Examining the regulatory and legislative future of Australia's on-line economy and society

As you are all aware the ABA is presently close to the end of the allotted time within which it was required by government to inquire into the content of on-line services and report its findings.

The deadline 30 June is and we will meet it.

I am not yet in a position to give you an idea of the terms of our findings—it is the privilege of Government to be among the first to find that out, although we will publish our report.

But I can report on the responses we have had to our issues paper.

Submissions to the ABA

To date the ABA has received 213 submissions by way of response to its issues paper.

We have had substantial responses from academia, educationists, the government sector, from various religious groups, and from the general community. The on-line community is well represented in those sectors.

Under the category of 'users' the ABA received approximately one hundred submissions. Most submitters in this category had heard of the investigation through other users, and were concerned with censorship and freedom of speech issues.

A majority of submitters expressed concern that adults would not be able to visit adult sites, and thus would be treated as children in order to protect children.

All submitters found this unacceptable.

From the education sector came strong support for the development of some form of codes of practice and for an independent complaints handling body.

From academia the main trends in submissions were towards the need to preserve freedom of expression, particularly in an academic context. A code of practice was supported, but universities have particular needs and concerns which should be addressed in any code of practice. It was suggested that the ABA may have oversimplified the on-line environment, and that we should re-visit our conceptual framework.

A need to educate the community, so that there is a better understanding of on-line services, was identified.

Community groups almost unanimously stressed the need to preserve freedom of expression.

There was an overriding concern that regulation be minimal, and there was broad support for:
* content providers bearing primary responsibility for the acceptability of their material;
* the introduction of a code of practice; and
* the formation of a peak industry association and a complaints handling body.

A small number of religious organisations indicated that they believed that the protection of children's rights was far more important than the right to view obscenity.

In the government sector the principal comments were to the effect that:
* content creators should be responsible for material they create and publish;
* the privacy of users was a major concern;
* a code of practice was appropriate to on-line services; and
* the formation of a peak industry body was desirable.

Given the timeframe within which the issues paper had to be prepared, and from a standing start at that, we feel that it has survived the scrutiny of our submitters reasonably well.

We acknowledge the concerns of those members of the on-line industry who have been happily and uneventfully working on-line for many years now without encountering untoward material or, for that matter, the prospect of some form of regulation.

Law abiding operators in a field are always the hardest to convince that there is a need for regulation, and the on-line sector is no exception to this understandable rule.

The splintered nature of the on-line world is a another reason why such a jaundiced eye is fixed upon those proposing regulation. This factor goes to the heart of what will need to be one of the fundamental building blocks of industry self-regulation—the formation of satisfactory representative arrangements for the industry.

Industry association arrangements

There are a number of reasons why the on-line industry will need to make suitable arrangements for its affairs so that it can speak to both the community

Peter Webb, ABA Charman

and to government with a representative voice about matters of concern to it and the community.

Late last year Roger Buckeridge and Terry Cutler produced their important report, *The On-line Economy*.

They proposed something called the on-line forum for content, network and service providers, to be initiated by industry participants as a means of conducting a continuous dialogue with the legislature and the regulators, and to drive into place a strongly competitive, self-regulatory framework for the on-line industries.

The urgency with which this proposal should be actioned cannot be overstated. And that's because the dialogue is at present rather onesided—not so much a dialogue as a monologue.

This failure to connect, between industry and government, seems to me to mark almost every debate about the Internet.

On the one hand defenders of the on-line phenomenon routinely claim that because it is impossible, technologically or otherwise, to apply regulatory rules unflinchingly across the entirety of the traffic on the Internet, it is pointless to attempt to do so.

The point that is being missed here is that very few systems of regulation are either designed to operate, or in fact do operate, so as to ensure every breach is brought to account and dealt with.

In a phrase, the criminal justice system is expected to be administered with discretion.

There is a large gulf of appreciation between the industry and the lawmakers, and the cultural approach each is applying to the issue seems certain to guarantee that there is most unlikely to be a meeting of the minds on the matter.

This is a shame because there needs to be a reconciliation between the two points of view, and each culture will only profit from such a reconciliation.

But it will be doubly a shame for the on-line industry in particular if it cannot organise itself to speak to government about matters such as this, because it will feel, and therefore be, the loser.

Its perspective needs to be built into Government thinking, but Government cannot delay too much longer before seeking to meet community pressure for action in an area of policy marked by such strong emotions.

Codes of practice

I believe it is generally known that one of the major defences to the application of these new laws is compliance with an applicable industry code of practice.

Such a code is designed to set out guidelines for users of on-line services or on-line service providers, and is to be approved by the participating ministers.

Such a code may relate to all on-line services or to a particular kind of on-line service, such as web sites, and, importantly, it may apply, incorporate or refer to any document formulated or published by persons or bodies that the participating ministers consider have an appropriate interest in the content of industry codes of practice.

This seems to suggest that the work of a body like the ABA, the content regulator for broadcasting, or like the Office of Film and Literature Classification (OFLC), might usefully be appropriated by the ministers when and if they see fit.

Overall, the scheme the censorship ministers seem to have in mind at this stage, albeit unambiguously criminal in
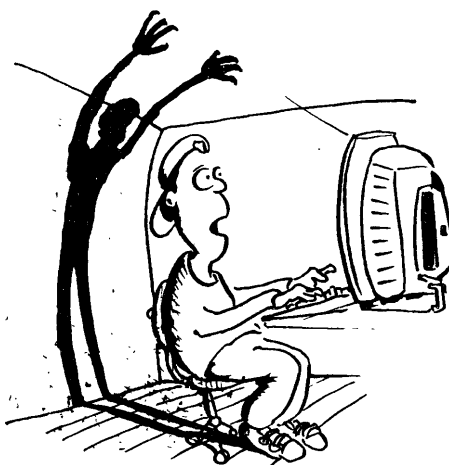
nature, does provide the on-line industry with opportunities to bring forward comment, suggestions and ideas and to have them incorporated into the new laws so as to provide some of the balance the industry feels is missing.

This opportunity cannot be realised without the industry making the necessary arrangements to speak with an industry voice, or with sectoral voices at the very least.

Elsewhere on the government front the industry will have noted that the new Federal Government's on-line policies, which are quite detailed, and which

show evidence of considerable thought, squarely address the regulatory issues.

The Government says that it will adopt a multi-faceted approach to the content regulation of the on-line industry in consultation with the community, the on-line industry and the States and Territories.

On-line Government Council

It intends to establish a Commonwealth/State On-line Government Council under the Council of Australian Governments (COAG), which will have the role of coordinating government efforts, encouraging collaboration where appropriate, and avoiding costly duplication.

The Government's policy says of the council:

This body will provide a focus for commonwealth and state government agencies involved in areas such as on-line education and content regulation, ensuring a consistent approach to the development of the regulatory framework and for the delivery of on-line services. The ambit of the council's discussions will include .... content regulation, and privacy.

The policy also says that:

The Australian Broadcasting Authority will supervise the development of on-line industry codes of practice, similar to the regime developed for the broadcasting industry.

These codes will contain complaints mechanisms and procedures to ensure that complaints are properly investigated, and where reasonable, acted upon. Dissatisfied complainants will be able to take the matter to an independent complaints body.

The codes will clarify the respective roles of content, service and network providers, creating certainty for the industry. Final details will be determined after the australian broadcasting authority's current review of on-line content regulation....

It also seeks to reassure the on-line community that:

Private one-to-one communications should remain private, apart from those exceptional circumstances already covered by existing legal constraints, and will not be subject to more onerous regulation than are private communications in other media such as the letter post or telephony.

This policy seems designed both with a focus, to restrict its operation to

actual areas of concern, and with care, to allow the on-line community to play a part in framing Government and regulatory policy.

The coalition policy goes on to say:

In conjunction with the States and Territories *and the on-line industry*, the Australian Broadcasting Authority will be required to coordinate the development of effective consumer education programs which will provide information about practical steps which can be taken to protect children from potentially deleterious material available through various information technologies [emphasis added].

This is a most important initiative, and one that should be welcomed by the on-line industry because of its explicit recognition of the industry's role.

Believing as it undoubtedly does in the power of expression, the industry must acknowledge that efforts at community education, and at industry education as well for that matter, are clearly a good thing, and will do much to help us all both to find the proper level at which community concern should be pitched, and to demystify 'cyberspace'.

But the industry will want its views to be represented in any such educative strategy, and, once again, it will need to have in place structural arrangements that will permit this to happen.

Without industry input, educational strategies might end up being the next battleground between the industry, lawmakers and regulators.

I do appreciate, I must hasten to add, that the challenge for the industry on this front is not an easy one.

I know that people of good will in the industry are trying hard to manufacture assemblages of industry players with a view to attracting a sufficiently critical mass of them to be able to say that they represent the industry, or a substantial sector of it.

I wish them all well, and I acknowledge that no one association is likely to emerge in the near future which will satisfy that requirement.

But there is a very real danger that the industry may, in fact, be so intimidated by the challenge that the initiatives currently being taken might fizzle out.

Relief may be at hand, however, in the form of another government initiative.

Information Policy Task Force

It is coalition policy to establish a body called the Information Policy Task Force, which will be:

...a standing advisory committee, supported by a secretariat in the Department of Communications and the Arts and tasked with the examination of specific issues.

The ITPF will be made up of professionals with established expertise in the application of new technology to service delivery and the impact of technology on regulation, society and commerce. Groups with special relevance include the:
• education, health and legal professions;
• the library profession and the cultural community;
• the information technology industry;

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• commercial information service providers;
• representatives of the users and consumers; and
• communications carriers and the service providers.

The brief of the IPTF will be to examine and report to the federal government on issues related to basic information policy issues such as:
• a education, health, science, social services, legal and commercial implications of new communications technologies;
• privacy, both in the private and public sectors;
• requirements for standards setting
• developments in copyright and intellectual property regulation; and
• regulation of on-line content.

The mission of the IPTF would be to advance public debate on information-related issues and to report opinions to a coalition government. The reports of the IPTF will be made public.

The Information Policy Task Force, by reference to its role and composition, looks as though it has been designed as a de facto on-line forum for the fledgling industry.

The Government, it seems, has foreseen the problem from the vantage point of opposition and, if the task force could be established quickly, it would fill the gap that has grown up between the industry and government, and provide the industry with the delivery mechanism it needs for its views.

In the short to medium term at least, this looks like an idea whose time has come.

Australians are not banners, although the OFLC does indeed ban, by refusing to classify, publications, films and computer games that:
• describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
• describe or depict in a way that is likely to cause offence to a reasonable adult, a minor who is, or appears to be, under 16 (whether the minor is engaged in sexual activity or not); or
• promote, incite or instruct in matters of crime or violence.

But we are a tolerant people who understand that adults should be, in the main, free to engage in activities that cause no harm to others.

Our response to the fact that different tastes in film, television and literature etc exist within our community is usually to classify, not to ban.

We believe in providing consumer information to Australians so that they

can make informed decisions about what they want to view or read.

It is only the smallest proportion of materials, relating to matter about which there is a near community consensus that it is truly objectionable and offensive, that is refused classification and, therefore, legitimate distribution in Australia.

The signals for the on-line industry are plain.

They are found neatly summarised in the submission of the Western Australia Censorship Office, which says,

'It is clear that government will expect the industry to do what industries like the commercial television and radio industries have long done, and to work together to define a competitive framework which respects community needs and concerns.'

Much of the material currently published on-line has already been published in some other form of media which is almost certainly subject to existing censorship regimes.

The argument (that on-line services should remain an unregulated utopia of free expression) therefore seeks special status for material published on-line without regard to the nature of the material.

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Both the Federation of Australian Commercial Television Statiom and the Federation of Australian Radio Broadcasters have lengthy and respectable records of industry representation. They have demonstrated they can make self-regulation, through industry codes of practice, work.

So too has the community broadcasting sector. The Community Broadcasting Association of Australia is comprised of many diverse groups, displaying all the diversity of view one would expect from a grass roots organisation, yet it too has signed off on codes of practice.

Plenty of Australians are still reticent about the television and radio programs

that come into their homes—some viewers and listeners think they can be the vehicle for offensive and disturbing information and entertainment.

And that's after 40 years of television and 60 years of radio in this country.

They won't respond well to an Internet which appears to carry much more objectionable and harmful material than radio and television will ever carry.

However it is worth identifying and focussing on Internet sectors to try to establish just where objectionable material is likely to be found.

After all, there is a tendency to speak of the Internet as one indivisible entity, to assume that objectionable material is ubiquitous throughout the Internet, and to further assume that regulation, of whatever kind, should be equally ubiquitous.

Internet activities, as a number of commentators continue to point out, are many and varied.

Some of them are closely analogous to activities with which we are all familiar. Email, particularly one-to-one email, is closely analogous to telephony. One-to-many email is closely analogous to a party line, something that has virtually disappeared these days.

Newsgroups are analogous to international meeting places where people can gather, talk informally with others and discuss matters of common interest.

The world wide web, which is the single most important development in on-line services during the past few years, has greatly simplified the provision of on-line services.

But I'm not sure that it has a close analogy with any concept already familiar to us. It is partly a collection of billboards, part-newspaper/magazine, part electronic encyclopaedia and part-archive and library or publishing house.

Of course, the transition, which seems inevitable, from narrowband to broadband capacity means that these services will undergo further conceptual change.

By the end of the century on-line services are likely to be much more a part of everyday life than at present.

They are likely to provide an important means of communicating socially, shopping, effecting financial transactions, and conducting business generally.

They also have the potential to become a major source of entertainment in the home and of educational materials in the school.

This potential is likely to be concentrated though, it seems, in the world wide web.

Email will go on being email, and newsgroups will go on being newsgroups, albeit that they will work better and faster over time. But they are unlikely to undergo fundamental change, and they are likely to remain analogous to telephony and meeting places.

It would seem sensible, therefore, to treat them in ways analogous to telephony and meeting places.

We have found it reasonably easy to distinguish between private and public purposes so far as the use of telecommunications for telephony is concerned.

Our issues paper dealt with this distinction and held out the prospect that it may be more appropriate for material which is essentially available to members of the public to be subject to a code of practice than material which is essentially made available to an individual, or a small group of individuals.

The on-line environment provides us with a much harder task than we have traditionally faced as we try to make these distinctions.

The dividing lines are more blurred and, accordingly, workable boundaries should be our aim for the present, rather than attempts to distil distinctions based on principles that have no ready application in the on-line environment.

So both the industry and government probably need to reach out to each other on a number of fronts.

If they do so, better public policy is likely to be the result, and the public interest is more likely to be served. ⟍⟋