# A Difficult Cache to Solve - Regulating Content in a Digital World

## Valeska Bloch considers online content regulation.

### Introduction

As an area of law that draws its impetus from community standards, the regulation of content in Australia has always been highly politicised and largely reactive. Australian politicians and shock jocks have been regularly outraged by the availability of online or interactive content deemed harmful or inappropriate for Australian youth. The live streaming of late night antics on the Big Brother website, the Henson photos on an art gallery website, hidden 'adult' content in *Grand Theft Auto* (a video game) and pornographic user-generated content uploaded onto social networking sites, are just some of the issues that have occupied headlines. In almost every case, ensuing controversy has resulted in ad hoc amendments to Australia's broadcasting and classification regime. As a result, the Australian online content industry is now one of the most highly regulated in the world.

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This paper examines the challenges posed by the digitisation of content, the internet and rapid technological change, and reviews the legal framework that currently effects online content regulation in Australia.

### 1. The digital environment

#### 1.1 What is the digital environment?

The increased penetration of high bandwidth internet connection has caused a transformation of the traditional media sector and its established one-to-many broadcast model.[1] Not only is digital media blurring the distinction between point-to-point and broadcast communication, but next generation internet users are no longer relying on traditional gatekeepers to provide them with content. The emergence of real time social infrastructure is enabling 'produsers' to enjoy a media lifestyle that is 'personal, participatory and pull driven' and to collaborate with peers and create and share media in profoundly new ways.[2] The dramatic uptake of social networking is a testament to the scope and effect of this transformation.[3]

The digitisation of content has resulted in drastic social changes. So has the means by which this content is distributed and accessed. The 1990s saw the internet emerge as a 'tool of low cost global connectivity' as the World Wide Web allowed people to post their digital content for other people to access and commercial web browsers enabled people to retrieve documents or web pages stored in web sites.[4] The 21st century is seeing a revolution in the way content is accessed, with remote, wireless and mobile applications making it possible for people to access online content almost anywhere and almost all the time.

#### 1.2 The (perceived) need for content regulation in a digital world

The interactivity, anonymity and mobility that have made the digitisation of content and online communications so attractive and innovative are the same features perceived to pose risks to users, and in particular, children. ACMA has categorised these risks as follows: content risks, which include exposure to illegal or inappropriate content (such as child pornography or other harmful material); communication risks, which arise from online interaction with other users (such as cyberbullying and online stalking); and e-security risks, which arise when the means of access is compromised or personal information is released online (such as spam, viruses and online identity fraud).[5]

Although the policy concerns informing online content regulation vary across jurisdictions,[6] the one commonality has been a desire to protect children from exposure to harmful or inappropriate content. It has been argued that in Australia, the 'symbolic and political value' of this rationale has been used to 'stifle debate and ensure greater cross party support than the problem actually justifies' because 'opposition to these policies which are advanced on 'motherhood' grounds is portrayed as a dereliction of duty to children'.[7]

At its most basic, any discussion around online content regulation will centre on three fundamental questions: whether digital content should be regulated at all, whether it can be, and who should bear the responsibility for regulation. Each of these questions inform the other.[8]

In the offline environment broadcasters or editors generally have a substantial degree of control over the content made available to the public and can be regulated accordingly. Online, a lot of content is user generated and identification of its source is difficult, particularly due to privacy regulations imposed on those gathering personal identification information (for example, internet service providers and content service providers). Further, a tension exists between the desire to protect children and the desire to encourage user-led innovation and preserve the free flow of information that has traditionally been associated with the internet. As discussed below, the ad hoc policy amendments that comprise the Australian regulatory framework have attempted to overcome these challenges. Not all attempts have been successful.

### 2. The Australian regulatory framework

#### 2.1 The framework

The Australian regulatory framework for online content regulation is essentially a mosaic of incrementally introduced and often overlapping statutes, codes, standards, guidelines, determinations and supplementary enforcement powers administered by ACMA under the *Broadcasting Services Act (Cth) 1992* (***BSA***). As a co-regulatory regime, content regulation in Australia remains strongly dependent on industry input.[9]

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**2.2. Background to the legislative regime**

The Australian online content regime commenced in 1999 with the introduction of the *Broadcasting Services Amendment (Online Services) Act 1999* (the ***1999 amendments***) which created a Schedule 5 to the BSA. The aim of the regime was:

> …to address the publication of illegal and offensive material online, while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy.[10]

Acknowledging that 'there are technical difficulties with blocking all illegal and offensive material that is hosted overseas', the Government nonetheless argued that 'it is not acceptable to make no attempt at all on the basis that it may be difficult'.[11] The result – despite staunch resistance from industry and suggestions that the proposed amendments would make Australia the 'global village idiot' or the 'dunce of the networked world'[12] – was a co-regulatory, complaint-based, take-down regime regulating internet content hosts and internet service providers that made available stored content over the internet.

In 2006, a highly publicised incident exposed a gap in the regulatory framework. Sexually explicit content unable to be shown on commercial television was nonetheless streamed live from the Big Brother website . As the framework established by the 1999 amendments did not extend to ephemeral content such as live streamed audiovisual services, the material on the website was not regulated.[13] Public outrage ensued, followed by new calls for the overhaul of the legislation.

A Department of Communications, Information Technologies and the Arts review of the regulation of content delivered over convergent devices published in April 2006 (the ***DCITA Convergence Report***) recommended that:

> [r]egulation based on the level of control exercised by service providers rather than the communications delivery platform is likely to be more robust and adaptable in the face of new and innovative content services.[14]

As a corollary to this, the review recommended that 'telephone sex and premium rate services should be brought into the regulatory framework for convergent content'.[15]

The *Communications Legislation Amendment (Content Services) Act 2007* (the ***Content Services Act*** or the ***2007 amendments***) adopted this approach. It established a new regulatory framework for particular internet content delivered over various platforms by substantially repealing Schedule 5 to the BSA and introducing a new Schedule 7.

**2.3 The online content regime**

(a) The jurisdictional reach

One of the challenges faced by policy makers attempting to regulate online content, is that an overwhelming majority of prohibited online content is hosted outside Australia. Schedule 7 to the BSA regulates content service providers, specifically, live content service providers who provide access to live content; hosting service providers who provide stored content to the public; links service providers who provide access to content via links; and commercial content service providers who provide access to content for a fee. To fall within the Schedule 7 content regime, these service providers must have an 'Australian connection', that is, they must host content in Australia (this includes hosting a link in Australia which provides access to content that may or may not be hosted in Australia) or provide live content from a server in Australia.[16]

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The Australian connection test appears to limit the jurisdictional reach of the Australian regulatory regime to content service providers that have servers located in Australia. However the operation of the test when viewed in light of the relevant definitions and the technical characteristics of content service provision, creates uncertainty as to the true scope envisaged by the Australian connection test. For example, many content service providers make content available to Australians from servers located overseas, but cache content on temporary storage areas ('caching servers') located in Australia. The purpose of these caching servers is to enable rapid access to frequently accessed digital data (in particular large files like video and graphics). The caching servers automatically overwrite data that is no longer frequently accessed, with more recent data that is. As such, the hosting service provider has limited, if any, control over the data temporarily stored on those caching servers. Furthermore, in some cases the caching servers themselves are provided by third parties such as Akamai Technologies Inc, who enter into agreements with the hosting service providers to deliver the content over their secure content delivery network.

Although there is an exception in Schedule 7 for content stored on a transitory basis, it is unclear whether caching falls into this exception. A 'hosting service provider' is defined as such if it 'hosts stored content in Australia'. 'Stored content' is defined as:

> …content kept on a data storage device. For this purpose, disregard any storage of content on a highly transitory basis as an integral function of the technology used in its transmission. Note: Momentary buffering (including momentary storage in a router in order to resolve a path for further transmission) is an example of storage on a highly transitory basis.

Whether content stored on caching servers is considered to be stored 'on a highly transitory basis as an integral function of the technology used in its transmission', is likely to be a technical and factual question and one with definite consequences. If the highly transitory exception does not apply, the relevant hosting service provider will be subject to the Schedule 7 regime. However, even if caching servers do fall within the highly transitory exception, content service providers based overseas may still be indirectly affected by the Australian regulatory regime for two reasons: First, Schedule 5 regulates internet service providers (***ISPs***) in relation to content hosted overseas. This means that if ISPs are required to prevent access to prohibited or potential prohibited content hosted overseas (either because they have received an access prevention notice from ACMA, or because they have been required to add the service to a filtering 'blacklist'), the content service provider providing that content will be indirectly affected. Second, mobile carriers that offer links to content (irrespective of whether the originating host is located in Australia) as part of a 'walled garden' service (provided that the walled garden is hosted in Australia) will be treated at the very least as a links service provider and will consequently be required to remove links to that content if a complaint to ACMA has been made and successfully investigated.

***...user-generated content is more difficult to monitor, classify and regulate than traditional content...***

## *Commercial content service providers have additional obligations...*

(b) User generated content

In the current digital environment, user-generated content comprises the bulk of available content and even traditional media services have enabled interactivity as part of their content offerings. This transition has two major implications. The first is that user-generated content is more difficult to monitor, classify and regulate than traditional content broadcast over television or radio. The second is that user-generated content is harder to regulate because of the anonymity afforded by the internet. The online regulatory regime does not always deal with these challenges in a way that recognises that there are different types of content, some of which, for example user-generated and interactive content, are inherently resistant to traditional forms of content regulation.

Although the scope of online content regulation under the BSA changed with the introduction of the Content Services Act, for the most part it retained the co-regulatory, complaint based, take-down approach introduced by the 1999 amendments. This means that although content service providers (with the exception of commercial content service providers) are not obliged to actively monitor or review content, where a complaint is made to ACMA that they have provided access to prohibited or potential prohibited content,[17] ACMA can issue the content service provider (provided they have an Australian connection) with a take down, link deletion or service cessation notice. Failure to comply with such a notice is a civil contravention and a criminal offence.[18]

This complaint-based take-down approach appears to recognise the burden that would be involved if content service providers were required to monitor the content that they make available. However, the fact that online content service providers must have a restricted access system in place if they wish to provide certain types of content[19] makes it difficult for content service providers that make available user generated content. Commercial content service providers have additional obligations imposed on them, as they are required to employ trained content assessors to monitor the content that they make available. This requirement is tempered by the Code, which only requires assessment of content that the service provider 'acting reasonably considers to be substantially likely to be classified as prohibited or potential prohibited content'.[20]

The formulation of Schedule 5 to the BSA also has implications for user-generated content. As amended by the Content Services Act, Schedule 5 now regulates internet content hosts (***ICHs***)[21] and ISPs, although it does so only in relation to content hosted outside of Australia.

If the ACMA is satisfied that an ISP is hosting prohibited content or potential prohibited content, then ACMA must, in certain circumstances, refer the content to the police; and require the ISP to deal with the content in accordance with an industry code or industry standard, or in the absence of a code or standard, require the ISP to prevent end-users from accessing the content by issuing the ISP with a standard access prevention notice. ISPs may be exempt from these notices if ACMA has declared that a specified arrangement is a recognised alternative access-prevention arrangement, that is, if it is satisfied that the arrangement is likely to provide a reasonably effective means of preventing access to that content.[22] Examples of such arrangements could include internet content filtering software or the use of a family-friendly filtered internet carriage service. If a content service provider provides prohibited or potential prohibited user-generated content, there is therefore a risk that an entire site could be blocked under the Schedule 5 regime.

### 2.4 Mobile

At present, there are approximately 3.3 billion mobile phone subscribers and 1.3 billion internet users worldwide and market penetration is increasing exponentially.[23] Technical convergence of platforms (as demonstrated by the advent of the *iPhone*, the *3 Skype Phone* and *Google Android*) has given content service providers the opportunity to leverage the market share enjoyed by mobile carriers and distribute their content to a far wider audience than was previously possible. Mobile carriers are now increasingly using content services (including more recently, killer apps like social networking, Presence and video) to sell connectivity. Broadband experts are predicting that in as little as two years the mobile phone network may replace the copper wire as the principal method by which people connect to the internet.[24]

The high uptake of mobile phones by youth has increased concern about mobile content because it is more accessible by children and because 'mobile filters are not amenable to filtering at the device level'.[25] Furthermore, mobiles now have the capability to offer a range of content services including: mobile premium services like adult text message 'chat,' or video downloads ('mobile premium services'); mobile proprietary portal services ('walled garden services'); access to the open internet ('mobile open internet services'); and mobile television or digital video broadcasting ('broadcast mobile television services').[26]

The regulatory regime for mobile content is still in transition. Prior to 2007, these services were regulated (if at all) under separate platform-specific regulatory regimes.[27] However the integration of the premium mobile service regime into the BSA in 2007 was one of the most integral changes introduced by the 2007 amendments.[28]

Although the approach taken by Schedule 7 is predominantly platform neutral, it makes specific reference to mobile premium services in order to clearly bring mobile phone based services within the online regulatory regime. In relation to the provision of mobile open internet services, the regime does not discriminate on the basis of the delivery platform. Content service providers are regulated in the same way, irrespective of whether their internet content has been accessed via a mobile handset or via a PC.

Mobile premium services are regarded in Schedule 7 as a subset of commercial content services.[29] As such, they are required to put in place restricted access systems if they make available content classified MA15+ or R18+ and they are also required to engage trained content assessors.[30] The IIA Content Services Code deals with the engagement of trained content assessors by commercial content service providers (including mobile premium services) and provides guidance for commercial content service providers as to when trained content assessors must assess relevant content for the purposes of categorising that content as RC, X18+, R18+ or MA15+ or (in the case of an eligible electronic publication) as RC or category 2 restricted. The Restricted Access Systems Declaration 2007 sets out age verification requirements for both commercial content services and restricted content made available by mobile handsets.[31] In addition, the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 No.1* still applies to premium mobile services, although as of 1 January 2008, it exists in a significantly pared back form.[32]

Walled garden services are also caught by the 2007 amendments. If an Australian mobile carrier offers a content service as part of an 'on-deck' or walled garden service, the mobile carrier will at the very least be considered a links service provider with an Australian connection. If they provide this service for a fee, they will be a commercial content service provider and subject to obligations under the Code and the Restricted Access

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Systems Declaration 2007 as is the case with mobile premium services (see above). That mobile carrier can therefore be issued with a take-down, link-deletion or service-cessation notice from ACMA. Australian mobile carriers that enter into agreements with hosting service providers to enable those carriers to provide relevant content (or links to that content) 'on-deck', need to be aware that even if the hosting service provider does not satisfy the Australian connection test, the relevant content will still fall within the Schedule 7 regime if the 'walled garden' itself is hosted within Australia.

Although to date, broadcast mobile television services have not yet been successfully implemented in Australia, they would be regulated as a type of broadcasting service and subject to applicable licence conditions, self-regulatory codes and standards in accordance with the BSA.

The current state of mobile content regulation is a prime example of the difficulties associated with regulating technologies that are rapidly changing in a context where the regulation itself is in a state of flux.

## *Mobile carriers are now increasingly using content services to sell connectivity.*

### Conclusion

The digitisation of content, the internet and rapid technological change have fundamentally challenged the way in which online content regulation in Australia is conceived, implemented and enforced. Australian policy makers have made it clear that their ultimate goal in regulating online content is to ensure that society, and in particular children, are protected from exposure to content that is harmful or inappropriate. However providing adequate protection in a marketplace where so much content is produced by so many users and delivered via so many platforms, is becoming increasingly difficult. As an increasing number of parties begin to participate in the production and consumption of content, it seems that the greatest challenge and the most hopeful solution for online content regulation in Australia going forward, may well be to find ways to raise awareness of the inherent risks and to empower stakeholders to cooperate in order to overcome them.

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**Endnotes**

1 Tony Walker in Sharp, D & Salomon D, *User-led Innovation: A new framework for co-creating business and social value*, Smart Internet Technology CRC, January 2008, p9.

2 Sharp, D. 'User-led Media: The Future of Value Creation', presented at Smart Services – Smart Outcomes Forum, September 21 & 22 2006, Accessed at: http://smartinternet.com.au/default.aspx?ArticleID=482 (podcast) on 1 June 2008.

3 Morgan Stanley, *Internet Trends*.

4 Friedman, T. *The World is Flat*, Penguin Books, Australia, 2006, p59.

5 Australian Communications and Media Authority, 'Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety: First annual report to the Minister for Broadband, Communications and the Digital Economy', February 2008, pp3, 12. Although each of these risks are to a certain extent interrelated, this article focuses on content risks.

6 In respect of political speech, Europe places an emphasis on eliminating hate websites, and China attempts to censor dissenting commentary. Conversely, the approach taken by the USA is informed by its constitutional protection of the freedom of speech.

7 Coroneos, P. 'Internet Content Policy and Regulation in Australia', Presented at the First International Forum on the Content Industry: Legal and Policy Framework for the Digital Content Industry collaboratively held by the East China University of Political Science and Law (http://www.ecupl.edu.cn) and the Queensland University of Technology (http://www.qut.edu.au) in Shanghai, People's Republic of China, May 2007.

8 These questions can also usefully be examined against four modalities of control in the digital environment – law, architecture, social norms and markets. See: Lessig, L. *Code and Other Laws of Cyberspace*, Basic Books, 1999, p71.

9 McGill, I and Bloch, V. 'Focus: internet content services regulation', 2007, Accessed at: http://www.aar.com.au/pubs/cmt/focmtdec07.htm on 10 September 2008.

10 The Senate, Broadcasting Services Amendment (Online Services) Bill 1999 Explanatory Memorandum, p1.

11 ibid.

12 Chalmers, R. 'Regulating the Net in Australia: Firing blanks or silver bullets?' in *Murdoch University Electronic Journal of Law*, vol.9 no.3, 2002, p3.

13 McGill, I and Bloch, V. 'Focus: internet content services regulation'.

14 Department of Communications, Information Technology and the Arts, *Review of the Regulation of Content Delivered Over Convergent Devices*, April 2006, pv.

15 Ibid, pvi.

16 Clause 3, Schedule 7, BSA.

17 Content (other than an eligible electronic publication, that is, text or images from newspapers, magazines or books) is prohibited content if: the content has been classified RC or X18+ by the Classification Board; the content has been classified R18+ by the Classification Board and access to the content is not subject to a restricted access system; the content has been classified MA15+ by the Classification Board, access to the content is not subject to a restricted access system, the content does not consist of text and/or one or more still visual images, and the content is provided by a commercial service (other than a news service or a current affairs service); or the content has been classified MA15+ by the Classification Board, access to the content is not subject to a restricted access system, and the content is provided by a mobile premium service. Clause 20, 21, Schedule 7, BSA.

Content that consists of an eligible electronic publication is prohibited content if the content has been classified RC, Category 2 Restricted or Category 1 Restricted by the Classification Board.

18 Clauses 106, 107, Schedule 7, BSA.

19 That is, R18+ content generally, and R18+ and MA15+ content for mobile premium service providers and commercial content service providers.

20 Clause 8, Content Services Code. Note that under the BSA, an industry code or industry standard is required to be registered to give effect to certain content service provider obligations and in particular commercial content service provider obligations. The ACMA registered the Code on 16 July 2008, making it legally enforceable.

21 Internet content host is defined to mean a person who hosts or who proposes to host internet content in Australia.

22 Clause 40, Schedule 5, BSA.

23 Morgan Stanley, *Internet Trends*, March 18 2008, Accessed at: http://www.morganstanley.com/institutional/techresearch/internet_trends.html on 1 July 2008.

24 Times Online, 'Mobile to displace fixed line internet within two years', Accessed at: http://technology.timesonline.co.uk/tol/news/tech_and_web/article4112268.ece on 12 June 2008.

25 Coroneos, P. 'Internet Content Policy and Regulation in Australia', Presented at the First International Forum on the Content Industry: Legal and Policy Framework for the Digital Content Industry.

26 Goggin, G. 'Regulating Mobile Content: Convergences and citizenship' in *International Journal of Communications Law & Policy*, No. 12, 2008, p142.

27 MPSI MPSD Default Scheme.

28 In accordance with recommendations contained in the DCITA Convergence Report.

29 Mobile premium service means a *commercial content service* [own emphasis] where:

(a) a charge for the supply of the commercial content service is expected to be included in a bill sent by or on behalf of a mobile carriage service provider to the relevant customer; or

(b) a charge for the supply of the commercial content service is payable:

(i) in advance; or

(ii) in any other manner;

by the relevant customer to a mobile carriage service provider or a person acting on behalf of a mobile carriage service provider.

30 Clause 81, Schedule 7, BSA.

31 The Restricted Access Systems Declaration 2007 replaced both the Restricted Access Systems Declaration 1999 and the Mobile Premium Services Determination 2005 but only to the extent that it dealt with the restriction of access to content and content classification.

32 It now regulates chat services and provides for the implementation of self regulatory schemes. It is envisaged that these residual parts of the MPS Determination will ultimately be made into a Part 6 Code under the *Telecommunications Act (Cth) 1997*. The *Telecommunications Service Provider (Mobile Premium Services) Determination (No.1) 2005* ('MPS Determination') which was introduced as an interim measure, covered mobile premium services, including both 'walled garden' services and premium rate SMS and MMS services.