Internet content regulation in Australia; perceptions thus far

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Introduction

During the passage of the *Broadcasting Services Amendment (Online Services) Act 1999 (Online Services Act)* and prior to its substantive provisions coming into force in January 2000, there was a great deal of criticism of the legislation, anticipation of onerous responsibilities being placed on the internet industry, and anticipation of huge changes to the internet in Australia. Industry Codes of Practice (Codes) were registered with the Australian Broadcasting Authority (ABA) prior to the legislation taking effect, and these Codes are to be read in conjunction with the *Online Services Act*. Due partly to amendments during the bill's passage, and partly to the provisions of the Codes of Practice, the concerns initially voiced over the scheme died down to some extent.

Information regarding the effects of the scheme can be difficult to access. The Internet Industry Association (IIA) reports periodically to the ABA on compliance with Codes of Practice,[1] and the ABA reports periodically on its activities under the scheme.[2] However, the reports available give little information about the industry's perception of the scheme, nor whether initial concerns have really been allayed.

Surveys

To gather more information regarding the effects of the *Online Services Amendment*, two surveys were conducted in July and August 2001, 18 months after the scheme for online content regulation came into operation. This paper looks firstly to the quantitative data gathered in that survey, such as: what proportion of respondents have changed policies as a result of the legislation or Codes; what proportion believe there have been changes in the internet content available; and changes in the methods of controlling that content and so forth. The paper then looks to the qualitative data gathered in the survey, which allows perhaps a more substantive insight into perceptions of the effects of the *Online Services Act*.

The surveys were not intended to test any hypothesis, and this paper makes no attempt to evaluate the *Online Services Act* on the basis of survey responses. Rather, the information collected in the surveys is intended only to throw further light on early responses to the *Online Services Act*.

Survey method

The first survey, addressed to industry participants, was distributed electronically to members of the Internet Industry Association, and to members of two Australian ISP email lists.[3] The second survey was distributed in hard copy to those who had made submissions to the 1999 enquiry into the Online Services Bill undertaken by the Senate Select Committee on Information Technology. It was assumed that the former group would be familiar with changes online and within the industry, and that the latter group would have an interest in those changes. One hundred responses were received overall; 74 responses to the email survey, and 26 to the hard copy survey. Respondents to the email survey included content providers, content hosts, filter makers, ISPs, and users.

Not all questions were relevant to all respondents, and thus numbers of responses varied from question to question. Furthermore, it was sometimes difficult to categorise a response as a yes or no answer for quantitative purposes. Where responses could not be reliably grouped into yes / no categories, they were not included in figures given, or where appropriate were separately categorised as 'possibly,' 'maybe,' etc. In this regard the author has taken every care possible to ensure that the figures given are not skewed by forcing inappropriate categorisation.

Results

Changes to Practice or Policy in the Internet Industry

Industry respondents were asked whether or not they had changed their practices or policies as a result of the *Online Services Act* or Codes. Sixteen had made changes while seventeen had not. When asked how important the changes were, nine classed the changes as trivial only, six thought they were significant, while eight saw the changes as in between the two.[4]

The most commonly cited changes made to policies and practices were moving content overseas, using anonymous proxy servers, and ensuring compliance with the *Online Services Act* and Codes (such as ensuring subscribers are over 18 years of age or having parents sign application forms). A number of respondents put information on their own websites regarding the *Online Services Act* and Codes, or provided links to such information on other sites. Further changes included selling or advising on filter software, and in one case even producing a new filter. Other action included restricting web content in various ways, such as refusing to host anything controversial and removing public service web hosting. At least one respondent would have preferred to continue hosting in Australia rather than moving to an offshore content host.

Respondents were asked how the changes they made to practice and policy impacted upon their organizations, and on their subscribers, viewers, and audience. For their organizations seven respondents viewed the changes as positive, eleven as negative, five as neither positive nor negative, and three as in-between.

Where respondents saw changes as negative for their organizations, they mainly cited the higher cost and loss of control (for example being forced to carry advertising) associated with overseas hosting, which they had moved to as a result of the new legislation and codes. Others saw the changes as requiring additional work, and leading to more uncertainty. On the positive side, changes made as a result of the Codes were seen to increase industry credibility, and to give organizations an opportunity for self-promotion. Only two respondents remarked specifically on content issues in reply to this question; both were concerned about any content restrictions, but one accepted that some internet content does require restriction.
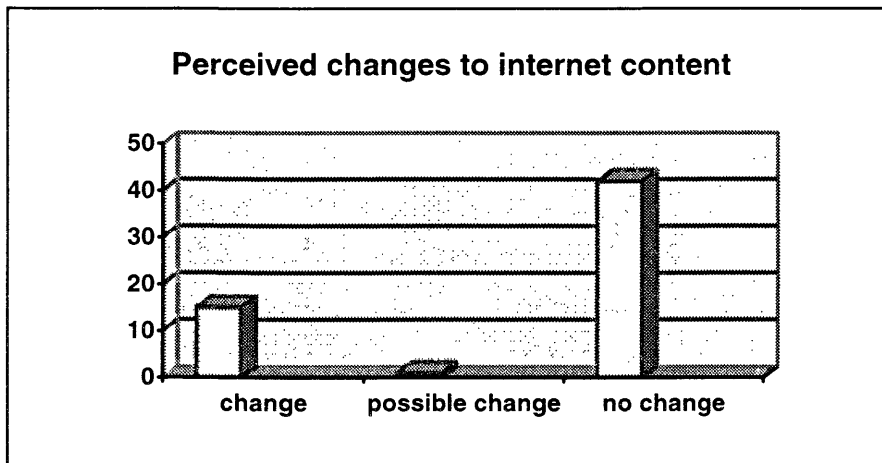
Seven respondents saw the changes as positive for their subscribers, viewers or audience, fourteen saw the changes as negative, and six as neither positive nor negative.

On the positive side, changes to policy and practice were seen to improve service to customers, to raise awareness, to encourage complaints if others were not doing the right thing, and to give users more options in controlling their own access to content. On the other hand, the changes were seen to restrict freedom of the internet and freedom of speech, force some Australian content - especially personal websites - to be removed altogether, or moved offshore when Australian hosts refused to carry the material. This was seen also to weaken the Australian internet industry, and to send Australian money offshore unnecessarily. There was also concern that only commercial filters had been approved, and that there was no disclosure of which sites had been blocked. One respondent also mentioned the potential for increased political control of internet content. Further, significant regulatory issues were seen to arise for young people and those providing services to them, for example, seventeen year-old university students.

Changes to internet content available within Australia

Respondents were asked whether they believed there had been any changes in the types of internet content available in Australia over the past 18 months, and whether or not they thought this was a result of the *Online Services Act* or Codes. Fifteen respondents thought there had been changes to the types of content available, forty-two responded that there had not been changes, and one respondent thought that there may

Perceived changes to internet content

possibly have been changes.

Only three respondents thought the changes were a response to the Online Services Act or Codes, one thought those partly responsible, and sixteen thought the *Online Services Act* and Codes were irrelevant to changes in internet content.

The most commonly stated view was that the same types of material are still available, but that there is more of it, and that more material may now be hosted outside Australia. An increase in the use of peer-to-peer technology for distributing content was noted. Some respondents thought there may have been a mild "chilling effect"[5] on local content as a result of host concern about potential liability under the *Online Services Act,* and adult mailing lists and groups were seen to be under pressure, but as a result not of the *Online Services Act* but of overseas Christian lobby groups! A couple of respondents mentioned that overseas standards and legislation would have a far greater impact on available content than would Australian legislation or codes. A couple of respondents thought that the

quality of content available had improved. Some thought there were increases in commercial content, more interactive e-business content, and more charging for previously free material. These changes were seen to result from good business planning. There was also seen to be more adult material available, with more aggressive marketing, but less 'mouse trapping' porn.[6]

External controls on access to internet content

Respondents were asked whether there had been any change in the ability of Australian internet users to access internet material, as a result of external controls (such as filtering or password systems) introduced by ISPs, content providers, content hosts etc. They were also asked whether they believed any such change to be a result of the *Online Services Act* or Codes. Two thought that there had been such changes, with one mentioning a change to a specific site which now required membership and passwords. Four others thought there may have been a minimal change in accessibility, while fifty-one, the vast majority, thought there was no change at all in the ability of Australian users to access internet material.

External controls on access to content - perceived changes

General Comments

In addition to answering specific questions regarding internet content regulation, both groups of respondents made general comments regarding the content regulation scheme. Submitters were responding to questions about their initial concerns, whether these had been allayed by the *Online Services Act* or Codes, and any continuing concerns. Industry respondents were replying to the more general 'Any other comments?' Responses from both groups overlapped considerably, and so have been collated together.
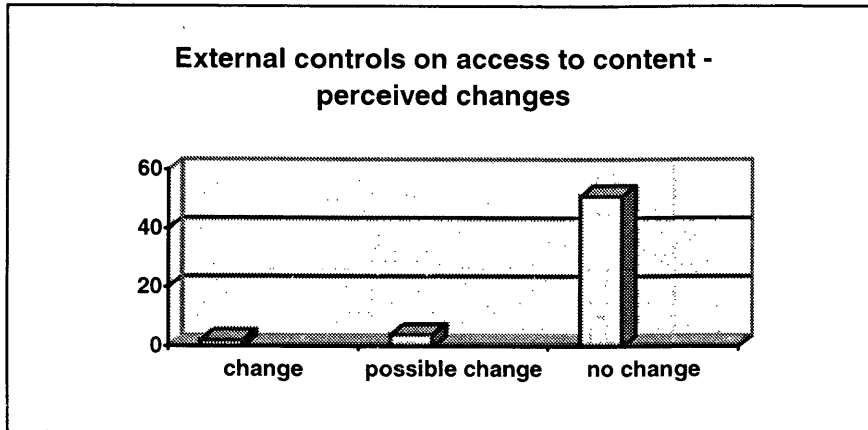
Five respondents attributed any change in content to the *Online Services Act* or Codes, three more thought that the changes were possibly due to the *Online Services Act* or Codes; two mentioned there may be changes as a result of media hysteria, and others mentioned tighter controls at top level users, for example corporations, to control workplace access to some internet content. One respondent thought ISPs may have introduced filtering.
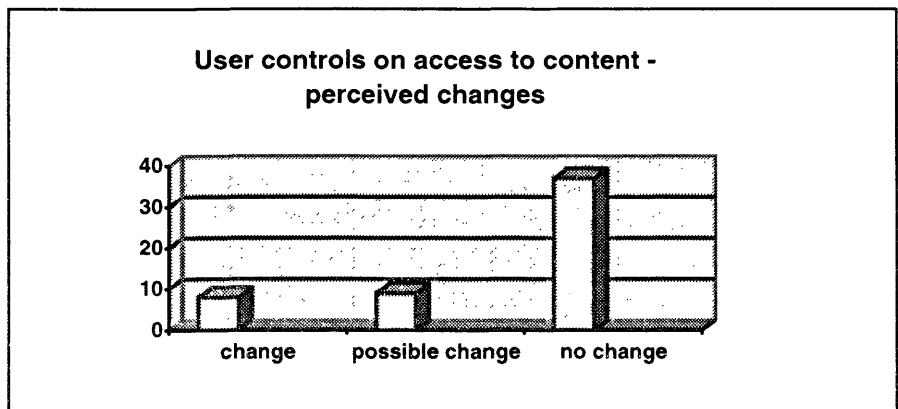
Some respondents suggested that with internet access being cheaper and faster, more people were connected to the internet from home, and so may surf for 'problematic' material from home if blocking occurred at work or school. The *Online Services Act* and Codes may have increased awareness of the availability of internet content, but their most commonly cited consequence is to move sites off shore.

User control of access to internet content

Respondents were asked whether there had been any change in the ability of Australian internet users to control or limit exposure to internet content for themselves or for those under their care. Eight respondents thought there had been some change, nine thought there may have been some change, especially through increased public awareness of filtering products, and thirty seven, over two-thirds, thought there was no change at all.

Seven respondents thought that any changes were a result of the *Online Services Act* or Codes, three possibly so, and fourteen thought that the changes did not result from the *Online Services Act* or Codes.

A commonly made point was that filters had been available and had been

User controls on access to content - perceived changes

used by those who wanted them long before the *Online Services Act* and Codes came into effect. One respondent claimed 'parents are not as stupid as governments think. There have always been sensible ways to use the internet.' Some respondents thought that the use of filters may have increased, with increased public awareness of them, and one respondent thought that filter technology had improved. Others, however, believed filter technology had not changed, that filters were generally ineffective, and often incorrectly installed. A number of respondents were concerned that the promotion of filters would give parents a false sense of security, and lead parents to abdicate responsibility when in fact there was no substitute for parental supervision. One respondent thought the *Online Services Act* and Codes superfluous: 'we don't need Acts or Codes to tell us to keep fireworks or medicines out of the reach of unsupervised children. In the same way we don't need an Act or Codes to tell us that about the internet.'

Very few respondents argued against censorship or content regulation *per se*. Many endorsed some type of regulation either of internet content, of the internet industry, or both. Many, however, criticised this particular legislation and its associated Codes of Practice.

There was criticism of the legislation as ineffective, and this came particularly from respondents who wished for more far reaching regulation. There was concern, for example, that the exclusion of email and chat from the legislation meant that these means could still be used for disseminating hate and racist material. Others were concerned that content restrictions were ineffective firstly because they did not mandate the use of filters or other blocking technology at any level, and secondly because enforcement was based solely on complaints. Some respondents suggested that active and random monitoring of internet content would be far more effective than the current passive 'complaints received' route.[7] Problems associated with relying on complaints included a lack of

knowledge about how to complain, the inability of users to distinguish legal from illegal material which may discourage them from complaining, and limitations on the resources of those charged with responding to complaints. One respondent who thought many users were not motivated to complain, felt restrictions should not rely on the motivation of users; there should be proactive monitoring and blocking because the restrictions are not just to avoid offence, but to protect society. Broader but related concerns included questions of whether content to be restricted was sufficient and appropriate (for example should racism be more subject to restraint than currently), and whether the classifications scheme was discriminating enough and provided sufficient information about content (classifications should be used better to inform parents and carers and users about the types of material they may see, and what ages various types of material were suited to). While some respondents thought that more blocking should be required, one thought that the legislation, although ineffective in restricting content, was effective in sending out a message about the dangers of the internet, and that the establishment of Net Alert[8] to promote information for internet users was also a positive move.

Other respondents were more critical of the legislation. Commonly expressed criticisms included:

a) that the scheme introduced could not meet its objectives;

b) that the legislation could be more heavily enforced in the future;

c) that the promotion of filters could give internet users a false belief in their effectiveness; and

d) that the operation of the scheme was surrounded by secrecy.

(a) *The scheme*

Some respondents felt that the scheme overall demonstrated a lack of understanding of the technical issues of internet content regulation, and a failure to acknowledge the global nature of the internet. Thus the *Online Services Act* made Australia look reactionary, discouraged investment,

embarrassed those in the industry, and insulted the public: "How stupid do politicians think we are? Or don't they think it matters what the public think?" "It has damaged Australia's IT reputation, it has forced traffic positive sites OS, and hasn't improved the safety of home surfers."[9] A number of respondents referred to the ease with which content could be removed from Australian servers and placed on overseas servers,[10] keeping content as readily available to Australians as prior to the *Online Services Act*. This made the provisions relating to Australian hosted material ridiculous, both practically and economically. As for the notification of illegal and offensive sites to filter makers, this was seen as subsidising, through Australian taxes, commercial operators and "particular vendors, at the expense of a more nuanced community education policy." Expert advice from overseas and from the CSIRO, advising against such legislation, had not been listened to by government.

(b) *Possible future enforcement*

Most respondents were pleased that threats to require ISPs to block content had not eventuated in the final versions of the *Online Services Act* and Codes. However, considerable concern remained that while the *Online Services Act* and Codes currently place minimal responsibility on the internet industry, the *Online Services Act* in fact allows for the placing of far more onerous responsibilities on industry, and thus leaves the industry largely unburdened but also uncertain for the future. One respondent described this as "a ticking time bomb."

(c) *Promotion of filters*

There was considerable concern that filters were being promoted as a means of restricting access to unsuitable material. Many respondents noted that children do need protection when using the internet, but the importance of filters in the current scheme was seen to encourage or develop a false sense of security in parents and carers who may be led to believe that filtering was effective in controlling access. The approval[11] of filters on bases other than

effectiveness "brings the legislation into disrepute." One respondent suggested protection of children should be dealt with as a topic in itself, not confused with 'internet regulation' which focuses on the medium rather than the protection.

Filter applications were seen as both too broad and too narrow: not restricting all content they should and restricting some content they should not. There was concern most filter products were American, and thus developed for a more conservative market. The bluntness of filter technology worried many respondents further, the inability of filters to distinguish health or educational content from porn or adult content meant a great deal of useful information was wrongly blocked if filters were used. This was seen as a particular concern for isolated and minority groups and individuals who may rely on the internet for information and contact. Some suggested more focus on researching better filter applications and providing information about them, to allow more choice to users.

(d) *Secrecy*

Secrecy surrounding the operation of the scheme was criticised. Respondents said that the internet was the only medium where users where not allowed to know what was censored. Further, reporting on the operation of the scheme was not transparent.

Further responses included criticism of the *Online Services Act* as politically motivated, enacted not to solve problems of internet content, but to gain political favour from right-wing constituents, parliamentarians, and institutions. It was thus seen by some as unsurprising that the scheme should not work to achieve its stated aims.

The ABA's recognition of the IIA as an appropriate body to represent the internet industry and to draft Codes of Practice was criticised by some respondents, particularly those who felt the IIA had failed to take competing views into account in negotiating prior to the legislation, and in drafting the Codes of Practice.

A couple of respondents thought any censorship of the internet was unnecessary and undesirable, while one noted that restricting any material not seen universally as problematic was itself problematic in a culturally diverse society.

Other concerns less commonly noted included the inappropriateness of film classification guidelines for internet content, and the inappropriateness of the broadcasting model of regulation for the internet which is interactive and private.

Responses commonly emphasised the need for self-responsibility in terms of internet content. Many respondents thought it imperative that children were supervised on the internet, and that the community was educated about the internet. Many respondents were concerned that the *Online Services Act* suggested that 'technical solutions' were available to the 'problem' of internet content, but that this was not really so. Respondents felt that the "attempt to wave a technical wand doesn't work."

Conclusion

Conflicting perceptions of the *Online Services Act* and its associated Codes of Practice are apparent in the results of this survey. However, both those arguing initially against the legislation, and those arguing initially in its favour, seem to have had their concerns somewhat allayed by the actual effects of the *Online Services Act* and Codes. For the former group the outcomes have been less draconian than anticipated, for the latter group any attempt to regulate internet content is a step in the right direction.

Quantitative responses suggest the impact of the legislation and Codes of Practice has been minimal only. Less than half of the industry respondents have made changes to their practices or policies, and most of the changes made have been trivial only.[12] Over seventy percent of respondents perceive no changes to the content available on the internet in Australia,[13] and the vast majority see no changes to external controls exercised over an internet user's access to content.[14] Over two-thirds of respondents also see no change in the ability of users to control content for themselves.[15]

Viewed against the backdrop of the *Online Services Act* and Codes of Practice, none of these findings are unexpected. The *Online Services Act* and Codes of Practice require little of industry members, and it is likely that most could therefore comply without significantly changing policies or practices. Further, it is to be expected than no changes would be found to internet content generally, given that only a tiny proportion of internet content is Australian-hosted, and only a tiny proportion of that content would be subject to the *Online Services Act*. Further, removal of content from Australian servers would not lead to removal of content from the internet.[16] The *Online Services Act*, when read in conjunction with current Codes of Practice, requires no external blocking or filtering of content and so it is to be expected that no additional external controls would be experienced. Finally, as filter products were equally available before and after the enactment of the legislation and Codes it is to be expected that respondents would not notice a change in the ability of users to control content for themselves. However, the higher profile given to those products through media coverage of the legislation, and information put out by NetAlert, the ABA, and by ISPs to subscribers, may have led to more awareness of content filtering and blocking devices. This may have led to greater usage of filtering devices, but there is no evidence that this is the case.

The qualitative data gathered in this survey tends to reflect arguments made prior to the legislation and Codes coming into force. There is continued concern, for example, that although the current scheme in fact has minimal impact on industry, and on freedom of speech, the current legislative framework could equally be used to support far harsher regulation. There is continued criticism of the *Online Services Act* as irrational, politically motivated, and a waste of resources. On the other side the concern is that although the legislation may help restrict some 'problematic' internet content, stricter enforcement of the legislative scheme, along with pro-active monitoring of content would be required for the scheme to achieve its stated aims.

The intention of this paper has not been to evaluate the Australian scheme for online content regulation, but rather to draw attention to some of the results of the regulatory scheme, and to highlight the perceptions of the scheme held by industry players and other interested parties. While the IIA reports periodically on Code compliance, and the ABA reports from time to time on the effects of the scheme, the IIA report is not publicly available, and the ABA reports are formal and statistics-oriented. Other information about the scheme, such as the results of a survey conducted for NetAlert by the Communications Law Centre, have not been made available. In such circumstances, it is important to ensure that any information collected on the topic is made accessible to those working, researching, or simply interested in the area.

The author welcomes comments.

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1   The IIA Reports to the ABA in letter form. These Reports were requested from both bodies by the author, but were not released.

2   ABA *Six Month Report on Co-Regulatory Scheme for Internet Content Regulation, January to June 2000, July to December 2000, January to June 2001;* tabled by the Minister for Communications, Information Technology and the Arts, September 2000, April 2001, February 2002 respectively.

3   isp-australia@lists.isp-lists.com list and aussie-isp@aussie.net list.

4   Some of those who made trivial changes may have answered that they had made no changes.

5   'Chilling' was a matter of concern both in Australia prior to the passage of the *Online Services Act*, and in US opposition to the *Children Online Protection Act*. 'Chilling' refers to a situation where speech or communications are not directly censored, but where less is said or communicated to 'be on the safe side' or to ensure one is keeping within the law.

6   'Mouse trapping' causes a computer user to lose control over his or her mouse commands – each click opens another window of, in this case, pornographic material, rather than the mouse responding to the user's commands.

7   The ABA is empowered to investigate material of its own volition, but 'it is not intended that this discretion will be used to monitor content actively.' The complaints mechanism was always intended to be the 'cornerstone of the regulatory framework.' Second Reading Speech, Senate, 21/4/1999 (Official Hansard No 5 19/23 April 1999) p3959-60.

8   Net Alert is an independent body established to conduct 'national education and awareness campaigns to promote the safe use of the internet as an educational and information tool, including by

informing parents about filtering and other technologies and the Government's online content regime.' For further information see the NetAlert site at http://www.netalert.net.au/

9 Quotations not otherwise referenced are taken directly from survey responses.

10 Some sites were moved overseas in anticipation of the Amendment coming into force, others were moved in response to take-down notices issued by the ABA. See

for example ABA *Six Month Report on Co-Regulatory Scheme for Internet Content Regulation, January to June 2000*, p16 note 3.

11 The Internet Industry Code of Practice has been amended and now refers to 'scheduled' filters rather than 'approved' filters.

12 This mirrors the findings of a study into the response of the adult industry to the *Online Services Act*, where the most common

response was to 'do nothing,' followed by 'moved content offshore.' Peter Chen, *'Australian Adult Industry Censorship Survey* 2002,' Centre for Public Policy, University of Melbourne.

13 42 of 58.
14 51 of 57.
15 37 of 54.
16 See above note 10.

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