shared consensus, but based – not on some abstract concept of moral rightness – but on the protection of citizens from predation where they lack the ability to protect themselves. In discussions on adult sexuality, however, there is limited consensus across the community about what is deemed right and appropriate, and the overarching principles of the classification system in Australia are based on the free choice of adults to select and use content of interest to themselves. In restricting access to R and X rated material online, the *online content regime* violates this principle.

In addition, the concept of "community" must be challenged. There is no agreed definition of community that holds that member of defined group will share common beliefs that can safely be applied to the total Australian population. Realising the non-operationalisability of the concept of community, the South Australian Department of Local Government have identified three characteristics that may be valuable in overcoming definitional differences<sup>4</sup>:

- *Perceptual* – the sense of belonging to an area or group that can be defined in some way (self-defining and pluralistic<sup>5</sup>);
- *Functional* – the ability to meet with reasonable economy (for deliberation and social interaction), and;

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<sup>3</sup> Brand, J (2002) *Review of the Classification Guidelines for Films and Computer Games: Assessment of Public Submissions on the Discussion Paper and Draft Revised Guidelines*, Bond University Centre for New Media Research and Education

<sup>4</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>5</sup> Little, A (2001) *The Politics of Community: Theory and Practice*, Edinburgh University Press, Edinburgh.

- *Political* – the ability for an elected body to reconcile the conflicts of members

In the case of online content, only the second characteristic applies. This point is returned to in §4.2.4.

### 2.2.1 Filtering Performance Issues

With regards to the use of filtering software, a point needs to be made. While the *online content regime* embeds the myth of "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 fourth 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>6</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 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 parents, 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.

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<sup>6</sup> Willard, N (2002) *Filtering Software: The Religious Connection*, <http://responsiblenetizen.org/documents/religious2.html>

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*Future ABA/NetAlert reports on the effectiveness of filtering products should make some statement about the origin and bias of the products being offered to Australians to improve their freedom of choice. A report / dissenting report format may be appropriate with input from public interest advocacy groups in Australia and around the world*

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 (see §4.2.1) and a significant abrogation of responsibility for ensuring the *apparentness* of the class of products government is strongly recommending to the Australian public.

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*Serious consideration should be given to a wholly domestic version of filtering software free of American bias and prejudice. This development appears to be unable to be supported by the current marketplace and may be a task to be undertaken by a public enterprise*

### 2.2.2 OFLC Guidelines and FOI

The discussion paper has canvassed the question of the appropriateness of the existing OFLC content guidelines for online content, and noted the moves to exempt restricted online content from FOI inquiries. Given that there are no current means to review the application of the OFLC guidelines to restricted content because of the refusal of the government to release substantive information about classified sites, it is queried how any realistic assessment of this issue can be made. This would appear to be a spurious request for information.

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*A methodology should be developed to determine the effectiveness of the OFLC guidelines in classifying content across media forms. The results of this research should be published*

The basic *raison d'etre* for this restriction, apparently, is the concern that these inquiries would provide a "roadmap" to illicit online content. 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.

In addition, the OFLC has informed me (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 freedom of speech group, Electronic Frontiers Australia, 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 *online content regime*.

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*FOI exemptions for restricted content under the Act should be withdrawn for all content except for that that would be classified RC under OFLC guidelines. Material hosted within Australia and referred to police for investigation should be reviewed by the equivalent of the state ombudsman in each jurisdiction*

### **2.3 Success as a National Framework**

The discussion paper rightly identifies that no state or territory has adopted the model criminal code regulations developed in the lead up to the introduction of the *online content regime* (although, at the time of writing, it appears that South Australia will implement this legislation in the coming 12 months). It is suggested that the findings of the NSW parliamentary inquiry be considered as part of the review process.

Overall the NSW parliament found that:

The Internet is an increasingly valuable tool for communication, research, artistic expression and business. The regulatory scheme proposed in Schedule 2 does not strike the right balance between the need to protect children and the right of adults to communicate freely. This is in part because the rapid changes in the way people communicate with new media are not being matched in pace by changes in legislative models attempting to regulate them.

In addition, there are significant concerns about the effectiveness and enforceability of the proposed scheme. It is more likely to deter use of the Internet by law-abiding content providers than by those with criminal intent.

This finding should not be surprising to the Commonwealth, but should be heeded. Given the states and territories were relegated the unenviable task of policing online content with the higher standards of evidence required for criminal prosecutions than the ABA takedown and complaints system, there is limited reason why these jurisdictions would commit scarce forensic computing resources within their Police Force and Services to the investigation of material classifiable as R or X, especially given the extent to which this material is more widely available. Concentration on issues surrounding paedophilia and fraud have been rightly prioritised by police organizations around Australia.

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*Attempts to push forward with the model criminal code legislation should be abandoned in favour of increased skills training for law enforcement with regards to the investigation of paedophilia and online fraudulent behaviour*

### **2.4 Adoption of the Regulatory Model for Online Gambling**

With the introduction of the *Interactive Gambling Act 2001* (the "*online gambling regime*"), the provision of online casino-style gaming to Australians<sup>7</sup> became illegal

<sup>7</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

within Australia in 2001, with the ABA 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. In effect, the *online gambling regime* emulates the regulatory mechanism of the *online content regime*, but adds criminal sanctions for operators who provide online casino services to Australians.

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*The value of the Interactive Gambling Act 2001 should be considered as part of this review process as many of the regulatory mechanisms, effectiveness issues, and problems associated with this legislation are largely identical in nature*

Overall, the practical effect of the legislation is identical to that experienced by the *online content regime*: limited regulatory capacity of the Commonwealth to prevent Australians access to offshore casinos as filtering remains a voluntary activity by Australians<sup>8</sup>. The question remains, however, why would problem gamblers voluntarily access filtering solutions if self-exclusion options were deemed unsuitable in addressing the problem of misuse of online casinos. 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>9</sup> estimate that 700,000 Australians gamble online (approximately 9% of the total online population of Australia), while Hitwise traffic measurement data show that level of use had been through the substitution of domestic operators with online casinos located outside of Australia during the implementation of the *online gambling regime*<sup>10</sup>.

As well as failing to prevent Australians use of online casinos, the *online gambling regime* has caused the states and territories to lose revenue (domestic and export). Overall, the Productivity Commission has recommended only that the Commonwealth should attempt to develop a national regulatory model based on "managed liberalism"<sup>11</sup>: customer protection and harm minimisation legislation through licensing and regulating the operations of domestic providers<sup>12</sup>. Under this approach, customers would be encouraged towards domestic providers because of their quality

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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 a similarly bound to citizens in that jurisdiction.

<sup>8</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>9</sup> Quoted in Jacobsen, G (2002) "Online Gamblers Facing a Credit Card Ban", *The Sydney Morning Herald*, August 2.

<sup>10</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>11</sup> Productivity Commission (1999) *Australia's Gambling Industries: Inquiry Report*, Report Number 10, November 26.

<sup>12</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.

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>13</sup>.

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*The Interactive Gambling Act 2001 should be repealed and states and territories encouraged to re-establish the development of their local regulations under a national framework to ensure maximum return to gamblers*

In addition, the Commonwealth appears to have made little progress in examining the restriction of credit card payments for gambling activities. Reporting on the progress of this process should be part of this review.

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*The Commonwealth should heighten efforts to encourage financial institutions to prohibit the use of credit cards for any gambling activities. The review should report on the process of these discussions and identify means to accelerate these negotiations*

## 2.5 Industry Compliance

### 2.5.1 ISPs

The discussion paper raises the issue of industry compliance under the Act. Overall, industry compliance pertains to:

- Actioning takedown orders issued by the ABA,
- The provision of filtering options for users, and
- The provision of information to users about the legislation, where and how to complain, and information about "safe surfing".

Under the industry code of practice, and the funding mechanisms employed, ISPs are *not* required to:

- Actively monitor content (hosted or transmitted), or
- Directly fund filtering activities at a loss to their business operations (cost recovery).

The discussion paper notes that compliance with the code of conduct is strong. However, the Department should be cautious in interpreting compliance information provided by the IIA. The initial request for responses to the survey issued by the IIA contained dubious wording that can be interpreted as encouraging distortion of the survey 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...

This submission does not dispute the view that the major ISPs are compliant. However, the issue of minor ISPs compliance is questionable. In a convenience

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<sup>13</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.

sample of ISPs servicing the Melbourne area<sup>14</sup>, the majority of small ISPs surveyed did not specify that they 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 *online content regime* 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 (unless

<sup>14</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 you say you comply with the regulations?".

Melbourne is substantially abnormal in this regard), there is limited understanding of the law, or ISPs themselves deem the law to be deficient in some regards.

Regardless of the motivations for action in this area, it would appear that ISPs have higher levels of available resources that could be put into regulation than is currently required. Because of the lack of direct funding of the regulatory model by the industry, there is limited industry oversight of the functions or outcomes of the regulatory scheme, and limited motivation for ISPs to adopt and utilise the range of safe-surfing information provided online.

The stated intention of this form of regulation is associated with distributed justice and social policy. The market operation of ISPs have a range of externalities in the form of negative social and economic outcomes 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. Overall, however, the structure of the industry, and the institutional framework developed to regulate it limit the effectiveness of the law: 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 the incredibly flexible nature of the uses to which online services can be put, there are clear information inequalities 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 nature of the framework to deal with emerging trends and issues (planning).

In the Australian regulatory context, Grabosky and Braithwaite<sup>15</sup> have highlighted the issue of regulatory distance as a determinant in the effectiveness of regulatory processes and structures. The concept 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' (warnings, advice to correct behaviour, education, public shaming, *etc.*). Overall, the co-regulatory nature of the system for content regulation brings the legislative regulators (the ABA) 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 *online content regime* has virtually zero regulatory distance. This limited distance has appeared to have limited industry compliance.

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<sup>15</sup> Grabosky, P and J Braithwaite (1986) *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, Melbourne.

Currently, there is 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>16</sup>, the development and maintenance of this information is simply a tick and flick compliance measure by industry with little interest, ownership, or active participation in the further development of this resource for users. 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 the public. Two factors motivate limited ownership, 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>17</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>18</sup>, rather than emphasis on specific market segmentation or product enhancement marketing strategies<sup>19</sup>, and
- 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 (*e.g.* excessive bandwidth use, use of accounts for SPAM mail, *etc.*).

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>20</sup>. In part, this reflects a clear economic motivation for action in this area, but also reflects – for ISPs – the use of a co-regulatory approach that includes 'ownership' of service quality regulation: through the TIO, ISPs directly fund mediation and dispute resolution with customers. This illustrates that limited industry interest in the *online content regime* 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. This point is returned to in §4.2.3.

## 2.5.2 Adult Industry

The vast majority of commercial sex sites located on the Internet remain outside of the jurisdiction of the *online content regime* and are therefore exempt from compliance with the laws. One measure of the effectiveness of the regulatory regime,

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<sup>16</sup> Internet Industry Association (2002) *IIA Guide for ISPs*, <http://www.iaa.net.au/guide.html>

<sup>17</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>18</sup> Productivity Commission (2001) *Telecommunications Competition Regulation: Inquiry Report*, December, Canberra.

<sup>19</sup> Dicken, P (1998) *Global Shift: Transforming the World Economy*, Paul Chapman Publishing, London.

<sup>20</sup> Australian Communications Authority (2002) *Consumer Awareness and Information Needs Survey 2002*, <http://www.aca.gov.au/publications/reports/awareness/report2002.htm#internet>

however, would be in determining what measures the Australian adult industry have taken in response to the laws.

A review of these responses was undertaken in early 2002 and are provided in an attachment. The research found that, in relation to Internet censorship:

- Awareness of the law was reasonably high,
- Inadequate action was taken in response to the law, and
- The law had limited impact on the industry.

The most common response to the regulations of the Commonwealth were not compliance with the spirit or letter of the laws (say, the implementation of access prevention arrangements for material that would be classified R), but regulatory avoidance through moving content outside of Australia. Overall, the industry appears to have identified that, as Australians can still access prohibited content hosted outside of the Commonwealths' legal and effective jurisdiction, the law has little relevance to their business operations.

## **2.6 In Summation**

The *online content regime* does not appear to have had success in achieving its stated objectives. Partially, this problem is associated with the limited capacity for online content to be restricted through technical means (the governments preferred approach – universal filtering), but also because of the scant investment in effective mechanisms for user protection: education, training, and support. While it appears that the operations of the Act remain unclear to the general community and elements of Internet industry, the value of the TIO for service quality issues shows that the industry is not adverse to positive co-regulation that requires an investment of financial resources to achieve improved consumer service outcomes.

In addition, the application of elements of the *online content regime* within the area of gambling have been similarly ineffectual. Whereas some may support content regulations because, byenlarge, they have had negligible impact on the freedom of speech of Australians, in exporting Australian online gamblers outside of Australia, the Commonwealth has done little to either protect the revenue base of the states and territories, and failed to provide any form of leadership in addressing the negative impacts of problem gambling in the online environment.

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*The Broadcasting Services Amendment (Online Services) Act 1999 has failed to achieve the stated intentions of the legislation, both in terms of its specific objective (child protection) and its wider application. The regime should be substantially redeveloped following the Departmental review process*

### **3.0 Changes in the Information Economy Post 1999**

From examination of the political debate surrounding the development of the existing regulatory regime, a number of factors unique to the period 1997-9 motivated debate surrounding online content and the Government's response:

- Wide scale ignorance of the nature of the technology (both within government and the general community), its capacity, technical basis, and capabilities,
- Alarmist reporting by members of the tabloid press about the risks associated with the online environment (based on poor quality, or distorted academic research),
- A mistaken belief that the technology would revolutionise the economy and government desire to limit regulation that might impede the domestic revolution, and
- An implicit belief that future technological developments would overcome emergent problems.

Since 1999, each of these assumptions has subsided or significantly declined. There is now a significant window of opportunity to correct previous regulatory errors and encourage greater benefits from this technology.

#### **3.1 Increased Ubiquity of ICTs and Decline of Online 'Hype'**

The *online content regime* was developed through the height of the "dot com bubble". This period was characterised by:

- Unrealistic expectations as to the economic transformation of the economy due to ICTs,
- Uncritical review of the claims of technology vendors, and
- Hesitancy, on the part of government, to regulate the ICT industry for fear of divestment or failure to invest within Australia.

This time has passed. Government, business and the wider community are taking a far more realistic view of ICTs and their value.

Regardless, however, of the dot com collapse, use of the Internet, and the growth of some commercial and government online services have continued where these are based upon realistic business models (though some government spending in this area remains speculative). The Australian public, now passing 50% usage rate for online services, has continued to see the benefits of the online environment for their social and economic lives. Given this "false start", government policy makers need to consider that:

- Just as with the false start for the introduction of television into Australia, this may provide an opportunity for a more sophisticated policy response from government, and
- Simply establishing the preconditions for increased use of ICTs in the community (*i.e.* the regulation of service quality and cost) may be insufficient for developing a vibrant and beneficial "information society".

The information society is defined by the *ad hoc* working group of the U.N. World Summit on the Information Society (2001) as:

... a society which effectively utilises information/knowledge and their related technologies to expedite the process of human, social and economic

development. Its progress relies on the efficient use and exchange of information. It aims at building a digital nervous system that provides unlimited knowledge management resources for further progress and knowledge creation.

What is clear, however, is that government has a positive role to play in ensuring the emergence of the information society. This approach includes business regulation and consumer protection, public information and the recognition of access to online services and technology as a public good, and the encouragement of citizens to utilise the technology in a way that enhances their interests (economic and social).

<b>R</b> <b>11</b>	<i>The online content regime should be considered within the wider context of the development of Australia as an information society</i>
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### **3.2 Shifting Community Information Needs**

One of the limitations of current government regulation of the online environment is the changing technology underpinning the technology (in the discussion paper, generally focused on concerns about "convergence"). Given the command and control nature of the *online content* and *online gambling regimes*, this takes the form of fear that technological developments will undermine the regulatory intent of government, or that a technological "magic bullet" will be developed to overcome the problems associated with online content (better, cheaper, faster filtering). That view is not supported by this submission.

What has not been particularly well considered to date, however, is not simply the development of new technological functions of the Internet, but the way that the Internet, as a plastic medium, is continually subject to alteration and change – not to the underpinning technology, but in the way the technology is applied. Overall, the approach of the Commonwealth (legislation) is – by nature – slow and unresponsive to change of this kind.

With specific regards to the issues of concerns to Australian Internet users, therefore, the ABA have identified four 'main areas of perceived risk':

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

As can be seen, gambling is not mentioned, while content is less concerning to users than financial and privacy issues. In addition, one significant area of public concern regarding the online environment pertains to the issue of hate speech online. This area of concern has been in the public arena for some time, but, because of the general orientation of the current government towards race-related matters (implicit sanctioning of racist views), the issue was not included within the *online content regime* in 1999.

In a recent discussion paper prepared by HREOC<sup>22</sup>, the Commission has identified that, while the *Racial Discrimination Act 1975* prohibits certain kinds of hate speech,

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<sup>21</sup> Percentages based on the number of research participants who identified the particular area of concern

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 *online content regime* 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 *online content regime*. 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).

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*The Commonwealth should consider if HREOC should be granted the power to require the identification of the user responsible for a website hosted in Australia, when a complaint is made under the Racial Discrimination Act 1975*

While this may be a limitation of the current approach to racial vilification, under the OFLC guidelines, material may be refused classification if the material is deemed to "promote, incite or instruct in matters of crime or violence" (video material) or "detailed instruction or encouragement in: (i) matters of crime or violence" (computer games). This provision would appear to capture some elements of hate-related online publications that have particularly violent elements. For example, 'Example 5', of the HREOC document, does appear to incite or threaten violence against "race traitors" and the application of the RC classification to this online content should be examined. It is questionable if this content has not been removed because of a specific deficiency in the existing guidelines, or because of the lack of a formal complaint. Overall, with regards to online content and vilification, the Commission has observed that "To date, there have been very few complaints about racial vilification on the Internet [to the Commission]".

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*The Commonwealth needs to determine if the OFLC guidelines need clarification with regards to applying the RC designation to specific elements of online content that threaten violence to members of the Australian community because of their race, or personal affiliations*

In addition, to the point made above (and with reference to the lack of public awareness of their avenues of complaint raised in §2.1) 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

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

Tobin case, currently subject to appeal]<sup>23</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 the online environment.

Overall, therefore, any regulatory system requires greater flexibility to identify areas of concern, and distribute resources to prioritise and address these issues. While consumer protection and privacy online have been addressed in some form (consumer protection through a range of educative programs developed by pre-existing agencies, see §4.1, and privacy – in a very limited way – through federal and state legislation), the current level of public concern about these issues indicates that more work needs to be done in this area. As new uses for the technology develop (or new technological problems), the *ad hoc* development of public education campaigns and legislation will become increasingly unwieldy, information messages too disbursed, and the government response further un-coordinated.

### **3.3 Emerging Challenges and Needs**

Just as Australia does not have a current cultural policy, there is no central guiding direction statement for Australians use of the online environment. Overall, governments across Australia (federal, state, local) promote the use of the Internet for a variety of purposes, as:

- An educative tool,
- A means of projecting an "intelligent" society,
- Because of economic interests (transformative business practices),
- As a means of cost control within government (online service delivery), and
- As industry policy (generally).

All governments have recognised the increasing importance of the Internet as a new, cheap, and effective tool for communication and commerce, however the communitarian elements of the approach have, to date, not been emphasised. Presently, a number of governments are examining the value of ICTs for democratic purposes (electronic democracy), with the intention of facilitating online policy debate and discussion and possibly engaging members of the community under-represented in the political process. While this approach is still experimental, and has inherent limitations, it does indicate some interest in the encouragement of Australians online for more than strictly financial reasons.

Overall, however, these approaches remain formative and un-coordinated. In addition, unlike the case of broadcast media, there is limited direct policy aimed at the encouragement of Australian content online. At a purely financial level, Australia pays for the traffic that is imports over the Internet (regardless of content). Presently, NOIE, despite its key priority to "take action to ensure that all Australians participate

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<sup>23</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.

in the general and individual social and economic benefits of online services", has been largely focused on the economic dimension of the Internet and policy responses aimed at securing greater access and higher service quality and/or access speed.

Given, however, that the majority of Australian users have taken on the technology well after their formal education, the rapidity of change prohibits reliance on institutional education to develop a capable and progressive online citizenry through generational change. Without the establishment of a consistent policy and strategy for developing the effective social and economic use of ICTs, the current take up of these services will continue to stall, divisions between different citizens' levels of engagement with the technology will remain (the digital divide), and the uses to which the technology will be put may remain formative.

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*The Commonwealth needs to ask "What do we want Australians to achieve by going online?". The current regulatory environment appears overly concerned with negative personal consequences of the online environment or the economic aspects of online life – a richer cultural policy for Australia online should be developed*

## 4.0 Proposed Alternative

Given the current regulatory system used to control access to online content is insufficient to meet the challenges presented in §3 through incremental adjustment to the model critiqued in §2, an alternative regulatory approach is presented for consideration: public engagement with online technologies through participative co-regulation of industry.

This model is based on the need for:

- Increased positive community education of the potential value of ICTs for their economic and social wellbeing,
- The need for greater – and more equitable – industry 'ownership' of regulatory *outcomes* (rather than processes), and
- Active participation of the citizenry in regulatory activity (eDemocracy).

None of these elements are incompatible with the policy of the current government or opposition.

### 4.1 User Education Activities Across Australia

Should education (juvenile, parental, consumer) be the effective core of any new strategy for online content regulation, it is important for the Commonwealth to identify:

- What information is currently provided to consumers,
- The effectiveness of this information,
- Information gaps, and
- Alternative mechanisms for public education and training to enhance the positive impact of education on the online experiences of Australians.

Given the range of issues of concern, and the multiplicity of points of contact between government departments and the public, a comprehensive review of current educative approaches is impossible within the context of this submission. Two key areas of interest are: school-based education, and consumer protection and information about online commerce.

#### 4.1.1 Public Schools

With regards to school-based education, the states and territories have – for the most part – incorporated teaching about technology and communications within their wider curricula. Most states and territories maintain centralised minimum requirements about the content of course material (through statements of learning objectives), and minimum skill sets to be developed by students of different ages. Most education systems around Australia (public sector) devolve the development of teaching materials to the school-level, within the context of their respective standards frameworks.

Overall, there currently appears limited ability for the Commonwealth to determine:

- The extent of coverage of "safe surfing" messages in the school system,
- The extent that this information is moving from children to adults, and

- The effectiveness of this information and training in preventing negative online experiences among children.

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*The Commonwealth should determine if the materials developed and implemented by the states and territories are effective in providing children the skills to navigate the online environment safely. The Commonwealth should determine if its education messages for safe use of the Internet by minors should be facilitated through a mechanism such as the Le@rning Federation initiative*

#### 4.1.2 Consumer Protection Online

With regards to consumer protection, a wide range of government departments and agencies act to provide information to consumers about potentially negative commercial experiences online (scams, fraud, how to deal with complaints about goods or services). While each state and territory maintain a degree of information about online commerce issues, the Commonwealth – across a variety of agencies – issues similar information about online transactions and consumer protection from a range of organizations (ACA, ABA, ACCC, Treasury, ASIC), with each organization offering information to fulfil its community education and information requirements (see figure 2).

Figure 2: Consumer Protection Responses within Australia

Jurisdiction	Organization	Comments
Victoria	Consumer Affairs Victoria	Maintain online information for "safe shopping" online and some information about online scams (mostly through the "little black book of scams", see Treasury reference)
New South Wales	Consumer Protection Agency	
Western Australia	Consumer and Employment Protection	
Queensland	Office of Fair Trading	
South Australia	Office of Consumer and Business Affairs	
Tasmania	Consumer Affairs and Fair Trading	Directs Tasmanians to the DoCITA "shopping online" website
Commonwealth	ACCC	Administer <i>Trade Practice Act</i> (misleading conduct, etc.) applying only to corporations and individuals through telecommunications power. Take action under act when large consumer detriment. eCommerce unit publish consumer alerts and publications about specific issues (pyramid schemes, "dumping", etc.)
	ACA	Involved with consumer protection issues, such as through the TIO and other service-related initiatives
	Treasury	Have developed the "The little black book of scams" and <a href="http://www.scamwatch.gov.au">www.scamwatch.gov.au</a> to highlight scams (including online scams)
	ASIC	Have developed a community education strategy pertaining to securities and investment issues
	DoCITA	Maintains information about shopping online across a range of subject areas

Overall, there appear to be a high degree of crossover with regards to responsibility for, and engagement with, community education pertaining to online safety issues, with a number of pre-existing and emergent areas of concern (hate speech, viruses) not specifically addressed by government community education campaigns.

*An audit of education campaigns for Australians about the safe use of the Internet should be conducted to identify gaps, co-ordinate existing activities, and determine the effectiveness of these various approaches*

## **4.2 Elements of the Alternative Model**

The proposed alternative co-regulatory model has four elements:

- It must be based within a wider policy context aimed at developing Australia as an information society,
- It must be based on public education, rather than command and control regulation,
- The Internet industry should co-fund the scheme, and
- The public should be involved in the direct governance of the scheme.

### **4.2.1 A National Policy for the Information Society**

The development of a national policy for the information society would assist in furthering the economic work undertaken by NOIE and provide a "white hat" view of the innovative and socially-beneficial uses to which the Internet and ICTs can be put. Such a policy would have, at least, the following elements:

- A clear articulation of equity issues associated with the online environment (addressing the "digital divide", accessibility of online content),
- Encouragement of increased development and publication of Australian content online,
- Objectives to enhance the discovery of domestic content (local search engines, enhanced use of location-specific metadata), and
- A clear view of the range of the potential benefits that ICTs may have to the cultural, social, and economic lives of Australians.

It would be envisaged that the development of such a policy would be broadly participative and serve in identifying and showcasing Australians' most innovative and effective uses of ICTs across a range of industries, communities, and cultural and artistic sectors.

### **4.2.2 Public Education is the Key**

Following the criticisms of the current regulatory regime for online content and gambling, and the emerging issues associated with areas of public concern, public education provides the most effective way to meet the objectives of any national policy for the information society and protect Australians online. Currently, there are a wide-range of organizations (government, quasi-government, and non-government) that have developed, or see the importance of developing, information pertaining to the effective and safe use of online services. Given that areas of concern are growing, the current, somewhat *ad hoc* approach to developing and distributing this information will not be effective in the longer term.

In addition, the focus on negative outcomes (or potential outcomes) of the current raft of information provided by some organizations (NetAlert, consumer protection organizations) may be ineffective in preparing Australians for the complexities of the

online environment *before* they find material or activities online that are of concern to them. Integrating safe surfing messages within wider positive use campaigns across a variety of media forms would, therefore, appear a more effective way to develop and distribute this information, and would emulate the way that "safe surfing" messages are being incorporated into the curricular in some state and territory education systems: ICTs as a tool for the achievement of specific goals and objectives, rather than either a risk in itself, or just a threat.

In making this statement, 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.

Development of the National Clearinghouse may not require the establishment of a new quasi-governmental body, but may be developed as part of existing organizations:

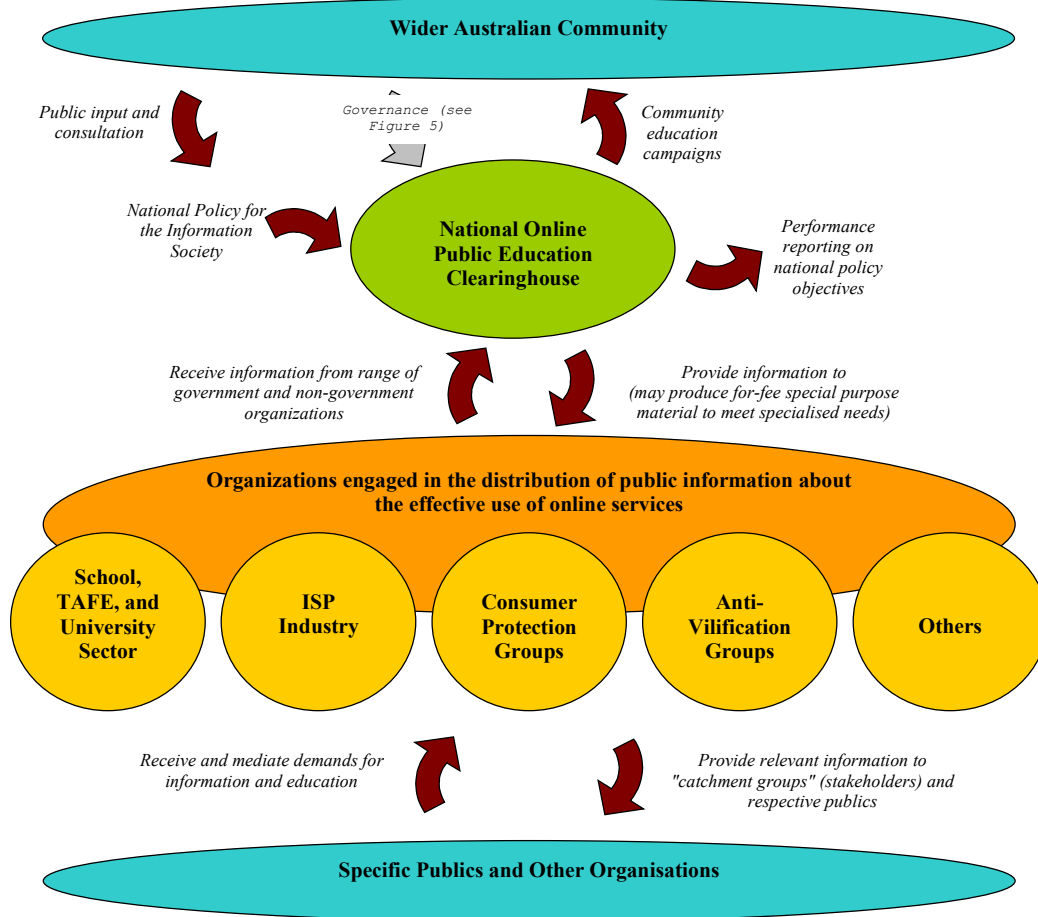
- NOIE (given their current, but somewhat under-realised, organizational objectives),
- NetAlert (given their educative responsibilities), or
- The proposed ABA/ACA merged organization (given their technical knowledge and legislative responsibilities<sup>24</sup>).

The structure of this approach is illustrated in figure 3.

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<sup>24</sup> It is unclear, however, if the ABA, as the regulator of content, should be given this function.

**Figure 3: Relationship Between the National Clearinghouse and Other Actors**



#### 4.2.3 Industry Should Fund and "Own" the Scheme

The lack of direct investment in the current co-regulatory regime has been criticised as part of the review of industry compliance. Overall, while the industry has a role in the development and implementation of codes of practice, it has escaped any direct financial responsibility for funding community education. This limitation should be corrected as it appears to limit the commitment of the industry to develop and implement these resources (although, as noted, online distribution of this information may not be the most effective communication channel). The alternative co-regulatory approach would, therefore, seek direct funding from industry for the operations of the National Clearinghouse.

Figure 4 outlines a range of different mechanisms for funding the alternative co-regulatory approach that may be considered by government. As ISPs and ICHs are not formally licensed by government at present, there are some constraints in the administration of any regulatory system in this marketplace (current or proposed).

**Figure 4: Funding Models for the Alternative Co-regulatory Scheme**

Model	
Industry Levy Approach	<p><i>Via the TIO:</i> The telecommunications industry ombudsman scheme is an independent body set up by government which investigates ISP complaints (as well as other telco services). Membership of the TIO is compulsory for all ISPs. Members are charged on a "per mediation" basis. Decisions to \$10,000 are binding.</p> <p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>○ Existing regulatory scheme with collection mechanism and compulsion for ISPs to join</li> <li>○ Wide coverage of industry</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>○ Not universal membership of scheme (although a levy would further encourage compliant organizations to "nominate" non-compliant ISPs for membership)</li> <li>○ Additional administrative impost on the TIO and the capacity of the TIO to determine the relative size of ISPs (for levying) may be difficult to determine – as the current size of the annual "Volume Related Costs and Operating Costs" is based on complaint numbers only</li> <li>○ May undermine compliance with wider TIO objectives</li> </ul>
	<p><i>Via the USO:</i> Money could be taken from the Universal Service Obligation on carriers (one step up the chain from ISPs). This money is already collected on a formula model that should discriminate between large and small carriers. The levy does not apply to the current USO holder (Telstra), but incorporating their contribution to a levy would not be problematic.</p> <p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>○ Cost would be passed through the commercial chain to ISPs (thus being equitable in distribution of costs to some degree)</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>○ Places the burden on carriers (rather than ISPs), levy may not be transparent</li> <li>○ Does not encourage "ownership" of the educational component by individual ISPs (as opposed to some ISPs who are also carriers)</li> <li>○ USO scheme has a range of wider difficulties and disputation within the telecommunications sector and may not be sustainable in the longer term</li> </ul>
	<p><i>Via The ACA:</i> ISPs fall under the category of Carriage Service Providers under the Telecommunications Act 1991. The ACA does collect some information on ISPs, through the Section 105 reporting mechanism that requires Carriers to provide information on telecommunications services and activities.</p> <p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>○ ACA have responsibility for industry regulation</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>○ CSPs are not licensed with the ACA, making the ability of the ACA to levy this subclass of providers potentially limited</li> <li>○ As ISPs range from the very large to the very small, the capability of this reporting mechanism to identify all ISPs and their level of market share is limited and could easily be contested by operators who have been subject to 3<sup>rd</sup> party reporting</li> <li>○ Impedes the ability for this mechanism to be utilised to develop an accurate funding model for any proposed industry levy. As further consolidation in the traditional ISP market continues, this limitation may become less problematic, however the growth of wireless "hotspot" operators may negate this trend to some degree.</li> </ul>
Alternatives to a Levy Models	<p><i>Fee for Service:</i> From information users for access to community education information and resources</p> <p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>○ Users have flexibility to select information on the basis of pertinence to their customers and its quality</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>○ Take-up likely to be limited (especially among ISPs if voluntary, and widespread avoidance if compulsory)</li> <li>○ Discourages information sharing</li> </ul>
	<p><i>Voluntary or Mandated Contribution from the Industry:</i> IIA provide funds for community education gathered from membership</p> <p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>○ Engages IIA with community education more closely</li> <li>○ IIA already has a differential mechanism for membership fees</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>○ No universal ISP membership of IIA</li> <li>○ Likely to be strongly rejected by the IIA</li> <li>○ Deter membership of IIA</li> <li>○ Free-riders</li> </ul>
	<p><i>Direct Funding from Consolidated Revenue:</i> Total cost of community education provided by the commonwealth.</p> <p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>○ Substantial resources available to the Commonwealth</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>○ Commonwealth already carries substantial cost of education development and distribution through a variety of bodies</li> <li>○ No industry ownership</li> </ul>

Overall, there is insufficient extant information to develop a detailed and fair funding model for an industry levy. The most *effective* point of levying would appear to be at the USO level, however a more *appropriate* point of capture would appear to be through the TIO. This mechanism would require:

- Legislative change and changes to the articles of association of the TIO,

- Development of a method for assessing members' relative size (be that based on customer numbers, market share, final profit after taxation) and determination of an appropriate levy formula, and
- Redevelopment of the existing collection mechanism.

The levy approach would appear to have difficulties associated with smaller ISPs in two forms:

- How to identify smaller ISPs that are not part of the TIO scheme (however, ISPs should be part of the scheme regardless of the application of the TIO for this purpose), and
- How to prevent the levy (or associated compliance costs) adding to the current process of consolidation within the ISP marketplace (net reduction of competition, possibly requiring a sliding scale of contribution based on market share).

The advantage of the development of an accurate assessment mechanism for collecting any levy would lie in greater data collection about the size and composition of the ISP industry. This information would be beneficial to NOIE, the ACA, the ABA, the ABS, and policy researchers and industry analysts. One potential area of complexity, however, lies with ICHs. At present, ICHs are not required to be members of the TIO, within the context of the alternative co-regulatory approach this may be problematic as:

- ICHs would be valuable in providing positive education messages for content development, indexing, and classification, and
- Some ICHs operate as commercial entities and therefore have the resources to support regulation

On the other hand, there are a range of ICHs that are not-for-profit organizations that have public interest outcomes (for example, universities). This issue would need to be clarified prior to the development of any levy model.

**R** *The structure of the market with regards to ISPs and ICHs needs to be clarified*  
**17** *through further marketplace research*

#### **4.2.4 The Public Should Govern the Scheme**

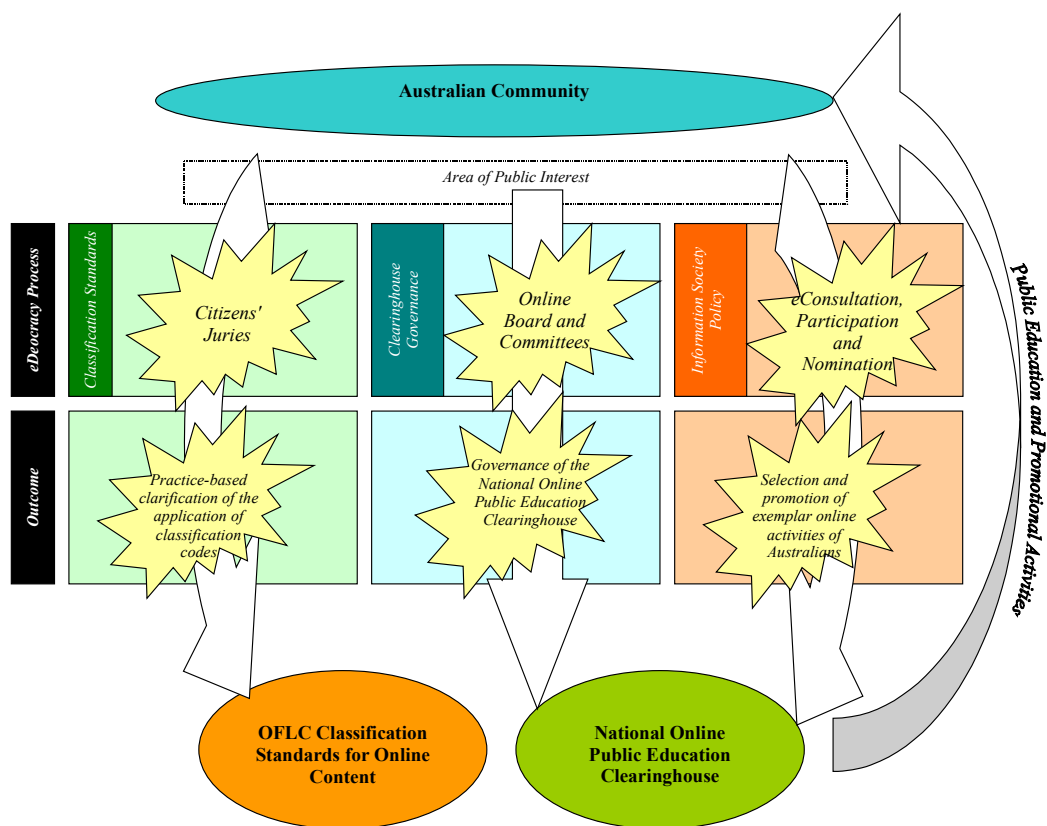
The final, and most critical, element of the proposed alternative co-regulatory model is that the public should be actively engaged in the governance of the system. At present, public involvement in the operations of any of the online regulations is extremely low – they tend to be subject to the decisions of government with few points at which their views and opinions can be aired. While this approach is not abnormal compared to most areas of regulation, the communicative elements of the regulated medium negates normal barriers to participation.

As the vast majority of the elements of current regulatory approaches apply solely to those who are online, there is no reason why the medium cannot be used for the application of a range of electronic democracy approaches to the operations of:

- The National Online Public Education Clearinghouse, and
- The OFLC.

This approach is illustrated in figure 5.

Figure 5: Public Governance of the Clearinghouse and Related Regulatory Bodies



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 the 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.

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>25</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:

- It increases public participation with the classification process,
- It provides the Office with ongoing feedback about community views and values – rather than the current approach to have period formalised consultation processes, and
- 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:

- Specific public education campaign development and implementation,
- The maintenance of the national policy for the information society,
- 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>26</sup>, with the aim of making this service a key default site for Australians' gateway into the online environment, and
- 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:

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<sup>25</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>26</sup> This portal currently maintains about 2,100 references, compared with Google's index of over 3,000,000 .au webpages.

- 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.

**R** *The alternative co-regulatory scheme is suggested for consideration as a*  
**18** *replacement to the existing content and gambling regimes*

## **Attachment: Australian Adult Industry Survey**

### ***Introduction***

This small research project aimed to examine the impacts of the *Broadcasting Services Amendment (Online Services) Act 1999* on the adult industry in Australia. These impacts were identified as including:

- Compliance with the law;
- Impacts of the law on the business operations of the industry; and
- Changes to the adult industry's online presence during the implementation of the new regulatory regime.

The research focused on the impacts of this section of the Australian economy for three reasons:

- The regulation of adult (erotic and pornographic) content was the core aim of the enacted legislation;
- The impact of the legislation (regulatory compliance) on other primarily affected industry segments (Internet Service Providers) has already been assessed by other researchers<sup>27</sup> and through periodic reporting by the Internet Industry Association<sup>28</sup>; and

Given the global nature of the Internet as the regulated medium, compliance among content generators and distributors (as opposed to service and infrastructure providers) can be seen as a key measure of the success or failure of the regulatory regime.

While just over six hundred requests for participation were issued, the response rate of the survey was just under ten percent (sixty respondents in total answered the survey). Given this low response rate, it should be considered that:

- The salience of the issue was low; and
- The results of the research are likely to be unrepresentative to some degree.

### ***Research Findings***

#### **Awareness of the Law was High**

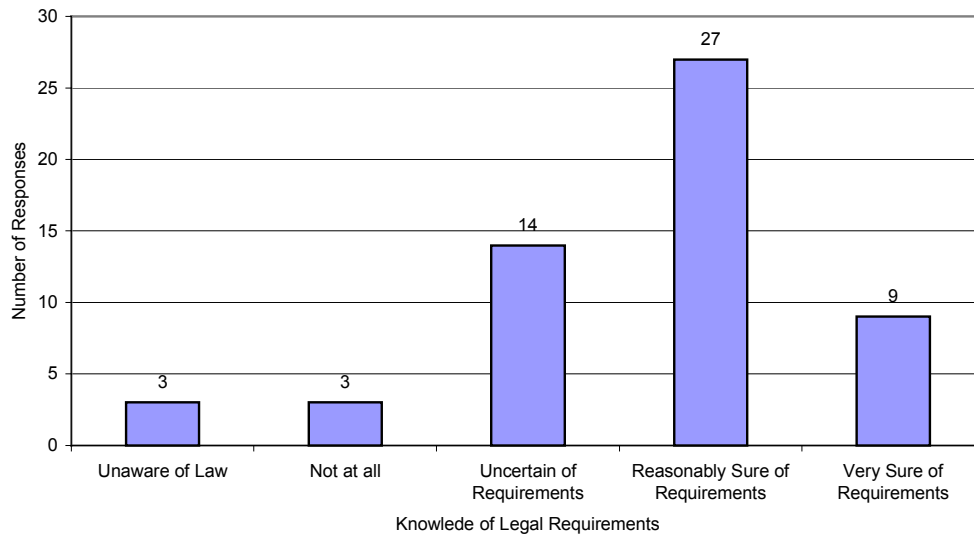
Figure a1 shows the awareness of respondents to the *Broadcasting Services Amendment (Online Services) Act 1999*. Overall, more than half of the surveyed industry members reported themselves as being "reasonably sure" or "very sure" of the requirements of the law, with approximately twenty percent reporting themselves as "uncertain of their legal requirements". A small proportion of the respondents reported that they were either unaware of the existence of the legislation, or had little understanding of its requirements. Overall, awareness of the new regulations appears high among adult industry members in Australia.

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<sup>27</sup> Carolyn Penfold of the University of New South Wales has undertaken a survey of ISPs in Australia with reference to the impact and compliance of the Act on these service providers (forthcoming).

<sup>28</sup> The Internet Industry Association (IIA) undertakes periodic surveys of regulatory compliance among member companies. This material has been tabled before the Parliament of Australia by the Minister for Communications, Information Technology, and the Arts.

**Figure a1: Awareness of the Law**

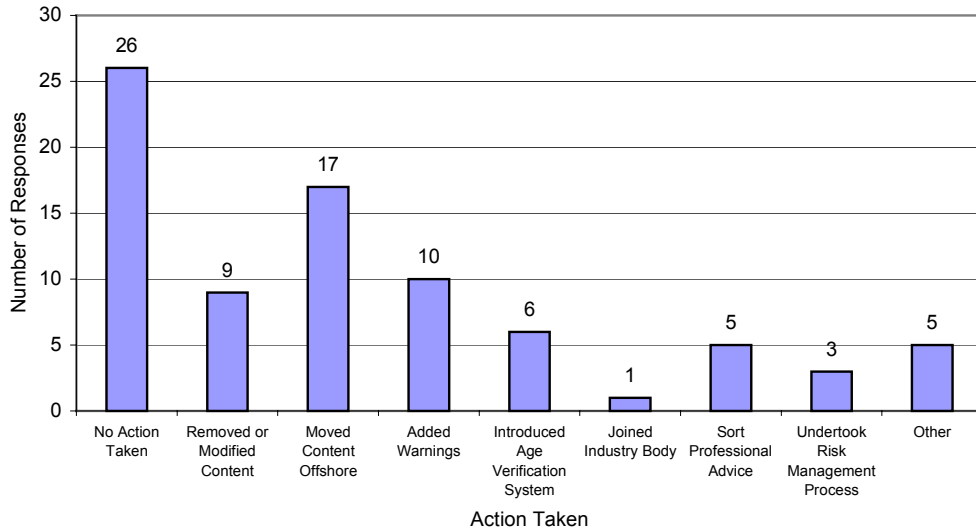


**Limited action was taken in response to the law**

Given the reasonable high awareness of the legislation, figure a2 indicates the actions taken by industry to comply with their legal requirements. Overall, most respondents felt that they needed to take no compliance action, possibly because their existing web sites contained no material that would be classified X, R, or RC under the OFLC guidelines.

The second most common action taken by industry members was the removal of their websites from Internet servers located in Australia, while a small proportion of respondents elected to remove or modify online content, introduce new warnings about the content of their website, or introduce an age verification system to prevent minors accessing their content online. What this findings shows is that, with the exception of those sites that lack content which would be restricted under the act, the majority of adult industry website operators opted to avoid regulation through off-shore hosting, rather than undertaken actions to comply with the intent of the *Online Services Act*.

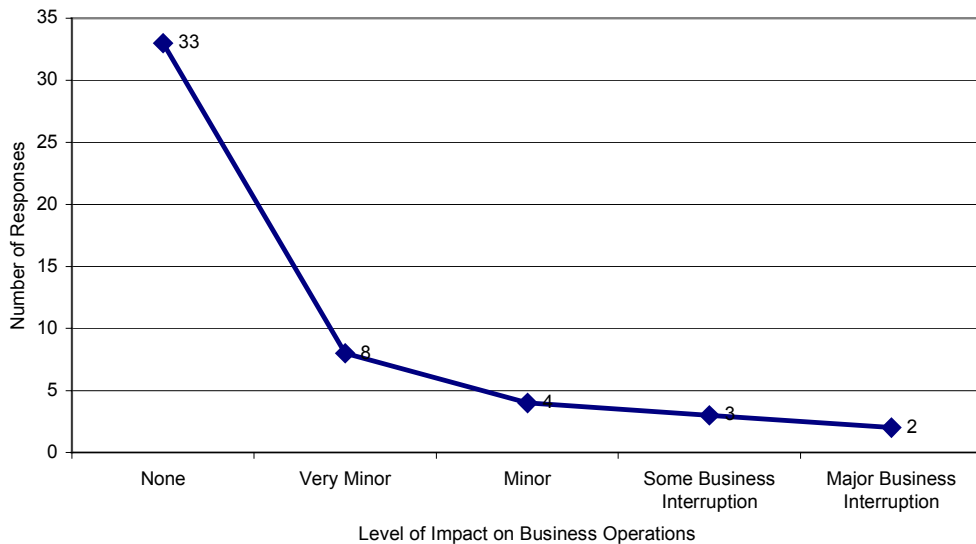
**Figure a2: Action Taken in Response to Law**



**The law had limited impact on the industry**

Possibly because of the findings illustrated in Figure a2, the reported impact on business operations of the *Broadcasting Services Amendment (Online Services) Act* is predominantly reported as none, or very minor (figure a3). Very few respondents reported significant impacts on their business operations in compliance (or avoidance) with the online classification law.

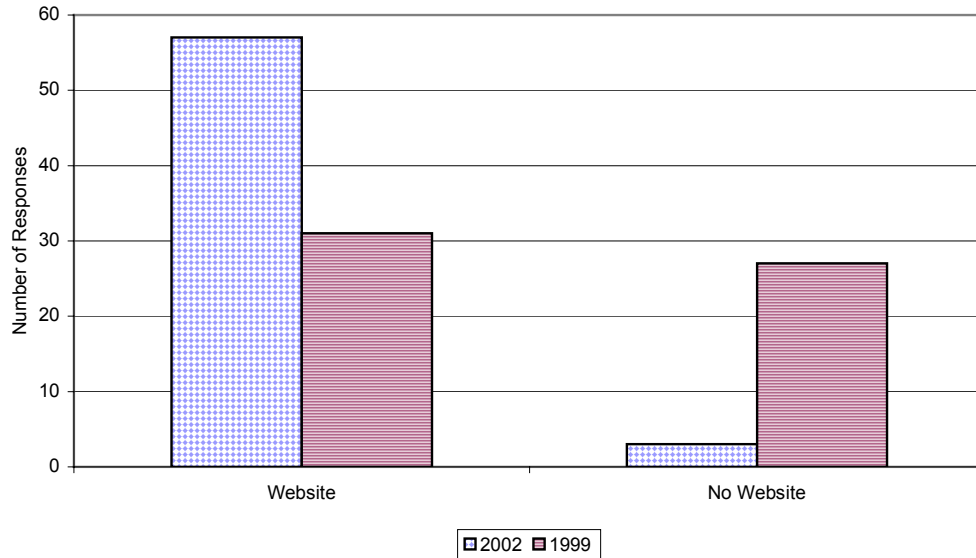
**Figure a3: Impact on Business Operations**



**Website growth rates remain steady**

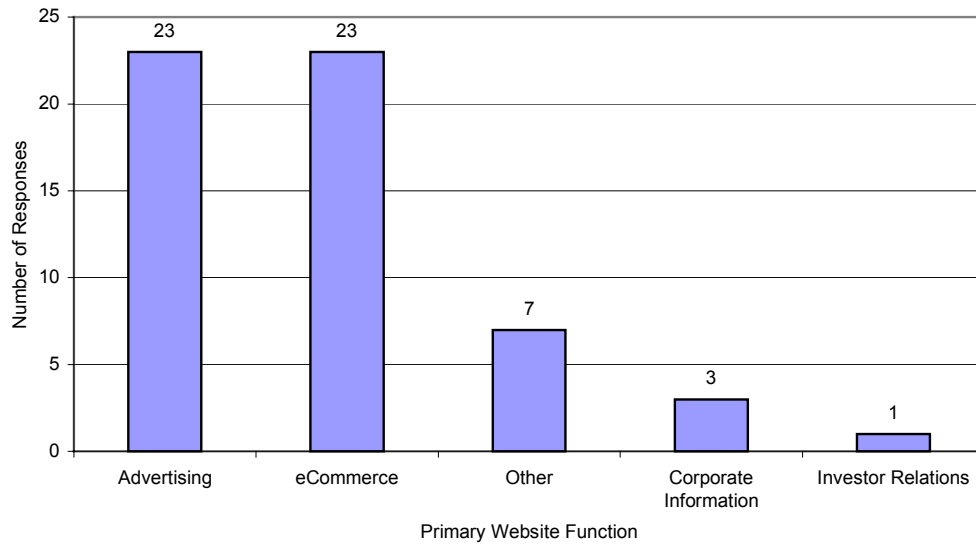
Figure a4, shows that, in the two years of the operations of the legislation, the growth in website operation by members of the adult industry in Australia continues to rise.

**Figure a4: Adult Industry Websites – 2002 and 1999**



In 2002, the primary function of these sites remains advertising of commercial services and products and online sales of goods and services (figure a5, b).

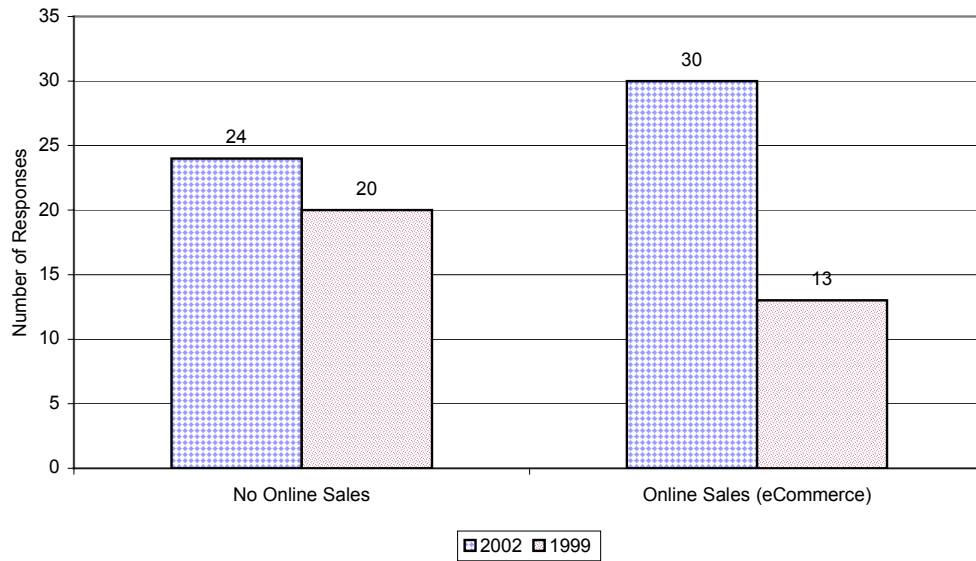
**Figure a5: Adult Industry Websites - Functions**



**Ratio of eCommerce providers continues to rise**

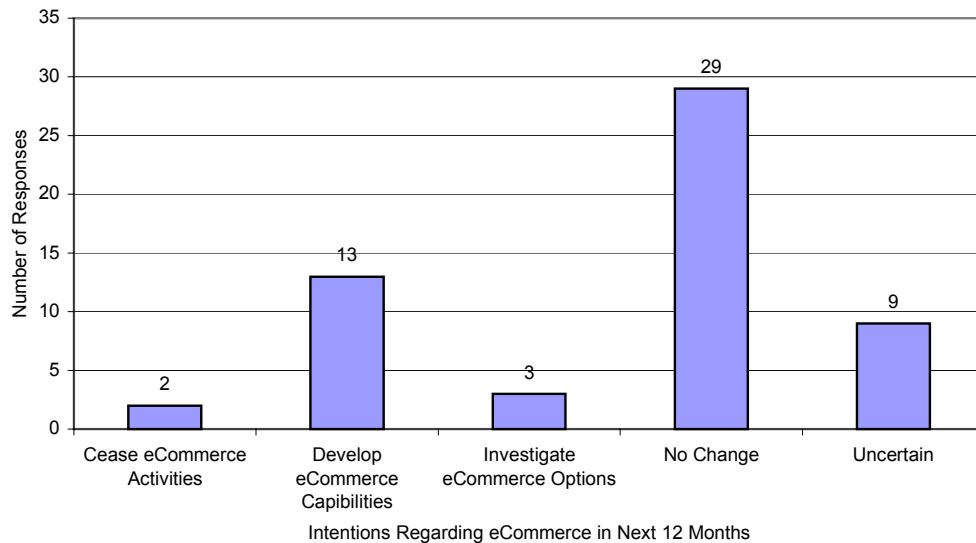
Overall, in the two years from 1999 to 2002, the ratio of sites containing online sales capabilities compared to those that do not has risen over the last two years, as indicated in figure a6, reflecting trends outside of the adult industry that indicate online shopping has continued to increase in recent years.

**Figure a6: Adult Industry eCommerce – 2002 and 1999**



As an adjunct to the findings of figure a6, the intention of members of the adult industry with regards to online sales continues to be bullish, with the majority of those maintaining eCommerce facilities to continue these operations, and a high percentage of those operators without eCommerce capabilities electing to introduce these services in the year 2002-2003 (figure a7). Only two respondents reported that they intend to cease online sales in the coming twelve months

**Figure a7: Adult Industry eCommerce Intentions**



**Summation**

While the response rate to the adult industry survey was low, the findings collected in the first quarter of 2002 indicate that, among members of Australia’s adult industry, the impact of the *Broadcasting Services Amendment (Online Services) Act 1999* has

been very low. While some avoidance of the law was undertaken, mainly through removal of content in Australia to international servers, the majority of respondents report little impact from the law on their business operations and required no action to comply with the new legislation.

As illustrated in the continued growth of online content and eCommerce in the sector, the Internet censorship legislation appears to have had a limited negative impact on commercial operations in this industry segment.

## ***Research Methodology***

The population universe for the research was all commercial providers of adult services and products operating within Australia. This population included domestic and multinational organisations, and included:

- Independent sex workers, erotic dancers, strippers, and performers;
- Erotic and pornographic photographers, artists, and film makers;
- Adult publishers, duplicators, and industry representatives; and
- Wholesale and retail sellers of adult goods and services.

The population universe consisted of organisations and individuals. However, given the nature of the industry, it must be noted that:

- A population sample was not possible to identify because of the fragmented nature of the industry, with many specialised service providers not readily identifiable from existing published sources (mailing lists, advertising, online references)
- A section of the industry (the size of which is difficult to fully estimate) do not operate legal businesses (for elements of the pornographic video distribution segment this consists of illegal distributors operating in most, if not all, states and territories, for providers of sexual services, this includes unlicensed brothels, sex workers, and erotic performers).
- However, it should be noted that, given the research was concerned with those members of the industry who have established an online presence (or were considering doing so), the limitations of unlawful or underground operators is limited in the research results.

## **Sample**

Based on this assessment of the population universe, a sampling frame was developed using the assistance of the Eros Foundation who provided extracts from their membership list as the first point of contact with industry members via personalised emails requesting participation. The Eros foundation is the peak industry association for the adult industry in Australia. In addition to this primary sampling method, the Eros membership list was increased using existing published sources to locate adult industry members, including:

- The Yellow Pages,
- Online adult business directories, and
- Those organizations and individuals involved in the adult industry identified through an online search (using the Google search engine).

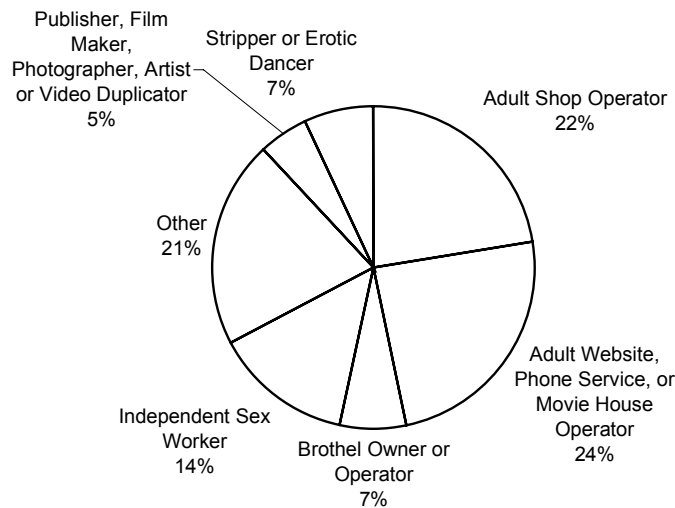
This approach was included to increase the sampling rate and include organisations and individual who may not have elected to join the Eros Foundation as the industry peak body. In addition, an advertisement was placed in the aus.sex newsgroup for participation from industry members. The total sample size was nearly seven hundred individuals and companies.

The response rate for the research project was just under ten percent. A break down of response types and business types of the respondents are provided in Table a1 and Figures a8 and a9.

Table a1: Response Rates

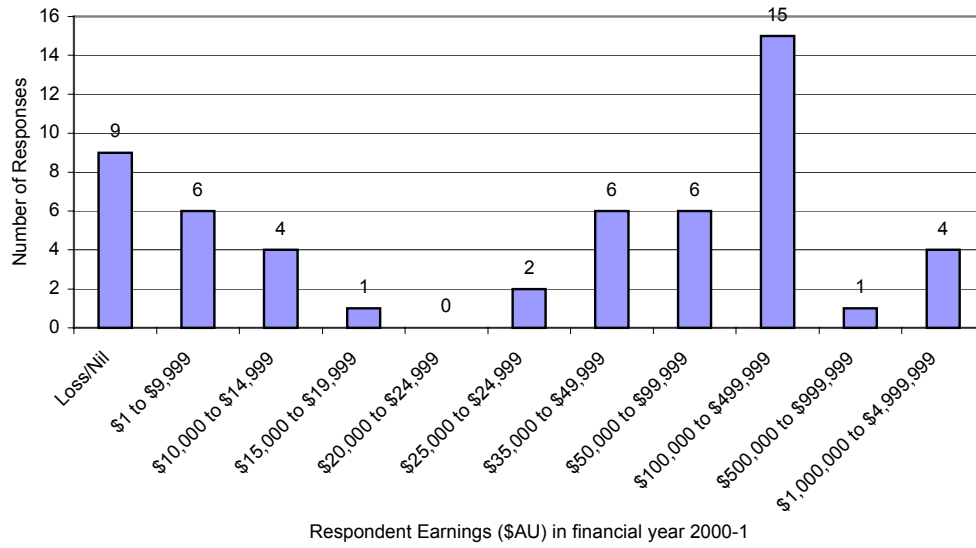
	<b>Issued</b>	<b>Returned to Sender</b>	<b>Responded Online</b>	<b>Responded by Post</b>
<i>Email</i>	323	59 <sup>29</sup>	46	1
<i>Mail</i>	362	21	2	11
<i>Fax</i>	14	7	0	0
<b>Total:</b>	<b>699</b>	<b>87</b>	<b>48</b>	<b>12</b>
	<u>Total Sample:</u>	612	<u>Total Response:</u>	60

Figure a8: Respondents by Business Type



<sup>29</sup> It is likely that the email failure rate reflects the transient nature of some sections of the industry.

**Figure a9: Survey Respondents – Earnings**



### **Instruments**

The industry survey took the form of an online survey using basic HTML form construction and Common Gateway Interface (CGI) scripting to record information for analysis. Information was recorded to a standard log file (CSV format) for analysis via a standard statistical analysis package.

The online survey has limitations associated with the limited uptake of the medium used to distribute the survey. The impact of this limitation was mitigated by the nature of the survey content, concerned with accessing industry perspectives on the impacts of the legislation on their current and past web strategies and commercial directions, thus exclusion of those organisations and individuals who were unable to access the Internet was less likely to have as statistical impact. In addition, organisations and individuals without an email address were mailed a paper version of the online survey, providing the option for these respondents to respond online or via mail.