LUST, GREED, SLOTH
The Performance and Potential of Internet Coregulation in Australia

Peter Chen[*]

This paper reviews the development and impact of the *Broadcasting Services Amendment (Online Services) Act 1999*, a coregulatory framework introduced by the Commonwealth to limit and control the flow of 'objectionable' content travelling over the internet. Developed amidst competing political calls to strictly limit the distribution of (mainly) pornographic material online and industry concerns about compliance costs, the legislation is a largely ineffective attempt to control a plastic medium with a global reach and participation. In examining this legislation, it is argued that emerging community concerns about poker machines in the offline environment motivated the coregulatory approach to be applied (in a reduced form) to online gambling — eroding developments of the states and territories in managing the social problems associated with this activity. Overall, it is argued that the two laws were largely symbolic policies of the type identified by Edelman: a government commitment to action without particular interest in the resolution of perceived public problems. The failings of the Government's model lies in its limited scope, 'black hat' view of the potential of online technologies and imbedded bias towards established commercial interests. The paper proposes a new regulatory approach, one with a more genuine collaborative and cooperative orientation that motivates industry participation and provides avenues for genuine community input in enhancing the experiences of Australians online.

---

[*] Centre for Public Policy, Department of Political Science, Faculty of Arts, The University of Melbourne. I would like to thank Mr George Hazim of iPrimus and Mr Donald Robertson of the Australian Broadcasting Authority for their prompt responses to queries. Comments on earlier drafts of this paper were kindly provided by Dr Asa Masterman of the National Office for the Information Economy, Mr Sherman Young of Macquarie University's Department of Media and Communication, Ms Carolyn Penfold of the UNSW Faculty of Law, Ms Joanne Faulkner of the La Trobe University School of Communication, Arts and Critical Inquiry, Professor Mark Considine of the University of Melbourne Centre for Public Policy, and Dr Geoff Airo-Farulla of the Griffith University Faculty of Law. I would also like to warmly thank the previous reviewers of this paper and Professor Sandra Berns of Griffith University for shaping the direction of this paper and asking the question 'Okay you've a critique, but what should we *do*?'

Introduction

Regulation of the online environment has become a common problem for many governments around the world. While the motivations for regulation are diverse, in their desire to censor internet content, English-speaking countries have tended to focus on the moral implications of unfettered communication between computer users. Issues associated with intellectual property protection, harassment and criminality have followed behind initial policy positions aimed largely at pornography and other morally unacceptable forms of communication.

In Australia, initial policy debates about internet content focused almost exclusively on pornography and paedophilia, with the policy debate centring around a conflict between the protection of minors from offensive and morally degrading material and the freedom of adults to communicate content of interest to them, regardless of the sexual nature of this material.[1] In 1999, the Federal Government introduced the *Broadcasting Services Amendment (Online Services) Act* prohibiting the unrestricted distribution of material that would be classified 'R' or greater under the existing film and literature classification regime. In 2000, following public debate about the extent of gambling in the Australian community, the government introduced a moratorium on the expansion of online gambling services in Australia, followed in July 2001 by the *Interactive Gambling Act* to prohibit the operation of online casinos within Australia. While initial regulatory proposals countenanced the possibility of strict regulation, each law was curtailed to regulatory regimes that would minimise compliance costs for certain established commercial players.

While the Internet censorship legislation has not had the detrimental effect on freedom of speech that some claimed it would, it is impossible to argue that either regulatory approach has been effective in addressing its core concerns: reduced access to online material or activities deemed morally harmful. While some might posit that this is unproblematic – especially those with the libertarian view that government intervention is unwarranted – the underlying concerns about offensive material and misuse of new communications technologies among the wider Australian community have not been resolved. As online technologies become more important in the economic, social, and political life of nations like Australia, the scheduled review of the initial regulatory regime in late 2002 offers the Australian government the opportunity to admit past failures and develop a new approach for online regulation. In this paper, therefore, an alternative model is proposed: a co-regulatory regime focused on the development of positive information about effective Internet use, with committed industry involvement, and – importantly – one that recognises and internalises the concept of 'community values'. Community values, it is argued, lay at the heart of public debate surrounding the *Broadcasting* and *Interactive Gambling* debates, but have not genuinely been incorporated into the management of these systems of control. Overall, the participative nature of the Internet – the feature that makes this

---

1 Young (2000), p3.

technology so distinctive and powerful – can be harnessed as a means to balance the competing interests in securing Australia's online future.

Three Sins of Omission

> Welcome to the world of sleaze
> pretty baby, we've got everything you need
> you'll fit in it's such a breeze, pretty baby
> happy living on your knees
>
> Cos there's dicks and cunts
> and slut, and butts, oh
> pimps and ho's, yeah
> plenty of those
>
> There's no end to the things you can win
> and I'll be your friend if you just spread your legs
>
> (Regurgitator, 'Welcome to the World of Sleaze', *Unit*, 1996)

Lust: Surfing the World of Porn

Following a protracted political debate beginning in 1995, the Commonwealth enacted a law to regulate online content in Australia.[2] The aim of the *Broadcasting Services Amendment (Online Services) Act 1999* (the *Broadcasting Amendment Act*) was for 'the control of illegal or highly offensive material published and transmitted through online services such as the Internet ... while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy'.[3] The implementation of this law allowed the Minister for Communications, Senator Richard Alston, to announce: 'Australian families will welcome the continued removal by the Online Content Regulatory Scheme of illegal and highly offensive material on the internet, particularly child pornography sites.'[4]

The regulatory regime contains a number of elements based on adaptation of existing broadcasting laws and regulating institutions in line with the national framework for controlling media content in Australia[5]. In essence, the law provides for a complaints mechanism maintained by the Australian Broadcasting Authority (ABA), with content review provided by the Office of

[2] For a more detailed examination of the development of this Act, see Chen (1999).

[3] Department of Communications, Information Technology and the Arts (2000).

[4] Department of Communications, Information Technology and the Arts (2001).

[5] An agreed model between the Commonwealth, states and territories that provides for the Commonwealth, via the Office of Film and Literature Classification, to classify content, and the various governments to determine what level of content is permissible within their respective constitutional powers.

Film and Literature Classification (OFLC). Content is either deemed prohibited or non-prohibited (rather than ranked, as for other media)[6] for the context of censorship. Material classified as RC[7], X[8] or R contained within Australia and not access-restricted via a technology that vets for children, is prohibited on internet sites maintained within this nation. For prohibited content contained within Australia, the ABA has the power to issue temporary and permanent take-down notices to Internet Service Providers (ISPs);[9] for material held outside of Australia, the Authority refers these URLs[10] to the makers of internet filtering technologies. Illegal content, such as child pornography, is referred to relevant law enforcement, where practicable.[11] Additionally, the regime established a wholly government-owned company (NetAlert) to provide advice to government, education services for Australians about online content, and review and publish assessments of commercially developed filtering technologies. The functions of these participants are listed in Figure 1.

Based on the regime employed to regulate the domestic television and radio industries, management of the scheme is described as a coregulatory partnership with industry, via the Internet Industry Association (IIA).[12] The *Broadcasting Amendment Act* relies on a limited number of industry Codes of Practice to provide cooperation with the enforcement of take-down notices for domestic content and the provision of filtering solutions for Australian

6 This distinction is important. While material like paedophilia is prohibited outright, other material is classified by the OFLC to provide for informed choice by potential consumers. Differential ratings are prohibited to some media forms, and times of consumption (television, for example).

7 Refused Classification (see Part 3, section 10(1) of the *Act*).

8 This includes illegal material, like child pornography, explicit and violent sexual activity, and fetish material, as well as material that instructs in the commission of crime.

9 ISPs are services that provide access to the internet to end-users. ISPs can be distinguished from telecommunication carriers, where they are resellers of bandwidth; however, some ISPs are also telecommunication carriers (such as Telstra which operates basic telecommunications infrastructure as well as ISP services through its Big Pond brand).

10 Internet addresses (Uniform Resource Locators).

11 Penfold (2001).

12 The peak body for the online industry in Australia. The emergence of the IIA as the key industry lobby developed from a number of competing organisations that merged over time to form the organisation. Cooperation with government on issues like the *Broadcasting Amendment Act* served to cement the organisation in this position.

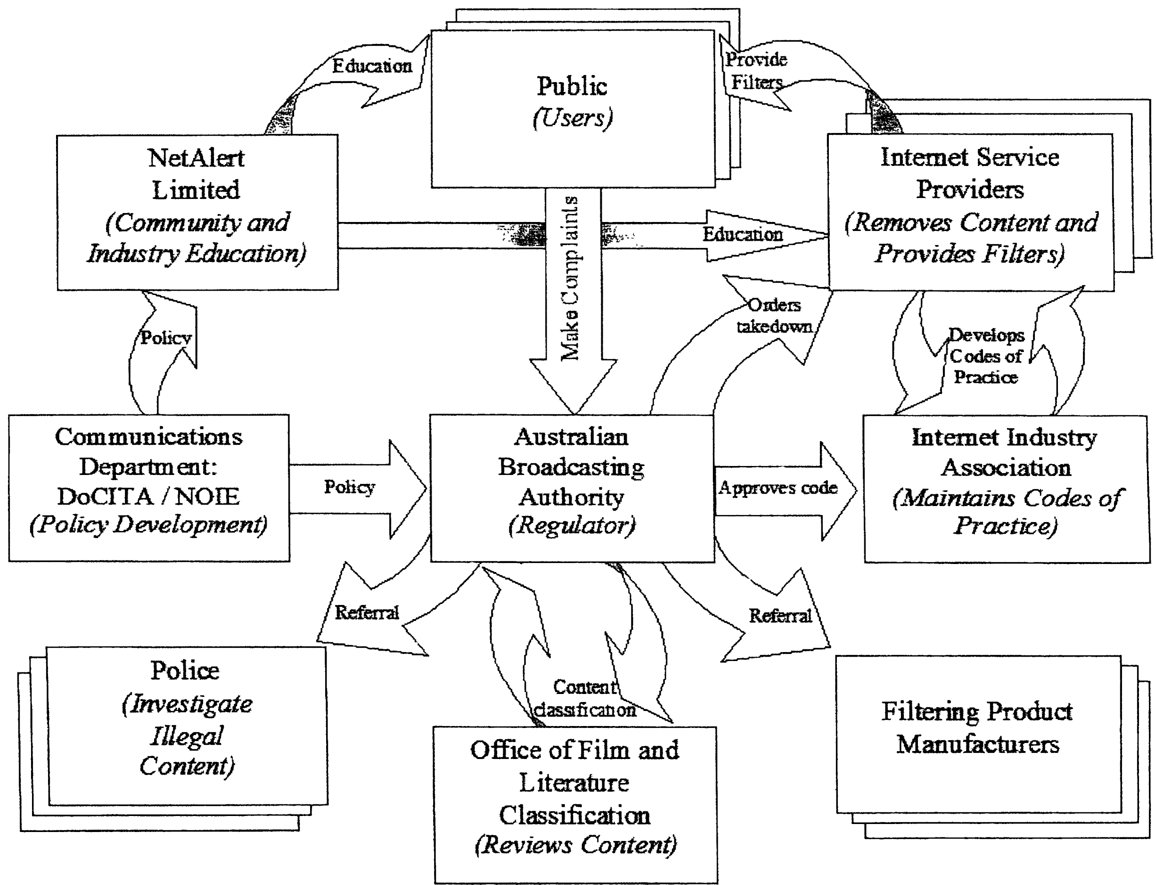

Figure 1: ***Broadcasting Services Amendment (Online Services) Act*** **— Participants**

subscribers.[13] The enabling provisions for this are contained within the Act, but administration of the code of practice falls within the control of the IIA, with the ABA empowered to accept industry-developed codes where they meet the aims of the Act.[14]

With specific focus on filtering provisions, the current industry code states:[15]

> In the case of commercial subscribers, the ISP will, as soon as practicable, provide for use, at a charge and on terms determined by the ISP, such other facility or arrangement that takes account of the subscriber's network requirements and is likely to provide a reasonably effective means of preventing access to Prohibited and Potential Prohibited Content. In this clause, provision for use includes:
>
> - providing appropriate software, including any of the Scheduled Filters; or
> - facilitating access to consultancy services with respect to firewalls or other appropriate technology.

This provision, inserted in the *Broadcasting Amendment Act* via amendment during the legislative debate, is the core element that undermines the regulatory intent of the legislation. The *Broadcasting Amendment Act*, as it stands, creates a two-tiered system of content control in line with the limited capacity of Australian regulators to take action against material hosted in offshore countries, and not subject to the Australian jurisdiction. Initially, the legislation identified this weakness and specified that ISPs would be required both to remove locally hosted material and block access to offshore sites specified by the ABA. For the internet industry, this bespoke of a system that would require a substantial investment in the hardware and software required to filter vast amounts of online content, a possibility that had implications for bottom-line profitability, as well as placing breaks on the speed of content flowing between the internet backbone networks and final end-users. Through amendment, the government offered ISPs exemptions from the mandatory filtering of overseas content should they utilise a 'designated access-prevention arrangement', on a case-by-case basis or where an established Code of Practice incorporated filtering technologies that meet with ABA approval. In practice, a very lopsided system emerged for content regulation, with the federal

---

13 Filtering solutions provide automated censorship of online content. These are generally based on two methodologies: the first via a 'blacklist' of sites deemed unacceptable, the second via automated scanning technologies that analyse content for key works (such as 'fuck', 'XXX', etc). A combination of these two methods is also used. The delivery of these solutions can take the form of pre-filtered internet feeds, blocking access to content from the ISPs' machines (proxy filtering) or via a 'desktop application', a piece of software installed in the users' computers.

14 Where this is not the case the ABA has the power to make and enforce a code itself. This contingency, however, has not yet been seen as necessary by the Authority.

15 Internet Industry Association (2001), section 6.1.

government stripping unacceptable content from within Australia,[16] but not mandating safeguards for the public in terms of material that may be accessed from every other location other than the .au domain.[17] Mandatory filtering was a key feature of the government's motivation for the law, as parents were deemed incapable (in aggregate terms) to provide filtering technologies for their children[18] without government intervention.

If offshore content remains available to Australians, the strict regulation of content within Australia loses much practical rationale. Table 1 shows the number of complaints received and processed by the ABA for the first year of the regulatory regime. While many of these complaints may refer to multiple 'pages' of content (the exact unit of analysis for online content is difficult to determine, unlike for printed material or audio-visual media), the number of complaints that resulted in direct regulatory action was extremely low. Thus, while several hundred complaints were referred to international law enforcement and/or the makers of filtering technologies, the year 2000 saw only 67 take-down notices issued within Australia (from 22 complaints). While the costs are not comparative to this reported timeframe, the ABA spent $294 825 on administration and $323 494[19] on staff and entitlements (total $616 319)[20] to maintain the regulatory regime in the financial year 2000/2001,[21] a costly scheme given its real failure to regulate content.

---

16 Following the announcement of the legislation, much of this content was simply moved offshore.

17 In practice, the .au domain is also confusing for the general public, with .com machines hosted within Australia, and .au domain machines that may actually be located outside of the country. By attaching regulation to the machine upon which the material is hosted, rather than the person responsible for the content, Australians continue to host prohibited content, using a simple transferral of content to offshore machines.

18 For example, see Tierney in Senate Select Committee on Information Technologies (1999), stating: 'Could you outline your view on how technology at the server level could be used to assist parents in screening materials where they are not supervising or where the kids are smarter than they are on computers?' and Freeman (same reference): 'As you pointed out, many children are smarter than their parents in relation to this technology.'

19 Included in this cost is the monies payed by the ABA to the OFLC for classification of online content referred from the Authority. In the *calendar year* 2000, the Office charged $85 040 for classification of online content (OFLC, correspondence: 9/10/01). Interestingly, in this total, only $7650 was charged for the classification of offshore content. As this content makes up the majority of complaints, the limited referral of this content for classification may indicate the ABA saw limited value in rigorously evaluating content that it could not require removal from public display.

20 The source of these figures is the ABA media liaison, Mr Donald Robertson.

21 The cash burn rate for the NetAlert advisory group was similarly high, with $255 430 expended by the advisory group within the first six months of the law's operation (NetAlert, 2000). The costs to consumers (purchase of filtering services or technology) and ISPs are unknown at this time.

Table 1: Outcomes of ABA Investigations: January–December 2000

	Hosted in Australia	*Hosted outside Australia*	*Total*
Prohibited/potential prohibited content	22	210	232
Not prohibited content	58	91	116
Total	80	301	381

Source Department of Communications, Information Technology and the Arts (DoCITA)[22]

Where the government can claim success, however, lies in compliance to the optional filtering requirements of the code of practice, with major ISPs (with the majority of market share) largely adhering to the provisions of the law and code of practice.[23] Compliance among smaller service providers remains limited, however, with DoCITA reporting on a survey by the IIA that compliance among small to medium ISPs was not universal. In the report tabled before parliament, the department stated: '78 per cent *of responses* from surveyed smaller ISPs reporting full compliance.' [emphasis added] This remains an ambiguous claim, with compliant companies more likely to report adherence in the context of a survey.[24] In addition, the initial request for responses to the survey issued by the IIA contained dubious wording that can be interpreted as encouraging distortion of the survey results. In his email dated 8 July 2000, the chief executive of the association wrote:

---

22 Department of Communications, Information Technology and the Arts (2001).

23 Of the 'Big Six' ISPs operating in Australia (September 2001): America Online (AOL) maintains an in-built system of parental controls aimed at family subscribers, allowing parents to filter children's use of the internet based on three age groups (Kids Only, Young Teens or Mature Teens); this service pre-dates the internet censorship legislation and has its origins in the United States where AOL differentiated itself as a 'newby' service via segmentation techniques (Braue, 2000). iPrimus provides a proxy filtering system that customers opt in or out of using basic browser configuration; Optus provides Windows users with a free copy of a popular desktop-based filtering product (NetNanny), while Macintosh users are not catered for; Telstra BigPond provides a 30-day trial of a desktop filter that can then be purchased; Ozemail provides customers with a free copy of the Cyberpatrol desktop filtering application; Dingo Blue sells customers a copy of the Eyeguard application for $33; and Pacific Internet does not offer a filtering solution. It should be noted that iPrimus maintains ownership of a number of smaller ISPs (franchise model) that recommend filtering, rather than providing access to the iPrimus proxy server.

24 That this statistic may substantially overstate the actual rate of compliance is evidenced by the series of workshops run by the NetAlert group to inform ISPs and content hosts of their responsibilities under the Act.

> The ABA has asked us to report to them on the compliance with the IIA content Codes of Practice ... There are political reasons why a positive response will be helpful at this stage ...

Regardless of this, even where companies do provide filtering options (either free or for a fee), the question of citizen uptake is an important indicator of demand and coverage. While little research on this issue is available, large ISP iPrimus report that less than 10 per cent of its consumers have taken up their proxy filtering option.[25]

In addition to these concerns, the democratic quality of the regulations have been queried. Young[26] observes problems associated with banned URLs being withheld from public oversight. Where other media forms may be prohibited (films, for example), explicit and detailed reasons are provided by the Office of Film and Literature Classification for these decisions, and the banned material is clearly identifiable. In the context of the *Broadcasting Amendment Act*, efforts by the staunchly anti-regulation Electronic Frontiers Australia (EFA) group to access lists of banned material[27] for the purposes of critical review remain rebuffed. While the ABA has argued that release of these lists would simply provide a road map of pornographic material,[28] the scrutiny of banned material by free-speech advocates has been a feature of the ongoing reform of censorship in Australia in the latter half of the twentieth century,[29] where the intellectual, political or literary value of a work was not recognised by official censors. Beyond this, the focus of regulation on filtering systems maintained by ISPs or individuals provides little democratic review of the content of these lists, as they remain restricted intellectual property subject to commercial confidence. While the ABA may have a minor hand in the provision of content to blacklists, the companies that manufacture these products and set the parameters of their censorship reside (largely) within the United States and lack even the minor recourse to Freedom of Information legislation and the Administrative Appeals Tribunal in the consideration of material banned by the ABA.

This concern about democratic governance also extends to the freedom of action the government's position has given to censorship based on *commercial*

---

25 This information was provided by iPrimus by telephone on 2 October 2001.

26 Young (2000).

27 The EFA remain in almost complete opposition to the legislation, taking a libertarian approach to the regulation of online content.

28 A 'roadmap' only in the sense that the failure of filtering allows this material still to be accessed where it originates from outside Australia.

29 This was particularly true in literature censorship in Australia before the liberalisation of censorship in the late 1970s and early 1980s, where key individuals, like academics and writers, complained about the censorship of material they had purchased and read overseas. John Power, for example, had sent some personal reading back to Australia from England, only to discover it had been seized by the Customs Department. Power, through legal action, induced the minister to reverse his decision to place the individual work on the Banned Publications List.

priorities. Beyond the voluntary nature of the provision of filtering solutions under the code of practice, some domestic ISPs have begun to instigate filtering of web users' content and the prohibition of access of this material through acceptable use agreements contained in service contracts.[30] While this outcome could be seen as an attempt to implement the spirit of the government's law, in reality this phenomena is simply a commercial decision. Use of online services to access pornographic content tends to be graphically intensive, consuming larger amounts of bandwidth than general surfing. As ISPs pay for bandwidth on a volume basis, limiting subscribers' access to online pornography has a direct flow through to bottom-line profitability, especially where larger service providers measure profitability in large, aggregate terms.[31] This area of mandatory filtering, or prohibition, remains an emerging trend, but one subject to market forces unassociated with the government's legislative aims and objectives.[32]

Finally, we need to consider the impact of the law on the source-origin of much of the content under consideration. While much of the debate surrounding the development and implementation of the *Broadcasting Amendment Act* focused on the impacts of the legislation on ISPs, little attention to date has been paid to commercial operators who generate much of the adult content found online. While international manufacturers and wholesalers of pornographic content remain outside of the scope of the legislation, primary research[33] among Australia's adult industry members reveals the limited impact of the legislation on their online business operations.

---

30 Additionally, it should be noted that Australian universities have not been excluded from this form of content regulation by network and IT directors. Sandy (2000) has reviewed the Acceptable Use policies of the Australian university sector and concluded 'many policies are seriously deficient' and can be seen to impinge on academic freedoms and lack acceptable due process when violations are identified. Similar adoption of these forms of policies can be found in the government and private sectors.

31 McAuliffe (2001) and Optus@home (2000). This approach is not just restricted to the corporate sector: governments and universities in Australia have implemented filtering and restrictions on services for employees and clients.

32 On a countervailing note, just as market forces have encouraged this form of corporate censorship in line, other economic dynamics within the IT and communications sector have served to undermine the regulatory intent. With the failure of many internet start-ups in 2000/2001, the so-called 'dot com' became awash with skilled internet professionals looking for means to use their skills to turn an effective profit. At present, while the internet industry has managed to generate returns through services like the provision of ISP services, hardware and software, the only truly effective e-commerce business models that have emerged remain firmly lodged in the provision of pornographic services, where the intangibility of the product and general restrictions on face-to-face sales facilitate uptake of online purchasing. The oversupply of internet-savvy professionals and depressed market for other online services encourages further investment in online pornographic sites: Field (2001).

33 For more information on the methodology of this research, see Chen (2002).

From a survey of 60 members of the various 'adult industries'[34] in Australia who operate websites (either domestically or internationally hosted), in the first quarter of 2002, some two years after the introduction of the legislation, the awareness of the law and its requirements was high (see Figure 2). Thus the promotion and media coverage of the legislation among the commercial operators of adult websites in Australia has been successful in distributing information about legal requirements under the classification regime and, overall, few commercial operators can claim complete ignorance of their new legal requirements with regard to online content.

Figures 3 and 4 illustrate the impact of the legislation on the business operations of Australia's adult industry. While awareness and understanding is high, in Figure 3 the vast majority of commercial operators have not had (nor seen the necessity) to take significant action with regards to compliance under the Act.[35] Where businesses have taken action to change their online practices as a result of the law, a small number have modified their online content, included new warnings for minors, or introduced an Age Verification System to limit access by those under the age of 18; however, the majority have simply evaded the regulatory powers of the ABA through relocation of their online content outside of the Authorities' legal and practical jurisdiction. As a result of this, as indicated in Figure 4, the actual impact of the legislation on the industry most likely to be subject to significant restrictions under the Act is reported as near-universally minor, or as having no impact at all. Only one in 30 respondents reported significant business interruptions as a result of the introduction of the *Broadcasting Amendment Act*.

Thus, while the spirit of the *Broadcasting Amendment Act* has encouraged some ISPs to include filtering options and use content controls to limit bandwidth use by members, statistics produced by DoCITA, and primary research conducted with the Australian adult industry show the impact of the legislation to be very minor.

---

34 The 'adult industry' in Australia is seen to include: real sex retailers (brothels and independent sex workers), adult product sellers (adult shops), pornography manufacturers and sellers (filmmakers, photographers, website operators, movie houses, duplication facilities and video sellers), and erotic performers (strippers, sexual massage services, and erotic dancers).

35 This may be because the content of their sites would not be classified R, X or RC under the OFLC guidelines.

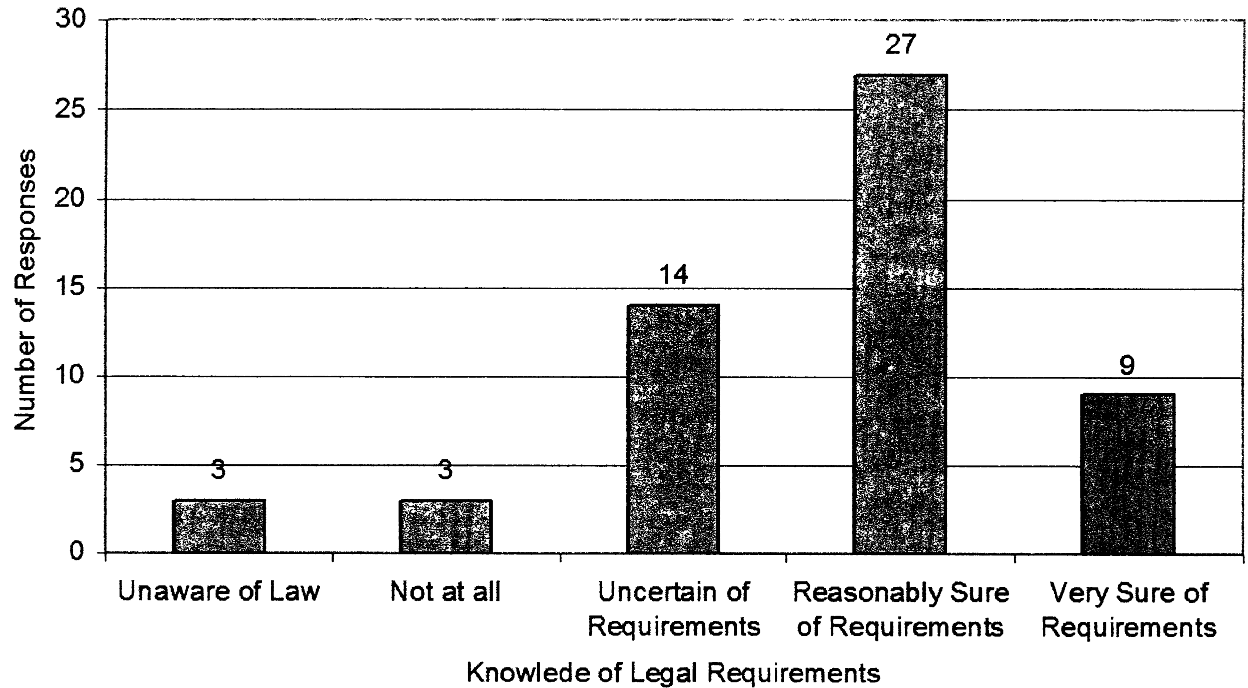

Figure 2: Awareness Among Australia Adult Industry Members

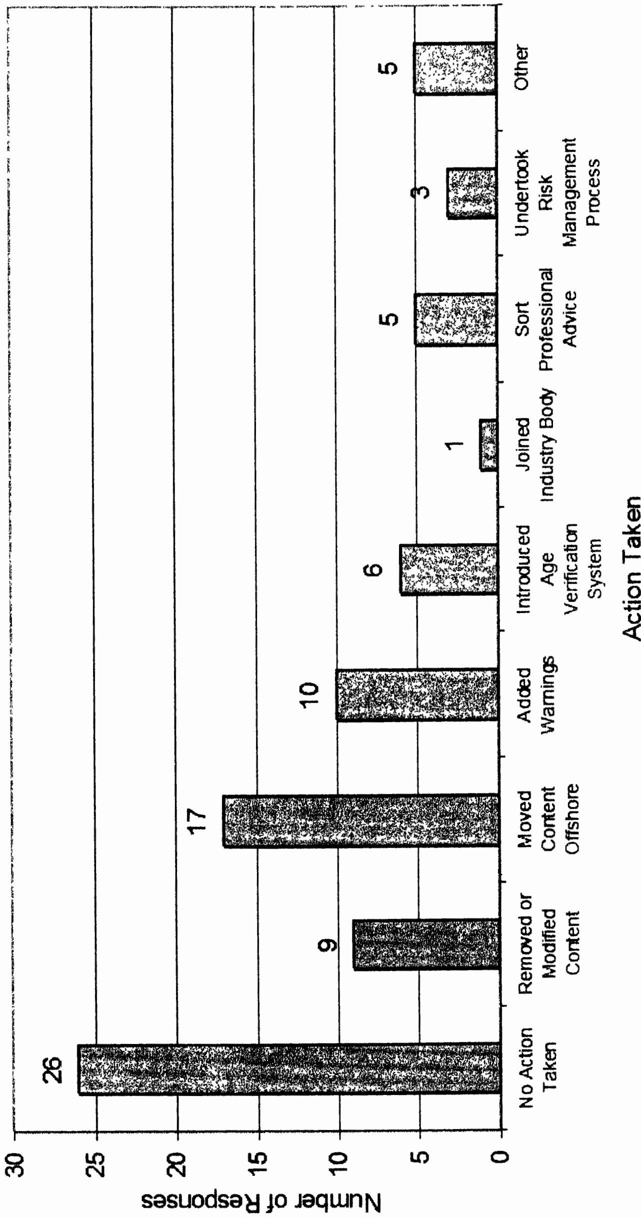

Figure 3: Compliance Measures By Australia Adult Industry Members

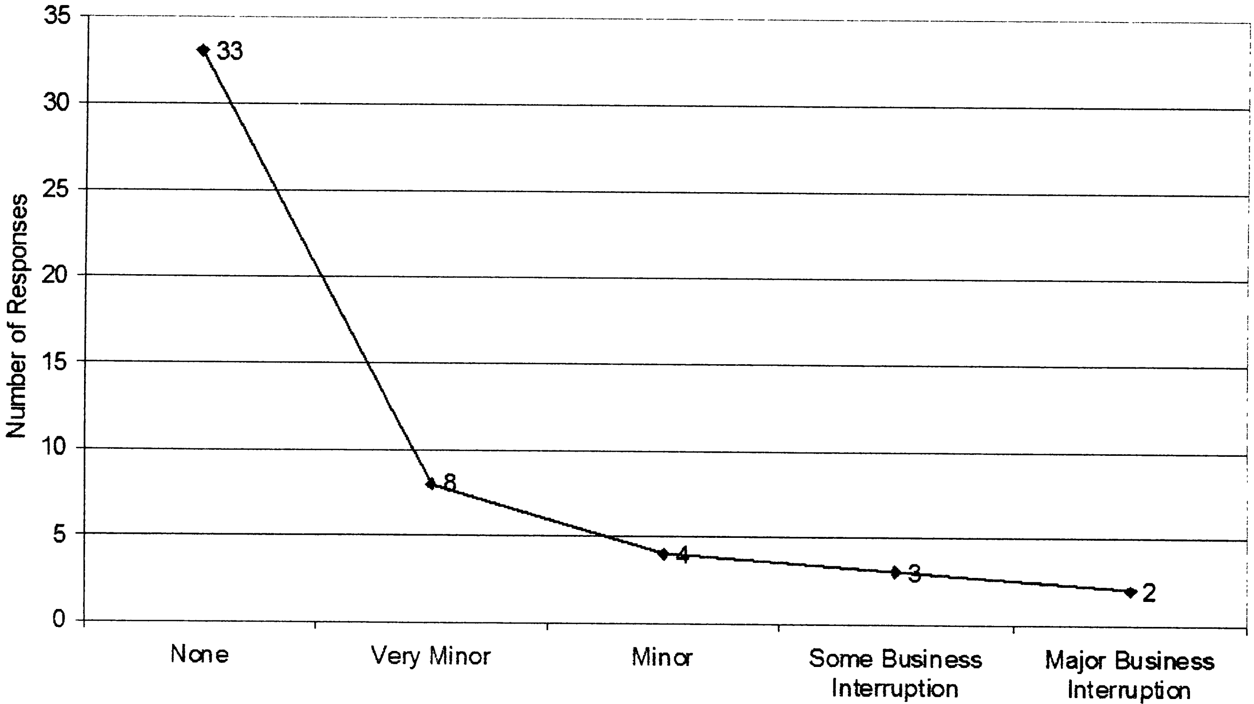

Figure 4: Degree of Impact of Legislation on Australian Adult Industry

Greed: Taking a Punt Online

As with the case of online pornography, interactive and online technologies can be used to facilitate access to gambling services by Australians. In a nation which generated over $13 billion of gambling revenue in 1999/2000,[36] the issue of online gambling came to the attention of the Commonwealth following increasing evidence and concern about the impact of gambling on the community. In its report on the Australian gambling industry, the Productivity Commission[37] found increased turnover from legal gambling in Australia had been facilitated by the liberalisation of laws governing the industry, combined with aggressive developments in the technologies used to deliver these services and the number of venues providing these technologies to the public. Additionally, with respect to problem gambling,[38] the Commission estimated that between 1.0 and 2.1 per cent of the adult population suffered from severe or moderate gambling problems, with the tendency for these individuals to concentrate their gambling problems on the use of electronic gaming machines ('pokies'), racing and casino gambling. In the context of assessing the relationship between accessibility of gambling and problem gambling, the Commission concluded:[39]

> Overall, the Commission considers that there is sufficient evidence from many different sources to suggest a significant connection between greater accessibility — particularly to gaming machines — and the greater relevance of problem gambling.

While the findings of this research stimulated debates at the state level about the increase of electronic gambling machines (and the increasing dependence of state revenues on these machines), federally the issue of gambling was taken up, first in 2000 with a moratorium on new online casinos and then in 2001 with the *Interactive Gambling Act 2001*. Following the work of the Commission, federal political debate surrounding the regulation of internet-based gambling reflected a concern with the evident impact of electronic gaming machines, and an implication of the 'evident' extension of this problem via internet delivery. In debate over the initial moratorium on new

---

36 Australian Institute of Gambling Research (2001).

37 Productivity Commission (1999).

38 Gambling activities by individuals where a lack of control over the activity is demonstrated, leading to negative personal, familial, and social consequences. The concept of problem gambling remains contested (rational activity versus pathology); however, the view that a social problem exists for individuals who appear unable to limit their gambling when confronted by substantial and ongoing financial losses is generally accepted by industry, government and non-government counselling and support organisations.

39 Productivity Commission, 8.31, see n 38.

internet casinos in 2000, this link was explicit,[40] with the minister stating in his second reading speech:

> Because this industry is still in its infancy, it is practical for the Commonwealth to take action now. In another year or two the industry may have grown to be too big and established for any government to take action. This is exactly the situation our State and Territory colleagues have found themselves in with poker machines.

This concern was quickly conflated with the issue of online gambling. One Nation's Senator Harris[41] highlighted the impact of electronic gaming machines, stating:

> We need to target the areas of greatest exposure to problem gambling, and that is very fairly levelled at the sector of the industry relating to poker machines. For example, if a small country town or a moderately sized country town has 400 poker machines, and each one of those machines has somewhere around $10 000 per month going through it, that is not returned as winnings. In a single hotel, $200 000 can go out of the economy of that area because of poker machines. I believe that is the area we need to address in relation to gambling.

This view was also reflected by Greens Senator Bob Brown.[42]

Concern over electronic gaming machines was also identified by the Democrats Senator Bartlett; however, his view identified the conflation and *possible* problem of prohibiting online casino games while state-based regulations continued to provide widespread access to electronic gambling. He stated:[43]

> Whatever side we are taking in this debate, we have all acknowledged that pokies are the big problem, and this makes it all the more breathtaking that we are supporting legislation that will provide a fillip for the pokie industry.

Thus a conflation of social issues ('pokies' and internet gambling) obfuscated the issue. While the Minister for Communications invoked the Productivity Commission's work in delivering the legislation banning interactive gambling

---

40 Senate Official Hansard (2000).

41 'I reiterate: I see poker machines and their spread right throughout the community as something that needs to be hauled in, and the states have not been effective in doing that. One only has to read the articles in the press recently about the impact of pokies on towns like Bendigo and Wagga Wagga and the amount of money that is being taken out of the communities through these machines, non-productively, to under-stand that we as legislators are required to do something about it.' Senate Proof Committee Hansard (2000).

42 Senate Proof Committee Hansard (2000).

43 See n 42.

before the parliament,[44] the Commission's findings led it to recommend only that the Commonwealth should attempt to develop a national regulatory model based on 'managed liberalism':[45] customer protection and harm-minimisation legislation based on the licensing of domestic providers.[46] Under this approach, customers would be encouraged towards domestic providers because of their quality and regulatory assurance, limiting any harm associated with unlicensed venues lacking provisions to support potential problem gamblers (limits, self-exclusions, etc), or whose commitment to pay out wins was questionable.[47] This cautious approach was recommended because of the small size of the current market (less than 2 per cent of the total gambling market in Australia)[48] and the limitation of any ban to comprehensively prevent access to online gambling services.

Given that gambling regulation is a residual power of the states, the 'managed liberalist' approach to online gambling had been adopted by a number of state governments around Australia (Queensland, Northern Territory), keen to access the potential additional tax revenues of online casinos (which included lucrative export revenue),[49] while including licensing requirements and customer safeguards.[50] McMillen[51] observed that, while parochial conflicts and unusual implementations of these kinds of regulation had limited the consistency and cooperative nature of the various state regulations for online gambling, the regulatory actions taken by states and territories had led to Australia attracting an international reputation for maintaining fair online casinos (honest win ratios, guaranteed payouts, etc).[52]

While a 'strong' regime which included mandatory filtering was initially considered,[53] once again the Commonwealth chose to amend the legislation to lower the impact of the law on industry. While the *Broadcasting Amendment Act* had been amended to mollify concerns of the Internet industry, this time it

44 Department of Communications, Information Technology and the Arts (2001).

45 Hurrell and Woods (1995).

46 McMillen (1998).

47 The willingness of unlicensed, offshore casinos based in tax havens to pay wins and provide harm minimisation services has been questioned, with the view that only those facilities required under law to provide these services can be deemed trustworthy: Stackhouse (2001).

48 Tasmanian Gaming Commission (2001).

49 Senate Select Committee on Information Technologies (2000).

50 Early entry into this market being an important commercial consideration.

51 McMillen (2001).

52 Evidenced by the number of non-Australian online casinos that represented themselves as operated by, or within Australia.

53 The prime minister's stated interest in a ban of online gambling was incorporated into the terms of reference into the feasibility and consequences of banning interactive gambling released by the National Office for the Information Economy in 2000: National Office for the Information Economy (2000); Howard (1999).

was the established racing and sports betting industry[54] which was exempted from the ban, except for the emerging practice of microbetting.[55] This reflects, in an ironic way, the view of Minister Alston about the capacity of government to act against 'too big and established' gambling providers, but in the context of a political debate about the social impact of gambling and its spread into non-traditional delivery forms, the amendments exempted significant gambling interests with extant revenue streams (and, implicitly, an input into problem gambling) that were leveraging these services into the online environment.[56] From the internet industry, the IIA attacked the proposed approach for exactly the same reason as the online pornography laws: that the laws would have little impact on the access by Australians to the undesirable services.[57] This, combined with technical advice from the National Office for the Information Economy (NOIE), led to a complaints-based regime substantially similar to the *Broadcasting Amendment Act*.

Providing online casino-style gaming to Australians[58] became illegal within Australia (using the Commonwealth's power to regulate telecommunications), with the ABA again handling complaints to be referred to police (for criminal prosecution for providing a prohibited internet gambling service within Australia or where offshore gambling activities are likely to be illegal in their country of origin) and to makers of filtering products. Overall, the practical effect of the legislation is limited by the regulatory capacity of the ABA to act where gambling services are hosted outside of Australia and filtering remains a voluntary activity by Australians.[59] The question remains,

---

54 The full range of exemptions includes telephone betting, sports wagering, telecommunications services provided for gambling activities conducted in public places, lotteries, and contracts under the Corporations Law: Internet Industry Association (2001).

55 Microbetting or micro-event wagering, applies where gamblers can bet on specific events within a game (the outcome of a play, number of fouls, etc).

56 For an alternative view, I have argued that this distinction reflects a normative view of gambling activity that focuses on activities that are 'OK' because they are essentially Australian pastimes (traditional activities like sports betting) and 'not OK' because they are innovative and new (virtual casino games and competitive combat games): Chen (2000).

57 Internet Industry Association (2001).

58 This element of the Act is interesting in its extraterritorial scope. First, the Act specifies that providers of internet gambling services to Australians from overseas countries can be subject to prosecution under the Act should they enter Australia (a defence can be mounted for not knowing under due diligence that the customer was an Australian, but not ignorance of the law itself). Second, Australian-based operators can continue to service ofshore customers. Third, where a country has a similar law, and requests the Australian government to declare it a designated country, Australian-based operators are similarly bound to citizens in that jurisdiction.

59 While a number of potential online casino operators moved offshore (especially to countries like Vanuatu), Fitzsimmons (2002) observes that Australia still remains a base of operations for the developers of gambling technologies for online casinos.

however, of why problem gamblers would voluntarily access filtering solutions if self-exclusion options were deemed unsuitable to addressing the problem of misuse of online casinos.

While the established gambling industry was set to benefit, in a small way, from deterrence of competitors, Australia's casino interests — already developing their own interactive versions of traditional casino products — were stung by the potential loss of this emerging niche. Overall, however — regardless of the closure of a number of domestic providers — Australian's use of international online gambling services has not abated. Figures from Nielsen Netratings[60] estimate that 700 000 Australians gamble online (approximately 9 per cent of the total online population of Australia), while Hitwise traffic measurement data show that level of use was through the substitution of online casinos located outside of Australia for domestic operators during the implementation of the *Interactive Gambling Act.*[61]

Sloth: Sweeping Back the Tide

The *Broadcasting Amendment Act* and *Interactive Gambling Acts* represent symbolic policies. Symbolic policies are defined by Edelman[62] as political responses not intended to be substantially implemented because the motivation behind public calls for governmental action is difficult to measure empirically, and/or the actual problem is one that will or may occur in the future.[63] These factors encourage decisions that emphasise the search for information to resolve uncertainty and, importantly, publicise government action which asserts a factual state of affairs that may not actually exist. While the capacity of any government to develop effective policy for a new and dynamic technology like the internet is likely to be limited in both short and medium timeframes, the case analysis shows not one, but a succession, of failures based on the reapplication of a sub-optimal regulatory model drawn from the broadcasting model of regulation.

---

60 Quoted in Jacobsen (2002).

61 In addition, the magazine *Gambling Online*, a publication aimed at members of the public who use online betting websites, distributes 12 000 copies per issue in Australia (source: Eric Morris, editor, *Gambling Online Magazine*, 30 October 2002).

62 Edelman (1971).

63 In the case of the *Broadcasting Amendment Act*, the amount of offensive online content and its impact on the public was never ascertained. The number of complaints to date does not support the initial claims of massive amounts of pornographic content of concern to the public. The amount of material was simply assumed during parliamentary debate, with statements like that of Liberal Senator for Tasmania, Paul Calvert: 'We are talking about the fact that you have only got to press P on the Internet and all this stuff appears free of charge in front of you and young children can access it.' Senate Proof Committee Hansard (1999). In the case of the *Interactive Gambling Act*, the amount of online gambling remained limited, with the *potential* impact of this technology on problem gamblers being asserted, but still indeterminate.

In the two legislative examples presented, ministerial claims of substantive regulatory regimes that 'minimise the opportunities' for Australians to access prohibited content (gambling or pornographic) are not supported in practice. Delineation between local and international content combined with optional deployment of filtering technology and the exclusion of key types of (entrenched) gambling activities has meant that Australians can continue to access prohibited content and gambling services from offshore providers at will (and, for online sports betting, using domestic providers). Where domestic content is subject to prohibition, the toleration of international content of exactly the same kind in a transactional space like the internet (where geographical influences are limited) makes the laws ludicrous in application. The motivation for this duel treatment directly stems from complaints of the internet industry about the impact of broad filtering on the industry, based on the high cost/low payoff of the mandatory filtering of all internet content, as originally posited by the Commonwealth. To make this argument, the IIA was able to point to successive technical reviews from impartial sources on the quality and impact of filtering solutions (by CSIRO researchers in 1998 for *the Broadcasting Amendment Act*;[64] in a report commissioned by NOIE for the *Interactive Gambling Act*[65] in 2001[66]). These reports consistently upheld the finding that filtering solutions would not provide complete protection from restricted material (especially for determined users), and the impact of these control technologies would negatively affect system performance (network speed) and have financial implications for the government, industry and end-users (regulatory and compliance costs that were open-ended depending on the increased penetration of the technology into Australian society,[67] as well as general deterrence of Australians from joining the online economy). Further, as the technology was continually developing in remarkable innovation cycles, any mandatory system may be subject to immediate obsolescence via sudden innovation. To underline this point, Gartner Consulting's[68] report, commissioned by the IIA, highlighted the emergence of peer-to-peer technology[69] as a direct way of evading content filters that would be highly practical in the facilitation of gambling. Overall, the technical analysis supported the position of industry that mandated filtering

---

64 CSIRO (1998).

65 National Office for the Information Economy (2001).

66 Both of these studies were commissioned by NOIE.

67 Already recognised as a very high user of internet services when compared with other nations.

68 Gartner Consulting (2001).

69 Peer-to-Peer (P2P) technology allows internet users to directly share files and information through a direct and private connection capable of evading filtering. Mays (2001) defines P2P as: 'A type of network in which each workstation has equivalent capabilities and responsibilities. This differs from client/server architectures, in which some computers are dedicated to serving the others. Peer-to-peer networks are generally simpler, but they usually do not offer the same performance under heavy loads.'

would be expensive and have limited impact, especially where the government (or third party, like the ABA or empowered service providers) attempted to enforce filtering on unwilling consumers motivated to evade these systems.

It is interesting that, given the evident failure of these laws to substantively prevent the proscribed activity,[70] the regulatory model used for content regulation was substantially reused in the *Interactive Gambling Act 2001*. While use of the standard OFLC classification system for all media forms does reflect a sensible commitment to regulatory parity (this argument is examined below), the use of the broadcasting regulatory model for online content (focusing on the ABA as key regulator for online content and using a coregulatory take-down approach with no value outside of Australia) lacked a balanced assessment of the capability of the Authority to govern online content in a manner that presented a meaningful outcome (the actual restriction of offensive content). Given the limited impact of the regulatory regime, the differences associated with interactive gambling (different entrenched interests, a focus on the *activity* of gambling and wagering as an online transaction) could have encouraged the adoption of an alternative model for regulation (such as managed liberalism) where failure of the original model was evident. In this case, however, the commitment by the federal government to endorse the regulatory regime as a success, combined with the politicised nature of the gambling debate (a proxy debate reflecting dissatisfaction with the impact of electronic gambling machines in Australian clubs and pubs) meant that action against gambling online remained locked in to repeat the clear failings of the pornography debate. Only the vague nature of the identified problem and limitations in reviewing the actual outcomes of the first iteration of the regulation of online content prevented a clearer identification of regulatory failure.

Forward Coregulation?

> There's a very fine line
> Between a groove and a rut
>
> (Christine Lavin, 'Prisoners of Their Hairdos', *Compass*, 1991)

Coregulation Online: A Critical Theoretical Review

In addition to the specific criticisms of the current regulatory system for online content and gambling examined in the first part of this paper, it is also necessary to examine the nature of the core co-regulatory framework against

---

[70] This is not to intimate that the laws have had no impact, as specified substantial expenditure has been undertaken in funding the ABA and NetAlert, compliance has been made to some degree by ISPs and a number of domestic online casinos in Australia have been forced to close their operations or move offshore to more liberal regulatory environments: Needham (2001). The emphasis of this point is on the *activities of the public*.

the stated aims of regulation, in general terms. In Baldwin and Cave's comprehensive review of the nature of and drivers for government intervention in markets, they identify 12 generic motivations for regulation:[71]

1. problems associated with monopoly (natural or artificial);
2. desires to equitably distribute windfall profits;
3. externalities that are not accounted for in economic transactions;
4. information inequalities within the market (between firms or to the consumer);
5. desire to ensure continuity and availability of service;
6. threats associated with anti-competitive behaviour and predatory pricing;
7. the production of public goods and moral hazard (free riders);
8. unequal bargaining power between parties;
9. scarcity and rationing of scarce resources;
10. distributional justice and social policy;
11. rationalisation and coordination; and
12. long-term market planning.

With regard to telecommunications services in general, wider regulatory activity by organisations like the Australian Communications Authority (ACA) and the Australian Competition and Consumer Commission (ACCC), tend to focus on issues 1, 2, 5–9, 11 and 12 — traditional marketplace activities that attempt to encourage more 'perfect' competition for lowest possible end-user cost, while balancing market distortion-creating policies aimed at more universal access to services of standardised quality (through mechanisms such as Universal Service Obligations and guaranteed rights of complaint and redress).[72] As telecommunications and networked information technologies have become more central to the economic and social life of Australians,[73] it is unsurprising that these considerations have been transferred into internet access provision.

With regard to the regulation of content online (more accurately, the attempted indirect regulation of Australians *behaviour* online), different regulatory motivations come into play from Baldwin and Cave's list. Overall, the stated intention of this form of regulation is associated with distributed justice and social policy — the protection of 'community values' and safety in the online environment. Thus, in the case of the supply of internet access, it is clear that the market operation of ISPs has a range of externalities in the form of negative social and economic outcomes (emotional or psychological damage associated with 'offensive' content of a variety of forms, threats associated with computer virus distribution, fraud and harassment online) for that segment of the community engaged in the online environment, but who lack sufficient skill, wit or will to safeguard themselves against predatory

71 Baldwin and Cave (1999).

72 Through the Telecommunications Industry Ombudsman scheme — mandated by government, but administered within the private sector.

73 NOIE places Australia third in a world ranking of internet take-up and utilisation: National Office for the Information Economy (2002)

behaviour. This is not to say that ISPs create these externalities — indeed, the comparison with, say, industrial pollution (the most simple example of direct externalities associated with economic production) shows how different online externalities are from most other industrial segments — but that, as the most obvious conduit of these externalities, ISPs have become 'fingered' for regulation because they are most easily identifiable market players, operate within the legislative environment of Australia and, at the end of the day, do make profits based on the range of online activities Australians engage in (either 'good' or 'bad'). Thus it is clear why the Australian government has selected this segment of the online market as the basis for regulation. In keeping with the analysis of regulation of the problems associated with market activities, however, the structure of the industry, and the institutional framework developed to regulate it, was likely to fail — not simply because of the technical incapacity of government to mandate filtering of all online content, but because of the nature of the coregulatory system itself.

Because of the substantially lopsided nature of the market (a very small number of ISPs dominate the vast bulk of user accounts) and the incredibly flexible nature of the uses to which online services can be put, there are clear information inequalities at work within the ISP industry. Users of different ISP services receive differential access to information about safety online because of the limited capacity for smaller ISPs to develop the range of 'safe surfing' information needed across the variety of areas of concern to government and the public. This problem is exacerbated by a number of features of the existing regulatory system: the small 'regulatory distance' between the core coregulator and individual industry players; limited 'ownership' of the regulatory system by ISPs; and the inflexible nature of the framework to deal with emerging trends and issues (planning).

First, in their examination of the sociology of regulation, Grabosky and Braithwaite[74] highlight the issue of regulatory distance as a determinant in the effectiveness of regulatory processes and structures. Simply stated, regulatory distance is a compound measure that includes the number of firms being regulated, the social relationship between regulators and industry, and the frequency of contact. The more personal the level of interactions between regulators and their industry, the less likely for regulators to apply formal sanction instead of informal 'correctives' (warnings, advice to correct behaviour, education, public shaming, etc). Overall, the coregulatory nature of the system for content regulation brings the legislative regulators (the ABA) into close contact with their industry partners. In addition, as the IIA has the core responsibility for developing the operating code of conduct (effectively delegated legislation under the two Acts), the sharp end of the *Broadcasting Amendment Act* has in fact zero regulatory distance. As the informal correctives are of negligible impact on industry in the existing coregulatory environment, there is little motivation for the IIA — or indeed the ABA — to push hard beyond the existing minimum win condition.

---

74 Grabosky and Braithwaite (1986).

Second, while the IIA can rightly claim significant coverage of the total market by code-compliant ISPs, there exists no direct responsibility for the coregulatory approach by industry players. Thus, while the IIA has developed a standard set of safe surfing information that ISPs 'merely have to point users' to (www.iia.net.au/guideuser.html),[75] the development and maintenance of this information is simply a compliance measure by industry with little interest in, ownership of or active participation in the development of this resource for users. The compliance-oriented nature of this guide is clear: it is legalistic, monolingual and written for a relatively computer-literate audience; the material is more for the consumption of the ABA (which ensures compliance) than members of the public. Two factors motivate this limited ownership. First, there are obvious financial reasons why any industry would restrict their commitment of time and money to the development of materials such as these, where they lie outside of the core business strategy of the firm:[76] user growth in ISP services has been strong over the last eight years, with little evidence that the negative elements of the online environment substantially reduce market growth. This has shaped the developing nature of the ISP market: a growing pie that focuses competition on price and connection quality (reflected in customer 'churn'),[77] rather than emphasis on specific market segmentation or product enhancement marketing strategies.[78] Second, there is limited motivation for ISPs — focused on connection speeds, cost, and reliability issues — to concern themselves with the actual use of online service, except where this provides risks or costs to their existing offering (eg excessive bandwidth use, use of accounts for SPAM[79] mail, etc). The second cause limiting industry ownership of the coregulatory system is the lack of any direct industry financial investment in the regime. In the operations of the ABA and OFLC as direct regulators of content (through take-down orders), and the educative functions of NetAlert, the industry has been remarkably successful in evading any financial commitment to these activities. Both activities are funded by general government revenue (or, in the case of NetAlert, from money raised from the partial sale of Telstra). Thus, while industry is indirectly represented at key points in the regulatory structure (IIA code development, advisory positions with the ABA, representation on the board of NetAlert), its lack of financial investment in these structures leads invariably to disinterest in the outcomes of these processes (other than, as intimated, interest in ensuring that compliance is seen to be achieved).

---

75 Internet Industry Association (2002).

76 Thus, for example, the ISP AOL features safe surfing as a core marketing element of its strategy and has invested substantial effort in the development of information and technologies to limit its subscribers' access to negative online experiences.

77 Productivity Commission (2001).

78 Dicken (1998).

79 Unsolicited Bulk Electronic Mail — normally of a commercial nature (no current formal definition exists).

Third, by hiving off different issues pertaining to online content into a variety of legislative responses introduced in an *ad hoc* and somewhat random manner,[80] the coregulatory approach lacks any capacity to adjust to emerging areas of community concern. Thus, while the *Broadcasting Amendment Act* responded to public (or media) concerns about pornography during the mid- to late 1990s, and the *Interactive Gambling Act* reacted (though with clear goal displacement in the legislative interpretation of this concern) to concerns about problem gambling, neither of these issues has remained static 'top of mind' problems for the Australian online community over time. Thus, in its report on the use of the internet in Australian homes, the ABA identified four 'main areas of perceived risk':[81]

- financial dangers, such as fraud and credit card number theft (54 per cent);[82]
- personal data misuse and privacy issues (45 per cent);
- content exposure concerns (39 per cent); and
- viruses (21 per cent).

It is clear is that content concerns were only third on the list of 'top of mind' issues associated with the online environment, while gambling was not listed. Importantly, regardless of the (purported) high level of compliance with the regulatory system, the ABA identified that there is limited community knowledge about what actions to take with regards to material encountered online that was problematic or offensive.

When comparing content regulation and general telecommunications service regulation, therefore, the effectiveness of the coregulatory system for content has clearly failed to increase consumer confidence, while ACA (which regulates connection quality and infrastructure concerns) research has found increasing levels of customer satisfaction with ISP services.[83] In part, this reflects a clear economic motivation for action in this area (combined with wider political debates about service quality in the lead-up to full Telstra privatisation), but also reflects — for ISPs — the use of a coregulatory approach that includes 'ownership' of service quality regulation: through the Telecommunications Industry Ombudsman (TIO) scheme, ISPs pay, on a per-complaint basis, for mediation and dispute resolution with customers. This illustrates that limited interest in the regulatory system is not simply a problem of coregulation as a generalised mechanism: the TIO has had success in drawing the attention of the ISP industry to areas of concern through pure financial expediency.

Thus, for a number of reasons, the regulatory approach has been substantially sidelined by industry as a tick and flick compliance requirement — with community input largely shunted to symbolic statements by government that something is being done about areas of concern. Overall, the

---

80 Including the exclusion of other issues of concern, such as hate speech online.

81 Australian Broadcasting Authority (2001).

82 Percentages based on the number of research participants who identified the particular area of concern

83 Australian Communications Authority (2002).

is little tenability of the existing coregulatory approach: while industry maintains an interest in the retention of the coregulatory approach because of its negligible compliance costs, the growth phase of the market has now plateaued (based on composite data regarding the uptake of new accounts and the amount of time spent only),[84] with the discovery function of the internet giving way to more practical concerns about efficient use of online services and the practical purposes to which the technology can be put.

'Community Standards'? Four Criteria for Effective Coregulation

Taking the three failings of the previous section — low regulatory distance, lack of industry ownership and commitment to the coregulation intention, and inadequate value of the current regime in addressing the variety of consumer concerns about the technology — into account, the existing regulatory approach is limited in its future viability. While technological incapacity for filtering and 'strong' regulation has been at the core of the critique so far, it is also important to attack the fundamental myth upon which the regulatory regime is based: that the coregulatory system, in some way, actually reflects some form of community morals and standards of behaviour.

Clearly, this proposition — as illustrated by the continued use of 'restricted' services by Australians — lacks foundation. In academic literature, the concept of a central set of agreed values or beliefs is not part of the defining nature of community. For Hillery,[85] community represents interpersonal interactions, while Willmott[86] observes that community can be defined as common interests or beliefs. Overall, neither definition captures the entire Australian population as a community; rather, the concept of community is — as pointed out by Fulcher[87] — an essentially contested concept, one that is either narrowly defined for specific purposes, or too broad for any analytical value. Thus, with respect to the vague concept of community and its application to governance, Fulcher identifies three characteristics that may be valuable in overcoming definitional differences. She argues that government conceive of community on three axes: *perceptual* — the sense of belonging to an area or group that can be defined in some way (self-defining and pluralistic);[88] *functional* — the ability to meet with reasonable economy (for deliberation and social interaction); and *political* — the ability for an elected body to reconcile the conflicts of members. With regard to the Australian online community, therefore, only one of the three axes can be realised: the very nature of the technology being employed allows the Australian online population to 'meet' at relatively low cost (compared with the offline community). The limited shared value system, and incompatibility of users' views over what is or is not acceptable content online, negates the contention

---

84 Market Intelligence Strategy Centre (2002).

85 Hillery (1955); see also Wilkinson (1991) for a similar definition.

86 Willmott (1989).

87 Fulcher (1989).

88 Little (2001).

that some basic community standard can be developed, and that standard promulgated for all.

Thus, in considering the future of the coregulatory approach, four key issues need to be identified and resolved:

- *effectiveness*: unlike the current system, the new approach must address areas of concern to segments of the Australian online population (communities of interest);
- *flexibility*: the regulatory system must be flexible to adapt to a rapidly changing environment that vastly outstrips the capacity for government legislative response in an effective timeframe;
- *stakeholder engagement*: the industry must have more commitment to the intent of the regulatory regime; and
- *positive intervention without arbitrary paternalism*: the public diversity of the Australian online population must be accounted for and internalised.

Steering Rather than Rowing: Coregulation as a Democratic Solution

In the development of the current regulatory regime, based within Australian broadcasting laws, the concept of *regulatory parity* was vaguely adopted in the use of OFLC guidelines for online content. This approach, however, drew together two dissimilar technologies under one umbrella: the one-to-many model of broadcasting with the many-to-many, one-to-many, one-to-one model that is the internet. Overall, the lack of centralisation of the network limits the capacity to identify any significant choke point where an effective regulatory mechanism can be applied (production, distribution and consumption being highly pluralistic). This factor, combined with differences in values among the Australian community, calls for the use of self-regulation *by consumers* to address their online concerns. Thus, to satisfy the requirement for effectiveness, it is users — responding to their own concerns or operating in a specific community of interest — who need to take action and, as indicated by the ABAs research, who clearly need the information and skills to navigate their online environment effectively. Government's role in coregulation, therefore, should be one of direction and support rather than intervention and mandate. To achieve this outcome, three factors are required: a way to identify what information and training is required; a means of developing the necessary information; and a means of distributing this information.

With regard to identification and distribution, the ease to which Australians online can be contacted and consulted through the medium is remarkable. However, under the current regime, consumers and users are almost completely excluded from direct participation in the regulatory process, and particularly in the way the Australian public can identify issues and prioritise government responses. With reference to Figure 1, therefore, it is clear that the Australian public plays only a peripheral role in the coregulatory system — members of the public make complaints (though the total number of complaints from the total population is low) and receive information (though

the effectiveness of NetAlert in this role has been questioned[89] — especially given its limited budget and large potential audience: $4.5 million over four years to service half the Australian population). Whereas online research can be criticised for its inherent sample bias,[90] the application of electronic democracy in this area of regulation does not encounter these difficulties. Through the medium itself, the online 'community' can determine, rank, receive and interact with information that enhances their experience online.

This approach is likely to have a number of characteristics. First, as already indicated, the concerns of the public are going to cross-cut institutional boundaries. State consumer protection agencies, the ACCC and Treasury are drawn into issues of online commerce; the Human Rights and Equal Opportunity Commission, state indigenous and women's policy units, and law enforcement drawn into issues associated with harassment and hate speech; schools and police drawn in on the protection of minors. At present, a raft of information is developed and distributed by these diverse bodies, with limited coordination or determination of its quality or impacts across the whole Australian online population. Second, the emphasis on risks — the 'black hat' view of the internet as a threatening environment — will have to give way to a positive educational experience. Users go online for a variety of reasons — personal or professional — but, as a tool, the internet experience is fundamentally an instrumental one: thus, instead of dire warnings about the hostile environment they face, users need positive *and* protective messages about what can be achieved online (be that political, social or economic) and how to evade whatever risks may occur in the achievement of personal objectives. Thus regulatory parity is achieved not with the vastly dissimilar medium of television, but with other participatory activities: driving, personal safety or social interaction. This 'white hat' view (not a utopian vision of the wired society based on technological determinist visions of the elimination of social evil, but a balanced assessment of pros and cons) also provides another regulatory benefit in an imperfect marketplace: the ability for government to guide the use of the internet for positive national purposes; the realisation of the educational, participative and economic benefits of a networked society.

If the user's role in the coregulatory system is to be enhanced, then we cannot forget our basic criticism of the industry's participation: lack of ownership. An expanded educative role for the online environment will require the commitment of resources, both from government and from industry. Contribution to the development and distribution of this alternative regulatory system by industry would both assist in the provision of adequate funding for a large nation-building endeavour — the creation of a progressive vision for Australians online that is build from the grassroots up — and reduce the tendency for limited participation in positive regulation by the ISP industry of this country. Two factors motivate this enhanced industry ownership: the desire from industry to see a return on their investment; and the legitimacy of

---

89 Senate Environment, Communications, Information Technology & the Arts Legislation Committee (2001).

90 Strauss (1996).

the demand for the information, driven by consumers for consumer interests. Overall, a per-user contribution from ISPs[91] would commit active industry participation in the coregulatory approach and overcome the free-rider problem associated with this form of regulation: information as a public good.

In Conclusion

Pornography may well be a fundamentally exploitative activity, but it is one that — like cheap coffee, designer sneakers and Third World holidays — many Australians appear to embrace. Likewise, as a nation that mythologises the social (and anti-social) activity of gambling, the tendency for Australians to use new media forms for this activity is not likely to subside. At the most fundamental levels — technical and regulatory design — the control of online content in Australia, from gambling to pornography or hate speech, has not been deterred by the coregulatory model introduced for the *Broadcasting Services Amendment Act*. The limited regulatory capacity of the Australian government, operating in a global medium, is evident in the restricted impact either of the two pieces of legislation discussed can have on the core areas of social concern.

In identifying this problem, it is not necessary to abandon the role of regulation and government in the market for online access. Like any area of market failure, the public will (and should) demand intervention and correction. What must be recognised, however, is that, in advancing only a symbolic response to these problems, the public interest has not been upheld. While evidence with regards to service quality shows that coregulation can be an effective mechanism for industry intervention, there are clear differences between the nature of the problem (specific versus broad and ill-defined) and the level of engagement government has required of industry in the online content area. Overall, therefore, the alternative coregulatory approach advocated in this paper addresses three areas of concern: *flexibility* — in terms of the range of issues that can be addressed by coregulation; *stakeholder engagement* — for both industry and the wider public; and — importantly — *positive intervention without arbitrary paternalism* — the recognition that members of the public have significantly different value systems to legislators and an emphasis on informed, active participation in the online environment. The future of effective coregulation in Australia lies in individual education and empowerment. To paraphrase Foucault: the smallest unit of surveillance is oneself. Need this be a negative regulatory environment?

---

[91] While ISPs are not currently licensed by the Commonwealth, the TIO provides a potential mechanism for the purpose of collecting a levy.

References

Secondary Sources

Australian Broadcasting Authority (2001) *The Internet at Home: A Report on Internet Use in the Home*, ABA.

Australian Broadcasting Authority (1996) *Investigation into the Content of On-line Services*, ABA.

Australian Communications Authority (2002) *Consumer Awareness and Information Needs Survey 2002*, www.aca.gov.au/publications/reports/awareness/report2002.htm

Australian Institute of Gambling Research (2001) 'Gambling Expenditure in Australia: Facts and Issues', *AIGR Fact Sheet*, AGIR.

Robert Baldwin and Martin Cave (1999) *Understanding Regulation: Theory, Strategy, and Practice*, Oxford University Press.

D Braue (2000) 'Net Cleanup is Latest ISP Value-Add', *Australia.Internet.Com*, 7 July.

Peter Chen (1999) 'Australia's Internet Censorship Regime: History, Form and Future' 3 *University of Western Sydney Law Journal Special Edition* 121.

Peter Chen (2000) 'Online Gambling Ban Reeks of Politics', *The Age*, 12 December.

Peter Chen (2002) *Adult Industry Censorship Survey 2002* www.webprophets.net.au/websites/chen/aics/

Robert H Cox (2001) 'The Social Construction of an Imperative: Why Welfare Reform Happened in Denmark and the Netherlands but Not in Germany', 53 *World Politics* 463.

CSIRO (1998) *Blocking Content on the Internet: A Technical Perspective*, prepared for the National Office of the Information Economy, June.

Department of Communications, Information Technology and the Arts (2001a) *Proposed Government Amendments to Interactive Gambling Legislation*, 19 June.

Department of Communications, Information Technology and the Arts (2000a) *Regulation of Objectionable Online Material*, www.dcita.gov.au/cgi-bin/trap.pl?path=3839

Department of Communications, Information Technology and the Arts (2000b) *A Family's Guide for Managing Access to the Internet.*

Department of Communications, Information Technology and the Arts (2001b) *A Safer Internet for All Australians*, www.dcita.gov.au/cgi-bin/trap.pl?path=5652, 19 May.

Department of Communications, Information Technology and the Arts (2001c) *Six-Month Report on Co-Regulatory Scheme for Internet Content Regulation: July to December 2000*, April.

Peter Dicken (1998) *Global Shift: Transforming the World Economy*, Paul Chapman Publishing.

Murray Edelman (1971) *Politics as Symbolic Action: Mass Arousal and Quiescence*, Markham.

R Field (2001) 'Dot Com Blowout Makes for Porn Boom', *Computerworld*, 30 August.

C Fitzsimmons (2002) 'Net Gambling Industry Thrives', *IT Australian*, 15 January, http://australianit.news.com.au/articles/0,7204,3596121%5E15317%5E%5Enbv%5E,00.html

Heather Fulcher (1989) *The Concept of Community of Interest: A Discussion Paper Which Explores the Concept of Community of Interest as it Applies to Local Government Boundaries*, South Australian Department of Local Government.

Gartner Consulting (2001) *Blocking Online Gambling — Technical Study,* Report Prepared for Internet Industry Association — Australia, May.

Peter Grabosky and John Braithwaite (1986) *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies,* Oxford University Press.

G Hillery (1955) 'Definitions of Community: Areas of Agreement' 20 *Rural Sociology* 111.

John Howard (1999) 'National Approach to Problem Gambling', Media Release, www.pm.gov.au/news/media_releases/1999/gambling1612.htm, 16 December.

A Hurrell and N Woods (1995) 'Globalisation and Inequality' 24 *Millennium* 447.

Internet Industry Association (2001a) 'Gambling Law Fails the Test of Good Public Policy', News Release, 2 July.

Internet Industry Association (2001b) *Internet Industry Codes of Practice: Codes for Industry Self Regulation in Areas of Internet Content Pursuant to the Requirements of the Broadcasting Services Act 1992 as Amended,* Version 6, July.

Internet Industry Association (2001c) *Interactive Gambling Bill 2001 Passes Through Senate: Internet Industry Legal Update,* www.iia.net.au/news/010701.html, 29 June.

Internet Industry Association (2002) *IIA Guide for ISPs,* www.iia.net.au/guide.html

G Jacobsen (2002) 'Online Gamblers Facing a Credit Card Ban', *Sydney Morning Herald,* 2 August.

Adrian Little (2001) *The Politics of Community: Theory and Practice,* Edinburgh University Press.

Market Intelligence Strategy Centre (2002) 'Electronic Banking', Media Release, 28 October.

Sean Mays (2001) 'Post Napster: Peer-to-Peer Revisited', *Information Security Reading Room,* www.sans.org/infosecFAQ/policy/post_napster.htm, 20 February.

Megan McAuliffe (2001) 'Excite@home Snoops on User Downloads', *Zdnet UK,* 22 August.

J McMillen (1998) *Gambling and Australian Society: Expanding Markets and Issues for Policy Makers,* paper presented at the conference Gambling, Technology and Society: Regulatory Challenges for the 21st Century, convened by the Australian Institute for Criminology in conjunction with the Australian Institute for Gambling Research, Sydney, 7–8 May.

J McMillen (2001) 'On-line Gambling', in Jay Forder and Patrick Quirk (eds), *Electronic Commerce and the Law,* Wiley.

National Office for the Information Economy (2000) *Terms of Reference: Commonwealth Study into the Feasibility and Consequences of Banning Interactive Gambling,* www.noie.gov.au/projects/consumer/gambling/tor.htm.

National Office for the Information Economy (2001) *Report on the Investigation into the Feasibility and Consequences of Banning Interactive Gambling,* 27 March.

National Office for the Information Economy (2002) *Current State of Play — April 2002,* www.noie.gov.au/projects/framework/progress/ie_stats/CSOP_April2002/index.htm

K Needham (2001) 'Poised to Be a Thriving Australian Industry, Now All Bets are Off', *Sydney Morning Herald,* 21 June.

NetAlert (2000) *NetAlert Limited: Report for the Period 6 December 1999 to 30 June 2000,* NetAlert.

Philippe van Parijs (1981) *Evolutionary Explanation in the Social Sciences: An Emerging Paradigm,* Rowman and Littlefield.

Carolyn Penfold (2001) 'Nazis, Porn and Politics: Asserting Control Over Internet Content' *Journal of Information Law and Technology*, www.elj.warwick.ac.uk/jilt/01-2/penfold.html, July 2.

P Pierson (2000) 'Increasing Returns, Path Dependence, and the Study of Politics' 94 *American Political Science Review* 251.

Productivity Commission (1999) *Australia's Gambling Industries: Inquiry Report*, Report Number 10, November.

Productivity Commission (2001) *Telecommunications Competition Regulation: Inquiry Report*, December.

Optus@home (2000) *Acceptable Use Policy*, www.optushome.excite.com.au/cgi-bin/kmd.cgi?aup.html&excite, 29 September.

GA Sandy (2000) *Acceptable Use Policies for Networked Services: Australian Universities*, Working Paper Series, No 4, School of Information Systems, Victoria University of Technology,
www business.vu.edu.au/infosyspapers/docs/2000/BestPractice.pdfSenate
Environment, Communications, Information Technology & the Arts Legislation Committee (2001) *Answers to Estimates Questions on Notice*, Communications, Information Technology and the Arts Portfolio Department — Broadcasting and Intellectual Property, Additional Estimates 2000–2001, 21–22 February 2001.

Senate Official Hansard (2000) *Parliamentary Debates*, 17 August, AGPS.

Senate Proof Committee Hansard (1999) *Select Committee on Information Technologies*, 28 April, AGPS.

Senate Proof Committee Hansard (2000a) *Parliamentary Debates*, 5 December, AGPS.

Senate Proof Committee Hansard (2000b) *Parliamentary Debates*, 6 December, AGPS.

Senate Select Committee on Information Technologies (2000) *Netbets: A Review of Online Gambling in Australia*, Report by the Senate Select Committee on Information Technologies, March, AGPS.

Senate Select Committee on Information Technologies. 1999. *Official Committee Hansard*, Reference: Broadcasting Services Amendment (Online Services) Bill 1999, 28 April, AGPS.

J Stackhouse (2001) 'Australian Net Gambling Ban Makes No Sense — Gartner', *Computer Daily News*, www.infowar.com/law/01/law_040201c_j.shtml, 2 April.

J Strauss (1996) 'Early Survey Research on the Internet: Review, Illustration and Evaluation' in Blair and Kamakura (eds.), *American Marketing Association Winter Educators' Conference Proceedings*, American Marketing Association.

Tasmanian Gaming Commission (2001) *Australian Gambling Statistics*, Tasmanian Gaming Commission.

K Wilkinson, K (1991) *The Community in Rural America*, Greenwood Press.

P Willmott (1989) *Community Initiatives: Patterns and Prospects*, Policy Studies Institute.

Sherman Young (2000a) *Reviewing the Law: Assessing Australia's On-line Content Regulations*, September.

Sherman Young (2000b) *Blinding the Net? Ethics of the BSA Implementation*, Paper submitted for ANZCA 2000, June.

Legislation

Broadcasting Services Amendment (Online Services) Act 1999
Interactive Gambling Act 2001