Village Idiot, or Wisest Person in Town? Internet Content Regulation in Australia

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THE *ONLINE SERVICES AMENDMENT* ENACTED IN AUSTRALIA in 1999 aimed to a) provide a means for addressing complaints about certain internet content; b) restrict access to certain internet content that is likely to cause offence to a reasonable adult; and c) protect children from exposure to internet content that is unsuitable for children. The introduction of the legislation caused a great furore. It was widely suggested that the legislation would introduce a regime of draconian censorship, that all internet content would be monitored, and that much of it would be blocked. Alternative suggestions were that the legislation would be totally ineffective, and would see Australia labelled as the "village idiot of the internet world." Others thought that Australia might just turn out to be "the wisest person in town." This article examines the provisions of the *Online Services Amendment* and explains the scheme enacted to control access to internet content in Australia. This scheme includes the establishment of complaints mechanisms, content take-down directions, industry codes of practice, provisions for community education, and complementary state and territory legislation to overcome jurisdictional difficulties. Having explained the scheme, the article then discusses the effects that the *Online Services Amendment* has had on access to internet content, the problems that have arisen as a result of the legislation, and recent Australian developments in the sphere of internet content control.

LA LOI *ONLINE SERVICES AMENDMENT* ÉDICTÉE EN AUSTRALIE en 1999 vise a) à fournir un mécanisme de traitement des plaintes au sujet du contenu sur Internet; b) à restreindre l'accès à certains contenus sur Internet pouvant offenser un adulte un adulte raisonnable et c) à protéger les enfants contre l'exposition à certains contenus sur Internet qui ne leur convenant pas. La présentation de ce projet de loi a provoqué la fureur. De l'avis général, cette loi allait introduire un régime de censure draconien, la surveillance de tout le contenu sur Internet et le blocage de l'accès à bien des contenus. Certains ont suggéré que cette loi serait totalement inefficace, et que l'Australie serait perçue comme « la folle du village dans le monde Internet ». D'autres, par contre, ont laissé entendre que l'Australie pourrait bien se révéler « la personne la plus sage en ville ». Cet article examine les dispositions de la loi *Online Services Amendment* et explique le plan de contrôle de l'accès aux contenus sur Internet édicté en Australie. Ce plan comprend la création d'un mécanisme de traitement des plaintes, des directives pour la consignation des contenus, un code de déontologie pour l'industrie, des dispositions en matière de l'information communautaire et d'autres mesures législatives, étatiques et territoriales, pour en faciliter la mise en œuvre dans les différents ressorts. Après cet exposé du régime législatif, l'article aborde la question des effets de la loi sur l'accès aux contenus sur Internet, les problèmes en résultant ainsi que l'évolution récente du droit australien dans la sphère du contrôle des contenus sur Internet.

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1. INTRODUCTION

WHEN THE AUSTRALIAN SCHEME for internet content control was introduced in 1999, it was thought to be entirely novel, and hugely different in many respects from the regulation or non-regulation of internet content in many other countries. Its proposed introduction caused an outcry both within and outside Australia. Danny Yee, of Electronic Frontiers Australia, in words later echoed by Nadine Strossen of the American Civil Liberties Union,[1] claimed that if Australia enacted legislation as proposed it would become "the village idiot of the internet world."[2] Such comments were countered with the argument that "the village idiot often turns out to be the wisest person in town."[3] In retrospect, Australia has probably turned out to be neither of those.

The debate in Australia in the late 1990s over internet content control of course aroused great interest, as any debate would that included references to sex, pornography, bomb making, hate speech, and paedophilia, but this debate also included a new and more awful dimension: technology, or more specifically, the internet.

The technology of the internet really did add a new dimension to the debate about censorship or content regulation. There were certainly those who were concerned about content on the internet, as there had previously been those concerned about rock music, TV content, video "nasties," early bulletin boards and so on.[4] But at the same time, from another perspective, the internet was being championed as a great source of communication that was free from state intervention and was bringing liberty to the downtrodden masses, allowing

1. Nadine Strossen, President of the American Civil Liberties Union (ACLU), in "Australia Urged to Repeal Law," *Sydney Morning Herald* (24 August 1999) 24.
2. Danny Yee, Electronic Frontiers Australia, EFA Media Release (26 May 1999), <http://www.efa.org.au/Publish/PR990526.html>.
3. Melinda Jones, "Free Speech and the Village Idiot," (2000) 6:1 University of New South Wales Law Journal Forum 43, <http://www.austlii.edu.au/au/journals/UNSWLJ/2000/11.html>.
4. Regulation of bulletin boards, for example, had been the subject of an extensive review in Australia; see Computer Bulletin Boards Systems Task Force, "Regulation of Computer Bulletin Board Services" (1995), <http://libertus.net/censor/nchistory.html#1995>.

everyone to have a voice, and enabling a new era of freedom and democracy around the world.[5] Yet another perspective came from the internet industry, which claimed to be simply developing and offering a new communication medium, and which argued vehemently that it should not be held responsible for the content that others wished to distribute or access via this medium.[6]

The way the debate was carried out in Australia was beautifully encapsulated in an article published shortly after the enactment of the *Online Services Amendment*:[7]

> Talking about internet censorship is like discussing abortion: the debate is confused, emotive and polarised. The protagonists mark out their territory based on flawed assumptions and a passionate belief in the absolute truth of their principles. Conservative groups preach family values, industry focuses on e-commerce and civil libertarians obsess with free speech. It is a collision of values and interests, without room for compromise, pragmatism and discretion. The result? The Broadcasting Services Amendment (Online Services) Act 1999 (Cth) (Online Services Amendment): confused, ill conceived, and very difficult to implement in practice.[8]

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2. BACKGROUND

TO UNDERSTAND THE AUSTRALIAN SCHEME for internet content control, it is necessary to know a little about Australia's Constitution and political background.

Australia has a federal system of government, made up of a central government (the Commonwealth), six state governments, and two territory governments. The Commonwealth has specific enumerated legislative powers, some of which are exclusive to the Commonwealth, but most of which are held concurrently with the states. The Commonwealth's powers include power to legislate for the territories,[9] and legislative powers for the territories' self government have been delegated by the Commonwealth to the Territories. By contrast the states (the existence of which preceded the Commonwealth) have much more general powers to legislate for peace, welfare, and good government.[10]

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5. See for example the judgment of Dalzell J in a US District Court, in *ACLU v. Reno*, 929 F. Supp. 824 (ED Pa 1996), <http://www.paed.uscourts.gov/documents/opinions/OPINION.pdf> at pp. 835–842, and quoted in *Reno v. ACLU*, 521 U.S. 844 (1997), <http://supreme.justia.com/us/521/844/case.html>, 117 S. Ct. 2329 at pp. 851-853, 862 [*ACLU v. Reno* (US SC) cited to U.S.].
6. See for example Peter Coroneous (Internet Industry Association), "Internet Content Control in Australia: Attempting the impossible?" (2000) 6:1 University of New South Wales Law Journal Forum 26, <http://www.austlii.edu.au/au/journals/UNSWLJ/2000/6.html>.
7. The term "Online Services Amendment" will be used throughout this paper to refer to the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), <http://www.comlaw.gov.au/comlaw/Legislation/Act1.nsf/lookupindexpagesbyid/6E2D62F72AACB92BCA256F710082447E?OpenDocument> [*Broadcasting Services Amendment (Online Services) Act 1999*].
8. Niranjan Arasaratnam, "Brave New (Online) World," (2000) 6:1 University of New South Wales Law Journal Forum 10, <http://www.austlii.edu.au/au/journals/UNSWLJ/2000/2.html>.
9. *Australian Constitution*, <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/CB49A63C9DF867ACCA256F71004F2624?OpenDocument>, ss. 52, 111, 122 [*Australian Constitution*].
10. For example, *Constitution Act 1902* (NSW), <http://www.legislation.nsw.gov.au/viewtop/inforce/act+32+1902+FIRST+0+N/>, s. 5: "The legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever…."

Where state and federal laws are inconsistent, the Commonwealth law prevails,[11] and where the Commonwealth may be said to have "covered the field" in an area of its legislative competence, the states will be unable to legislate. Overall, however, the states have much broader and more general legislative power than does the Commonwealth.

The reason that an understanding of the federal system is so important in the current context is that the Commonwealth has no power generally to enact laws regarding censorship, or the internet, or internet content. To do so, it needs to find an appropriate head of federal power, and legislate only within the limits of that head of power. There are a number of heads of power which may be used for controlling some aspects of the internet, such as the powers in section 51 of the Australian Constitution to legislate in respect of:

(i) trade and commerce with other countries or between the states,
(v) postal, telegraphic, telephonic and other like services,
(xviii) copyrights, patents and trade marks,
(xx) foreign, trading and financial corporations,
(xxix) external affairs, and
(xxxvii) matters referred to the Commonwealth by the states.

In the past, the Commonwealth and the states have cooperated in some areas to ensure both constitutional power and uniform legislation. For example, the Commonwealth, states, and territories have sometimes passed mirror legislation to ensure uniformity, and states have sometimes referred their powers to the Commonwealth.[12]

Relevant cooperation between the Commonwealth, states and territories may be illustrated for current purposes by the Australian content classification scheme. Through Commonwealth, state and territory co-operation, the federal Office of Film and Literature Classification (OFLC) has for many years classified content prior to release in Australia. Not all content requires classification; generally books, newspapers, and educational films do not require classification, but most films and magazines are classified by the OFLC prior to release.[13] While classification is carried out uniformly by the Commonwealth OFLC, restrictions on display or distribution are matters for state and territory governments.

Consequently, restrictions are not uniform. For example, it is illegal in all Australian states to distribute or display X-rated content (non-violent erotica), while it is not illegal in the territories. However, it is not illegal in the states to *possess* X-rated content, and thus the territories do a thriving legal mail order business selling their X-rated wares into the various states.

This instance illustrates the interaction of the laws of the Commonwealth, states and territories; the Commonwealth classifies content, which ensures uniform classification across all Australian jurisdictions, while the laws of individual states and territories restrict the display and distribution of content, and each of those jurisdictions is responsible for enforcing such restrictions.

11. *Australian Constitution*, *supra* note 9, s. 109.
12. For example, the state of Victoria has referred its power over industrial relations to the Commonwealth.
13. *Classifications (Publications, Films and Computer Games) Act (1995)* (Cth.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/7181F606D557DF4FCA25700A0004B0D0>.

As will be seen later, the Commonwealth hoped for a similar co-operative system that would apply to internet content control.

2.1. Political Dimensions

At the time that the *Online Services Amendment* was passed, Australia had a federal government which was ideologically driven to reform the economy through efficiency and competition.[14] It was also a very conservative government—a coalition of two conservative parties—which did not have control of both houses of Parliament. Holding the balance of power was conservative Christian independent Senator Harradine, who had been campaigning for the cleaning up of the internet. The coalition government needed Senator Harradine's support to pass legislation relating to its economic reforms, and Senator Harradine wanted legislation to restrict access to internet content. Between them, both pieces of legislation were passed.[15]

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3. THE *ONLINE SERVICES AMENDMENT*

IN INTRODUCING THE *ONLINE SERVICES AMENDMENT*, the Commonwealth Government repeatedly asserted that there was no intention that the internet should have any higher level of censorship or regulation than any other medium. It claimed an intention only to legislate for media equivalence, pointing out that it was logical that what was illegal offline should also be illegal online.[16] The government acknowledged the difficulty of achieving this, but argued that the possibility of the legislation not being 100% effective did not justify doing nothing.[17]

The expressed aims of the *Online Services Amendment* were as follows:

> a) to provide a means for addressing complaints about certain internet content;
> b) to restrict access to certain internet content that is likely to cause offence to a reasonable adult; and
> c) to protect children from exposure to internet content that is unsuitable for children.[18]

The Parliament also intended that the regulation should not impose unnecessary financial and administrative burdens on internet content hosts (ICHs) and internet service providers (ISPs), should readily accommodate

14. John Howard's Liberal/National Party Government, which is still in power (December 2006).
15. See David Marr, *The High Price of Heaven* (Sydney: Allen & Unwin, 1999) at p. 114.
16. Richard Alston (Minister for Communications and Information Technology), "The Government's Regulatory Framework for Internet Content," (2000) 6:1 University of New South Wales Law Journal 4, <http://www.austlii.edu.au/au/journals/UNSWLJ/2000/1.html>.
17. *Ibid.*
18. *Broadcasting Services Amendment (Online Services) Act 1999*, *supra* note 7, s. 2, now incorporated into *Broadcasting Services Act 1992* (Cth), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/7238696148155C6DCA25730C0005B4E0?OpenDocument> [*Broadcasting Services Act 1992*], as ss. 3(1)(k), (l) & (m).

technological change, and should encourage the development of internet technologies, provision of services, and acceptable performance standards.[19]

How was the *Online Services Amendment* to achieve all this? Firstly, a hotline was to be established whereby members of the public could lodge complaints about internet content,[20] which would then be investigated by the Australian Broadcasting Authority (ABA).[21] Secondly, the *Online Services Amendment* was to create a co-regulatory scheme,[22] involving a legislative framework within which the internet industry would regulate itself and help to regulate access to internet content. Thirdly, a uniform national scheme was intended, whereby the *Online Services Amendment* would deal with what was within Commonwealth power, and the states and territories would reinforce the scheme for those areas outside Commonwealth power.[23] Fourthly, community education regarding safe use of the internet was to be an important factor in the scheme.[24]

3.1. Complaints and Content

Regulation of content under the *Online Services Amendment* was intended to result primarily from complaints made by members of the public. The ABA was granted power to investigate complaints about internet content,[25] and this complaints mechanism was referred to as "the cornerstone of the regulatory framework."[26] The ABA also had power to investigate content of its own volition,[27] although it was "not intended that this discretion [would] be used to monitor content actively."[28]

The ABA was to determine whether the content complained about was prohibited or potential prohibited content accessible via the internet.[29] "Prohibited content" is defined as Australian hosted R-rated material that is not subject to a restricted access system,[30] and all material rated X or RC.[31] "Potential prohibited

19. *Broadcasting Services Amendment (Online Services) Act 1999*, *supra* note 7, s. 4, now incorporated into *Broadcasting Services Act 1992* (Cth), *supra* note 18, as s. 4(3).
20. "Internet content" is information kept on a data storage device, and accessed or available for access using an internet carriage service. During passage of the Bill an amendment was made specifically to exclude "ordinary electronic mail" from its reach. Ordinary electronic mail is not fully defined, except to exclude from its definition a posting to a newsgroup. Information transmitted in the form of a broadcasting service is also excluded. *Broadcasting Services Act 1992*, *supra* note 18, sched. 5, cl. 3.
21. The functions of the Australian Broadcasting Authority (ABA) in regard to internet content regulation have now been taken over by the newly established Australian Communications and Media Authority (ACMA), <http://www.acma.gov.au>. To avoid confusion in this paper, ABA is used to refer to either or both of the ABA and the ACMA.
22. The scheme is often referred to as a "self-regulatory" scheme, but in fact it has many features of co-regulation. For simplicity it is referred to here as "co-regulation."
23. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 1(3).
24. *Ibid.*, sched. 5, cl. 1(4).
25. *Ibid.*, sched. 5, cl. 26.
26. Broadcasting Services Amendment (Online Services) Bill 1999, Second Reading Speech, Cth, *Parliamentary Debates*, Senate (21 April 1999), Senator Ian Campbell, <http://parlinfoweb.aph.gov.au/piweb//view_document.aspx?TABLE=HANSARDS&ID=2146085> at p. 3959 [Senator Ian Campbell].
27. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 27.
28. Senator Ian Campbell, *supra* note 26 at p. 3960.
29. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 22.
30. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 10. A restricted access system is one that enables content to be accessed by adults, but not by children. *Ibid.*, sched. 5, cl. 4.
31. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 10. R-rated content is content not suitable for minors. X-rated content is not suitable for minors and includes explicit sex (also known as non-violent erotica). RC is content which has been refused classification. For further detail as to the Australian classifications, see the website of the Office of Film and Literature Classification (OFLC), <http://www.oflc.gov.au/content.html>.

content" is unclassified content which, if classified, would be substantially likely to be prohibited content.[32] Classification of internet content was to occur under the Commonwealth's film classification guidelines,[33] so that even pure text was to be classified as film, under guidelines more stringent than those applying to literature.

Where the ABA determined that content was prohibited or potential prohibited content, it was to notify ICHs or ISPs to remove or prevent access to the content. Recognising the practical difficulties involved, the internet industry was given responsibility for working out the finer detail of how this should be done. Thus a co-regulatory scheme developed, by which the ABA would investigate and make decisions about internet content, and industry bodies would develop codes or standards specifying the technical aspects of how those decisions would be applied.

Where prohibited or potential prohibited content comes to the attention of the ABA, whether through a complaint or by some other means, the action to be taken depends on whether the material is hosted in Australia or is hosted overseas.

3.1.1. Material Hosted in Australia

The ABA may issue interim "take-down notices" to Australian sites hosting what is believed to be X- or RC-material,[34] and refer such material to the Office of Film and Literature Classification (OFLC) for classification.[35] A take-down notice requires the ICH to remove the specified content from its server within 48 hours of the issue of the notice.

The ABA may revoke its interim notices, or issue final take-down notices, depending on the classification that the material receives from the OFLC, whether there has been a voluntary take down of the material,[36] and in the case of R-rated material, whether or not an approved restricted access system is in place.[37] To prevent avoidance through modification of the specified material, the ABA may also issue notices for removal of material "substantially similar" to that which is the subject of such a notice.[38]

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32. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 11.
33. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 13, except computer games which are to be classified as computer games, sched. 5, cl. 12.
34. *Broadcasting Services Act 1992* (Cth), *supra* note 18, sched. 5, cl. 30. Material hosted within Australia and believed to be R-rated is not subject to interim take-down orders, as it is generally of a less serious nature than X- or RC-material, and issuing interim orders for such material may substantially increase both the ABA's administrative costs and the industry's compliance costs. However, the ABA will still refer such material to the OFLC for classification.
35. *Ibid.*
36. *Broadcasting Services Act 1992, supra* note 18, sched. 5, cl. 33. Where a content host voluntarily removes content in response to an interim take-down notice, and gives an undertaking not to host that material, the ABA may dispense with classification of that material. This has been strongly criticised, as hosts may take the easy route of simply removing such content, even though, if classified, the content may not be found to be prohibited content.
37. *Broadcasting Services Act 1992, supra* note 18, sched. 5, cls. 32–35, 42–45. A restricted access system is one which prevents minors from accessing the content.
38. *Broadcasting Services Act 1992, supra* note 18, sched. 5, cls. 36, 46–47. These anti-avoidance provisions were inserted to stop internet content hosts or content providers from minimally altering content and then re-hosting it.

3.1.2. Material Hosted Outside Australia

Where the ABA is satisfied that material hosted outside Australia is prohibited content (that is X- or RC-material), two possibilities arise. In the absence of an industry code dealing with the topic, the ABA may issue an "access prevention notice" requiring ISPs to "take all reasonable steps to prevent end users from accessing the content."[39] The legislation softened this requirement by stating that "in determining whether particular steps are reasonable, regard must be had to the technical and commercial feasibility of taking the steps."[40]

However, where an industry code of practice is currently registered, ISPs must act in accordance with the requirements of that code. So although the legislation provides for the use of access prevention notices, and thus the blocking of internet content by ISPs, in fact such notices have never been required, as industry codes of practice have been in force throughout the life of the *Online Services Amendment*.

In practice, where the ABA determines that access is available to prohibited content hosted overseas, it notifies ISPs of that content, and they must comply with the registered internet industry codes of practice. These codes require ISPs to provide a content filter to subscribers. In fact, this is fulfilled by ISPs bringing filter products to the attention of subscribers upon subscription, and periodically thereafter.[41] There is no requirement that subscribers *use* filter products, nor that ISPs filter content.

The practice that has developed during the operation of the legislation has been for the ABA to notify the makers of "family friendly filters" about prohibited overseas-hosted content,[42] and the makers are expected to add this content to their block lists.[43] Family-friendly filters are those included in a schedule to the industry codes. Thus, when the ABA notifies filter makers of prohibited content, that content should theoretically become inaccessible to those using a family-friendly filter. For those who do not choose to use a family-friendly filter, the ABA's notification of content will have no effect at all.

3.2. Penalties

Those sections of the *Online Services Amendment* requiring content to be taken down or access to content to be prevented are defined as "online provider rules."[44] A contravention of the "online provider rules" carries a penalty of fifty penalty units (currently AU$5500) for an individual, or up to five times that for a corporation.[45] The *Amendment* also provides that the ABA may direct a provider to take action to avoid contravening the online provider rules (a breach of such

39. *Broadcasting Services Act 1992*, *supra* note 18, sched. 5, cl. 40(1)(c). ISPs need not take reasonable steps to stop access to the content so long as an "alternative access prevention arrangement is in place." Alternative access prevention arrangement can include the use of a filter or filtered service. *Ibid.*, sched. 5, cl. 40(6).
40. *Broadcasting Services Act 1992*, *supra* note 18, sched. 5, cl. 40(2).
41. *Internet Industry Codes of Practice*, <http://www.iia.net.au/files/IIA/Codes%20of%20Practice/Content%20Code/ContentCodes10_4.doc>, code 2, s. 12 and code 3, ss.19.3–19.6 [*Internet Industry Codes of Practice*].
42. *Ibid.*, code 3, s. 19.2.
43. *Ibid.*, sched. 1, "IIA Family Friendly Filters."
44. *Broadcasting Services Act 1992*, *supra* note 18, sched. 5, cl. 79 states that rules set out in cls. 37(1), (2), (3) and (4), 48(1) and (2), 66(2), 72, and 80 are "online provider rules."
45. *Ibid.*, sched. 5, cl. 82.

a direction also carries a penalty of fifty penalty units),[46] or may issue a formal warning to those in breach.[47] The Federal Court may also order a person found to be supplying or hosting internet content in contravention of the online provider rules to cease supplying the contravening internet carriage service or to cease hosting that content in Australia.[48]

3.3. General Provisions

Under the *Online Services Amendment*, the ABA is also empowered to register appropriate industry codes,[49] and to draft codes or industry standards where: 1) there is no relevant industry body, 2) where the industry body has not done so, or 3) where the ABA believes that the code or standard is deficient.[50] The ABA must also monitor compliance with such codes or standards.[51] Further, the ABA is given power to approve restricted access systems (RAS)[52] behind which Australian hosted R-rated material must be housed.

The ABA is also charged with less technical powers and responsibilities. It is required to advise and assist parents and adults in relation to supervision and control of children's internet access, to conduct and coordinate community education programs, to conduct and commission research into related issues, to liaise with regulatory and other bodies involved in the internet industry, and to gather information on technological developments and service trends in the industry.[53]

Industry codes likewise are required to deal with topics such as advising and assisting parents and responsible adults in relation to supervision and control of children's internet access, giving content providers information about their legal responsibilities, and informing users about complaints procedures regarding online content.[54]

Both the ABA and the Internet Industry Association (IIA) carry out these functions to some limited degree, mainly by providing a webpage containing information regarding safe internet use.[55] The IIA has also introduced a "family friendly seal" to be awarded to code-compliant ISPs. However, neither body is really active in providing education or advice regarding internet use.

3.4. Further Provisions

As a result of amendments while the *Online Services Amendment Bill* was before Parliament, the Federal Government's scheme for internet content control was modified to include two further aspects: firstly, complementary state and territory legislation, and secondly, the establishment of a community advisory body.

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46. *Ibid.*, sched. 5, cl. 83.
47. *Ibid.*, sched. 5, cl. 84.
48. *Ibid.*, sched. 5, cl. 85.
49. *Ibid.*, sched. 5, cl. 62.
50. *Ibid.*, sched. 5, cl. 68–71.
51. *Ibid.*, sched. 5, cl. 94(a).
52. *Ibid.*, sched. 5, cl. 4.
53. *Ibid.*, sched. 5, cl. 94.
54. *Ibid.*, sched. 5, cl. 60.
55. ABA, *supra* note 21; Internet Industry Association, <http://www.iia.net.au/>.

3.4.1. Complementary State and Territory Legislation

As discussed above, the Commonwealth Parliament has only limited powers to enact legislation, and any enactment must fit within the power specifically granted under the Commonwealth Constitution. Therefore, while the Commonwealth has some power to legislate to restrict the carriage and hosting of specified content, it has no general censorship power and no power to restrict individuals from creating, uploading, downloading, or possessing the content about which it was concerned. Thus it was necessary, if the scheme were to be more roundly effective, for states and territories to enact complementary legislation. The second component of the proposed scheme therefore was state and territory laws to cover producers of content,[56] and persons who upload or access content.[57] This component of the scheme was intended to ensure a uniform national approach to online content regulation and to stop the fragmentary regulation of the internet in Australia, which had been occurring prior to the enactment of the *Online Services Amendment* and could have had an "adverse effect on the development of the online industry."[58] Such legislation was intended to "supersede online services specific legislation currently in place…."[59] This component of the scheme also included amendment of the Commonwealth's own *Crimes Act 1914* to guard against inconsistency between federal and state law in this area, and thus to ensure that the new state and territory laws would be upheld.

3.4.2. Community Advisory Body

The third component of the scheme for internet content control was a range of non-legislative initiatives directed towards monitoring content on the internet[60] and educating and advising the public about content on the internet.[61] The *Online Services Amendment* provided for a body to be set up specifically for this purpose, funded by the Commonwealth. Interestingly, this body was to be located in Tasmania, the home state of Senator Harradine.[62] It was envisaged that this body, known as NetAlert, would also operate a hotline to receive complaints about illegal material, and advise the public about options, such as filtering software, which were available to control online content.[63]

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4. EFFECTS OF THE *ONLINE SERVICES AMENDMENT*

THE *ONLINE SERVICES AMENDMENT* CAME into force in July 1999, with the complaints regime to operate from 1 January 2000. While the lead up to the regime had caused uproar, this soon quietened down once the scheme commenced to operate, as it became clear that the scheme would have little substantial effect,

56. *Broadcasting Services Act 1992*, *supra* note 18, sched. 5, cl. 1(3)(a)(i).
57. *Ibid.*, sched. 5, cl. 1(3)(a)(ii).
58. Senator Ian Campbell, *supra* note 26 at p. 3958.
59. *Ibid.* at p. 3958.
60. *Ibid.*, sched. 5, cl. 1(4)(a).
61. *Ibid.*, sched. 5, cl. 1(4)(b).
62. Senator Harradine's involvement in the introduction of the scheme is discussed above part 2.1.
63. See *Supplementary Explanatory Memorandum*: *Broadcasting Services Amendment (Online Services) Bill 1999* (Cth), <http://parlinfoweb.aph.gov.au/PIWeb//view_document.aspx?TABLE=OLDEMS&ID=325>, am. 5.

and that little additional burden would be created by the scheme. The main effects of the scheme are discussed below.

4.1. Complaints and Content

Complaints made under the *Online Services Amendment* have related mainly to overseas-hosted content, over which Australian authorities have no jurisdiction. Of investigations conducted by the ABA between 2002 and 2004, Australian-hosted content accounted for only 10%, 4% and 1% per year, respectively.[64] The reduction in the number of complaints relating to Australian-hosted content has been interpreted by the ABA as proof of the scheme's success in removing Australian-hosted prohibited content.[65]

In the first three years of operation of the complaints scheme (January 2000–December 2002), 297 take-down notices were issued for content hosted in Australia, 72 take-down notices were issued in the three-year period from January 2003–December 2005, while in 2006 only 16 take-down notices were issued.[66] There is evidence that some content has been removed from Australian servers as a result of the *Online Services Amendment*. There is no evidence, however, that any content has actually been made inaccessible due to a take-down notice. Such content can easily be taken down from Australian servers and re-hosted overseas, and there is some evidence of this occurring.[67]

Complaints about overseas-hosted content are far more prevalent. However, as the scheme has developed such that no blocking of content is required, no "access prevention notices," which are provided for in the legislation, have ever been enforced. Instead, the filter makers who have agreed to add notified content to their block lists are notified by the ABA of prohibited overseas-hosted content, and are expected to add that content to their product's block lists. In the first three years of operation of the scheme (from 1 January 2000 to 31 December 2002), 1080 items of content were referred to makers of family-friendly content filters, 594 in 2003, 810 in 2004, 729 were referred in 2005, and 492 in 2006.[68] These figures generally show increasing quantities of overseas-hosted material coming to the attention of the ABA.

It must be noted that compliance with both take-down notices and content referrals may have no impact at all on the accessibility to internet users of the content in question. Australian-hosted content can simply be removed to overseas hosts, and overseas-hosted content can be accessed simply by not using a content filter. Further, while specific notified sites may be blocked by

64. "Five Years On: Internet Content Regulation in Review," *ABA Update* (December 2004–January 2005) 17, <http://www.acma.gov.au/webwr/aba/newspubs/info_about_us/newsletter/documents/abaupdate138_dec2004jan2005%20.pdf> ["Five Years On"].
65. *Ibid.*
66. Statistics can be found in Australian Communications and Media Authority, "Internet Content Complaint Statistics," <http://www.acma.gov.au/ACMAINTER.852114:STANDARD::pc=PC_90105> ["Internet Content Complaint Statistics"].
67. *Six Month Report on Co-Regulatory Scheme for Internet Content Regulation, January to June 2000,* tabled in the Senate by the Minister for Communications, Technology and the Arts (September 2000).
68. "Internet Content Complaint Statistics," *supra* note 67. Note that the statistics for December 2005 are not available.

filter products, it is likely that the same or substantially the same content would be accessible from other overseas sites.

4.2. Uniform State and Territory Legislation

Unfortunately the envisaged uniform state and territory legislation, intended to complement the Commonwealth scheme, has not eventuated. South Australia passed and commenced the hoped for legislation;[69] NSW passed but did not commence the legislation;[70] and the other jurisdictions made no attempt to enact such legislation. As a result, state and territory legislation dealing with internet content continues to vary enormously. For example, Operation Auxin, a national investigation of those buying child pornography via the internet, resulted in arrests and charges being laid across Australia. Due to the continuing lack of uniformity across jurisdictions, those arrested were charged under state and territory laws, which included a variety of offences, defences, and penalties depending on whereabouts a person was charged.[71] Thus even those in possession of the same content, in the same format, of the same quantity, and from the same source are still subject in Australia to hugely varying laws.

4.3. Community Education

The community education scheme envisaged under the *Online Services Amendment* has been singularly unsuccessful. Few people have ever heard of NetAlert, the body set up to disseminate information regarding safe use of the internet. Three years after the scheme commenced, only 30% of public libraries were aware of NetAlert's existence.[72] The ABA and IIA do offer some minimal "community information" regarding safe use of the internet, but this is in the form of webpages only,[73] which users may or may not seek to access.

The ABA's "Cybersmart kids" page does not even mention the existence of NetAlert, nor is NetAlert mentioned in an ABA article reviewing the first five years of the scheme.[74] It appears that the creation of NetAlert really was a sop to Senator Harradine, bringing considerable income into his home state of Tasmania, although Tasmania may not have had the required expertise to run such an undertaking effectively. Overall, community education regarding internet safety has been minimal at best, and requires urgent and effective attention.

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69. *Classification (Publications, Films and Computer Games) (Online Services) Amendment Act 2002* (SA), <http://www.governmentgazette.sa.gov.au/2002/november/2002_132.pdf>.
70. *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW), <http://www.parliament.nsw.gov.au/prod/parlment/NSWBills.nsf/0/834e4c2623285691ca256afc001a1438/$FILE/b01-128-p02.pdf>.
71. Under this operation, codenamed "Operation Auxin," arrests were made and charges laid in the latter half of 2004. For further discussion of this point, see part 8.4 below and Carolyn Penfold, "Child Pornography Laws: The Luck of the Locale," (2005) 30:3 Alternative Law Journal 123.
72. Australian Library and Information Association, *Survey of Internet Access in Public Libraries, 2002: Preliminary Report*, included in ALIA's *Supplementary Submission to Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* (November 2002), <http://www.alia.org.au/advocacy/internet.access/summary.report.html>.
73. The Internet Industry Association refers users to the ACMA and other websites, <http://www.cybersmartkids.com.au/>.
74. "Five Years On," *supra* note 65.

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5. REVIEW OF THE SCHEME

THE OPERATION OF THE *ONLINE SERVICES AMENDMENT* was reviewed in 2004, but little activity ensued. There was concern that filter makers were not adding referred sites to their filters quickly enough, or at all, and accordingly there was a threat that they would be dropped from the schedule of filters if they did not comply more efficiently and effectively.[75] Another concern was that NetAlert and ABA activities overlapped, and the functions of each body were altered to try to avoid this.[76] In response to the concern that NetAlert was not very effective, NetAlert's objects were altered, presumably to give it tasks it may be better able to do.[77] Finally, there was concern that filters were offered to subscribers by ISPs only at the point of subscription, and that by the time people realised the need for filters, the information would no longer be available. In response to this concern, the code requirements were changed, so that ISPs are now required to inform subscribers of the availability of filters periodically, and not only upon initial subscription.[78]

Very little concern was expressed in submissions to the review about the continuing availability of certain types of content on the internet. In fact, the main submission in this area came from the Race Commissioner of the Human Rights and Equal Opportunity Commission and related to race-hate content.[79]

Independent of the review, but while the review was being conducted, a survey was released in Australia claiming that 84% of boys and 60% of girls reported accidental exposure to "sex sites" on the internet. The survey results were reported along with results of studies said to show the dangers of exposure to pornography.[80] Both were used to support calls for more stringent controls on internet content, including mandatory blocking of prohibited content. Despite this, the review panel found that upstream filtering or blocking of content would be impractical, expensive, and still not necessarily effective, and they thus recommended no substantial change to the current arrangements.[81]

The review did not receive many submissions.[82] The bulk of those received were from key stakeholders such as NetAlert, the ABA, the IIA, and internet and telecommunications companies, which supported the current scheme and were keen to see the scheme remain as it was. They commented, for example, that the current scheme was "…working very well. It strikes a

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75. DCITA, *Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* (May 2004), <http://www.dbcde.gov.au/__data/assets/pdf_file/0012/10920/Online_Content_Review_Report.pdf>at p. 44 [DCITA, *Review*].
76. *Ibid.* at p. 28.
77. *Ibid.* at p. 15.
78. *Ibid.* at p. 21.
79. Race Discrimination Commissioner, Human Rights and Equal Opportunity Commission, *Submission to Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* (November 2002), <http://www.dcita.gov.au/__data/assets/word_doc/10892/Racism_and_the_Internet.doc>.
80. Clive Hamilton & Michael Flood, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects* (Australia Institute, 2003); and Clive Hamilton & Michael Flood, *Parents' Attitudes to Regulation of Internet Pornography* (Australia Institute, 2003).
81. DCITA, *Review, supra* note 76 at p. 3.
82. Only 26 submissions were made to the enquiry, compared with well over 100 submissions made to the Senate enquiry preceding the 1999 passage of the *Act*.

balance between providing consumers with information and tools to manage online content themselves while ensuring that the obligations on ISPs do not undermine the commercial viability of providing Internet access...,"[83] and that the scheme "provides an effective and efficient structure to balance the needs of the Australian community… with the need not to impose unnecessary financial and administrative burdens."[84] The entirely minimal obligations imposed under the scheme were clearly preferred to any changes.

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6. PROBLEMS ANTICIPATED PRIOR TO THE *ONLINE SERVICES AMENDMENT*

THE MAJOR PROBLEMS ANTICIPATED in the lead-up to the enactment of the *Online Services Amendment* have not come to pass. The internet industry has not been required to monitor, block, or filter content, and in fact, the industry has had very little obligation at all under the scheme. The content-control regime really can not be seen to impinge in any way upon the development of the internet industry.

Concerns about media non-equivalence, such as all internet content being classified as film, or all X-rated content being prohibited, need not have caused great worry. In fact, very little content is classified at all under the scheme, and that which is classified can easily be moved outside Australia if it falls foul of Australian restrictions. X-rated content is still available within Australia in other formats and via the internet through overseas hosts.

The concern that private email would be monitored was removed with an amendment to the bill prior to enactment.[85] Concerns regarding the legislation's competing priorities of restricting access to internet content versus ensuring continued growth and economic viability of the industry have not caused any real friction, as so little action has occurred at all under the *Act*. Some other concerns have arisen, however.

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7. REAL PROBLEMS

7.1. Slippery Statistics and Freedom of Information

EVERY SIX MONTHS THE ABA reported to the Minister for Communications and Information Technology, who in turn reported to Commonwealth Parliament on the progress of the scheme. Early reports were found to be "accidentally" inflating the figures for prohibited RC-content and deflating the figures for R-rated content. Thus the reports suggested that a great deal more of the content being investigated and regulated under the scheme was more extreme

83. Telstra, *Submission to Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* (November 2002), <http://www.dcita.gov.au/__data/assets/word_doc/10897/Telstra.doc>.
84. Optus, *Submission to Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* (November 2002) 2, <http://www.dcita.gov.au/__data/assets/word_doc/10917/Optus.doc>.
85. This aspect of the Bill was amended during its passage so that "ordinary electronic mail" was specifically excluded. Ordinary electronic mail is not fully defined, except to exclude from its definition a posting to a newsgroup. *Broadcasting Services Act 1992*, *supra* note 18, cl. 3.

than it actually was. The Minister was forced to correct the statistics after questions arose in Parliament.[86]

To keep a check on how the reports to Parliament tallied with what was actually happening under the scheme, Electronic Frontiers Australia requested information under the *Freedom of Information Act* 1982 (*FOI Act*) about content that had been ordered to be taken down from Australian servers, or that had been referred to filter-makers. Consequently, the Government amended the *FOI Act* to exclude this information from the reach of the *Act*. The Government suggested that without such an exemption paedophiles and miscreants may use FOI applications to gain access to pornography, and that disclosed information may be used to "feed the bizarre sexual appetites of deviants."[87] However, the federal government amendment unnecessarily excluded completely the availability of detailed information regarding what content was removed or restricted under the scheme. It could instead have allowed access only to those who could show a legitimate interest, possibly with restrictions on further release. The blanket restriction suggested that the government did not wish the operation of the scheme to be transparent, nor wish those making decisions under the scheme to be accountable. In many ways, the Commonwealth Government's move to exclude this content from the reach of freedom of information legislation creates more concern than does the scheme itself!

7.2. Community Education

The need for effective internet education was accepted by the Commonwealth Government prior to the enactment of the *Online Services Amendment*. However, in Australia money earmarked for community education regarding the internet seems to have been largely wasted, as there is little evidence of any effective community education being carried out at all. This is a major concern arising from the Australian scheme. It may be that the community feels "safe" with the internet now that they know that it is regulated; but if this is so it is a huge misconception. In fact, community education was probably the most promising aspect of the whole scheme, and could have had the most useful impact. Recently however, NetAlert has embarked on a "National Road Show," visiting schools, libraries, and community centres throughout Australia. It is intended that the National Road Show's seminars will provide parents, teachers, and students with education and training on Internet safety management. It is hoped that this attempt at community education will have more substance than NetAlert's past activities.

7.3. Content Filters

The schemes' reliance on the use of content filters, although voluntary, remains of concern. There are no Australian-developed internet content filters. Those filters available from overseas were generally developed by commercial

86. Question on notice, asked by Senator Greig (Cth), *Parliamentary Debates*, Senate (8 April 2002), responded to by Senator Alston (Cth), *Parliamentary Debates*, Senate (17 July 02) at pp. 1914–1916.
87. Comment attributed to Senator Alston in "FOI Loophole opens way to banned websites," *Courier Mail* (Queensland) (4 September 2003), <http://www.mako.org.au/ausnews81.html>.

organizations, are possibly culturally inappropriate for Australia, very possibly biased, often overly zealous, and often simply ineffective.[88] Under the scheme, money was put aside for research into effective content control and internet safety, and the development of appropriate filter products were seen as legitimate uses for this funding. However, after five years of the *Amendment* being in force, not one Australian-based or Australian-adapted internet content filter had come onto the market. This makes it difficult for those who may wish to filter content but are not willing to use commercial (and generally American) filter products. There has been some encouragement for Australian content providers to label content, and in fact this encouragement forms part of the internet industry codes of practice. There is no evidence, however, that it is any more common for Australian content to be labeled now than it was prior to the introduction of the *Online Services Amendment*.

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8. RECENT DEVELOPMENTS

THE COMMONWEALTH GOVERNMENT HAS never admitted that its scheme for internet content control has been largely ineffective. Despite this, the lack of effective control of internet content in Australia is being countered to some degree by tinkering with the current scheme, and by the development of alternative approaches.

8.1. Industry Codes of Practice

For example, there have been some changes and improvements to the internet industry codes of practice. Filter products referred to in these codes were initially known as approved filters, although their effectiveness had not in fact been evaluated.[89] After considerable criticism, two changes were made. Extensive research into the effectiveness of content filters was funded by NetAlert and the ABA, and results of this research made publicly available.[90] Further, codes were amended to refer to such products as "scheduled" rather than "approved" filters, to avoid the impression that particular filters are sanctioned by bodies such as the ABA, NetAlert, or the IIA. More recently, the codes have been amended again and refer now to "family friendly filters."[91]

Changes to the codes of practice also now require that subscribers to internet carriage services are informed periodically about how to make complaints about content and how to access filter software. This is to ensure that the information remains accessible to subscribers throughout the period of their internet use, rather than being provided upon initial sign-up only. Further, ISPs

88. Early reference to these problems can be found in Australian Broadcasting Authority, *Investigation into the Content of Online Services* (30 June 1996), <http://www.aba.gov.au/newspubs/documents/olsfinal.pdf>, especially chapter 9. See more recently Ovum, *Internet Content Filtering: A Report to DCITA* (4 April 2003), <http://www.dcita.gov.au/__data/assets/file/10915/Ovum_Report_-_Internet_content_filtering.rtf> [Ovum, *Internet Content Filtering*].

89. See discussion in Carolyn Penfold, "The Online Services Amendment, Internet Content Filters, and User Empowerment," (2000) National Law Review 7, available at <http://pandora.nla.gov.au/parchive/2001/Z2001-Mar-13/web.nlr.com.au/nlr/HTML/Articles/penfold2/penfold2.htm>.

90. Ovum, *Internet Content Filtering*, *supra* note 89.

91. *Internet Industry Codes of Practice*, *supra* note 41.

that make filters available must now do so at cost price; provision of filters is not to be used by ISPs as a profit-making activity.

Interestingly, in a recent survey of families using the internet, parents reported double the use of internet content filters in 2004 than reported in 2001 (usage rose from 17% to 35%).[92] Finally, the internet codes of practice have now been amended to include requirements for mobile phone carriers making web content available via mobile phones. This is intended to go some way toward making more uniform the regulation of internet content, regardless of the hardware through which it is accessed.

8.2. New Legislation

In an attempt to regulate other internet content that is also of concern, the Government has introduced legislation to restrict both gambling sites[93] and the distribution of spam.[94] While these legislative schemes may be seen to be in keeping with the type of regulation introduced by the *Online Services Amendment,* there may also be drawbacks in enacting separate regimes for different types of internet content. For example, complaints giving the URL of a child pornography site will be investigated under the *Online Services Amendment*, but a complaint related to an email offering child pornography will need to be dealt with under the SPAM legislation.[95] Likewise, complaints about gambling sites will be dealt with under gambling legislation, but a complaint about an email offering access to gambling sites will be the subject of the SPAM legislation.

8.3. Amendment to the Crimes Act 1990 (Cth)

As mentioned above, the Commonwealth Government amended its *Crimes Act* when enacting the *Online Services Amendment*, to ensure against inconsistency with the proposed complementary state and territory legislation. As it has become clear, however, that the proposed state and territory legislation is unlikely to be enacted, the Commonwealth has moved to include in its laws a number of internet-related criminal offences. The Commonwealth has amended its own *Criminal Code*[96] to include offences such as use of a carriage service to access, transmit, or publish child pornography or child abuse material, or to procure or

92. NetRatings Australia Pty Ltd, *kidsonline@home: Internet use in Australian homes* (April 2005), <http://www.acma.gov.au/webwr/aba/about/recruitment/kidsonline.pdf> at p. 62.
93. *Interactive Gambling Act 2001* (Cth), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/0A26E04ABE95D0BBCA25702600018A62>.
94. *SPAM Act 2003* (Cth), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/0A26E04ABE95D0BBCA25702600018A62>.
95. The author received an unsolicited email offering "horny child pornography," which was then forwarded to the ABA, not as a formal complaint but "for its perusal." The ABA responded in part: "Please note that the ABA's powers under schedule 5 to the *Broadcasting Services Act 1992* do not extend to investigating complaints regarding unsolicited email (SPAM). The government body, the Australian Communications Authority (ACA), is directly enforcing the Spam Act 2003, monitoring spamming activities, promoting public education and working internationally to combat Spam. The email address by which you may report Spam to the ACA is…".
96. *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act 2004* (Cth), <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/A0BA7D273D5F7225CA256F72001197AA?OpenDocument>.

groom under-aged persons.[97] Accessing child pornography over the internet now carries a maximum ten-year sentence under the federal legislation.[98]

However, the charges available under this legislation still need to be within Commonwealth power. Possession of child pornography cannot be covered by this legislation because, given that it is a purely intrastate activity, it does not come under any head of Commonwealth power. So while the new legislation will allow federal prosecutions for activities such as *accessing* child pornography over the internet, it will still not cover others, such as *possession* of child pornography!

Thus the new Commonwealth legislation adds yet another layer of law, rather than removing existing inconsistencies. Individuals accessing child pornography on the internet may now be charged uniformly with accessing content under federal legislation, but still be subject to varying state and territory laws regarding possession of the same content. Unfortunately there are no moves afoot for the states and territories to come into closer alignment, and thus the lack of uniformity in this area is likely to continue.

8.4. Federal, State and International Co-operation

There have been some positive moves in terms of increasing cooperation at a number of levels. Although the states and territories have not enacted the hoped for uniform legislation, they have established more uniform procedures for investigating and prosecuting some internet-content-related crime.

The Australian High Tech Crime Centre, for example, has been established as a joint state, territory, and federal body to:

> a) provide a national coordinated approach to combating serious, complex and multi-jurisdictional high tech crimes, especially those beyond the capability of single jurisdictions;
> b) assist in improving the capacity of all jurisdictions to deal with high tech crime; and
> c) support efforts to protect the National Information Infrastructure.[99]

Shortly after its establishment, the AHTCC conducted an investigation of internet distributed child pornography. Known as Operation Auxin, this investigation culminated in the issue of over 400 search warrants, which resulted in more than 150 people being charged throughout Australia.[100] Not only did this involve the cooperation of a number of Australian police forces, but their information came initially from an overseas body investigating credit card transactions linked to the distribution of child pornography in Eastern Europe.

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97. Provisions inserted into *Criminal Code Act 1995* (Cth), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/6A819525F06C227DCA2571AE00270F6C>, s. 474.
98. *Ibid.*, s. 474(19)–(20). Procuring carries a maximum fifteen-year sentence (s. 474(26)), and grooming a maximum twelve-year sentence (s. 474(27)).
99. For further information on the Australian High Tech Crime Centre (AHTCC), see their website, <http://www.ahtcc.gov.au/>.
100. Australian Federal Police, "Hundreds netted in nationwide crackdown on childporn," Media Release (30 September 2004), <http://www.ahtcc.gov.au/news_and_information/media_releases/mr30092004opauxin.pdf>.

This increased cooperation both within Australia and internationally is likely to be a positive step in the control of internet content, which recognizes the need for multi-jurisdictional efforts in this area.

Taken together, the introduction into the federal *Criminal Code* of specific offences (such as grooming, procuring, and distributing child pornography), the establishment of the Australian High Tech Crime Centre, and the multi-jurisdictional nature of Operation Auxin suggest that a different approach to internet content control is emerging in Australia. If this type of development continues, it is likely to have a more real effect than the *Online Services Amendment* will have or has had.

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9. CONCLUSION

GIVEN THE EFFECTS (OR OTHERWISE) OF the *Online Services Amendment*, and the more recent developments aimed at controlling transmission of internet content, can Australia be said to be the "village idiot of the internet world?" Probably not. While it is not possible in this article to examine content control in other countries, Australia actually shares some methods, such as the encouragement of filtering and labeling,[101] use of hotlines,[102] and codes of practice,[103] whether legislated or otherwise, with many other countries. In fact, the Australian scheme for internet content control looks decidedly mainstream. The aims of the *Online Services Amendment* were probably broader reaching than those in many other countries, and initial discussion of monitoring and blocking certainly raised many fears; but given the way the operation of the scheme has developed, it is not out of line with other democratic nations.

If nothing else, this attempt to regulate online content probably did have the effect at least of taking the controversy and urgency out of the debate for a while. This allowed time for the internet to take hold and to become a mainstream communications medium, which is open to all and used by most of the community. Concerns and complaints about internet content have been channeled to a non-political body which can investigate the content, rather than continuing to deal with concerns at a political level. In this respect, the *Online Services Amendment* may have had some positive effect.

After six years of the operation of the *Online Services Amendment*, it is probably fair to say that Australia is neither the village idiot of the internet world, nor the wisest person in town. Rather, it is just one more country trying to come to grips with a new and rapidly developing communications medium, the internet.

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101. "A number of national governments have praised ICRA's [Internet Content Rating Association] efforts and, in some cases, made specific reference to ICRA in legislation or government agency reports on protecting children online. These include: USA, UK, France, Germany, Spain, Greece, Canada, Australia, Hong Kong, Korea, and Japan. These countries also encourage the use of labeling and filtering as part of a wider effort to protect children from potentially harmful material." Email from Anna Hughes (ICRA) to the author (7 March 2006).
102. INHOPE, the International Association of Internet Hotlines, has twenty-three member countries, all of which operate hotlines.
103. Codes of practice are used in at least Netherlands, France, Italy, UK, Ireland, Austria, New Zealand and Singapore.