REGULATING CONTENT IN A DIGITAL WORLD: HOW AUSTRALIA IS TACKLING THE INTERNET

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Introduction
Over the past 2 years, Australian politicians and shock jocks have been regularly outraged by the availability of online or interactive content that has been deemed harmful or inappropriate for Australian youth. The live streaming of late night antics on the Big Brother website, the publication of the Henson photos on an art gallery website, the availability of hidden ‘adult’ content in a Grand Theft Auto video game and the uploading of pornographic user-generated content onto social networking sites, are just some of the incidents that have occupied the headlines over the past few years. In almost every case, the ensuing controversy has resulted in ad hoc amendments to Australia’s broadcasting and classification regime. As a result, the Australian online ‘content’ industry is now the most highly regulated in the world.

All of this is no real surprise. As an area of law that draws its impetus from community standards, the regulation of content in Australia has always been highly politicised and largely reactive. However until recently, content regulation has been relatively straightforward. For much of the 20th Century, consuming content was a passive experience and access to content could only be obtained via a limited number of mediums. Over the past few decades however, society has been revolutionised by the ability to digitise and transport content quickly, cheaply and on a mass scale. At the same time, the convergence of telecommunications and content services, the proliferation of platforms upon which content may be accessed, and the increased accessibility and mobility of digital content has resulted in an increase in the amount and the nature of content available. Web 2.0 has also resulted in a transformation of the ways in which content is created and published, with consumers becoming ‘produsers’ and taking an active role in the generation and distribution of content.

This paper examines the challenges posed by the digitisation of content, the internet and rapid technological change for online content regulation in Australia. Part I explores the nature of the digital environment and the perceived need for online content regulation in Australia and Part II sets out the regulatory framework and the ways in which it has been shaped by the challenges inherent in the digital environment. Ultimately, this paper argues that the changes to the way society produces and consumes content over the past few decades has created important and significant challenges for online content regulation in Australia.

The digital environment
What is the digital environment?
Over the past decade, the increased penetration of high bandwidth internet connection has caused both a shift in the way content is created, distributed and consumed, as well as an increase in the type and amount of content that is now available. This shift has major implications for the traditional media sector and its established one-to-many broadcast

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1 For the purpose of this article, discussion and commentary on privacy, communications risk, defamation, copyright and online gambling have been excluded. The article also focuses on negative content regulation rather than positive forms such as the imposition of minimum requirements for Australian content and children’s programming.
Not only is digital media blurring the distinction between point-to-point and broadcast communication, but next generation internet users are no longer relying on traditional gatekeepers to provide them with content. At least 2 blogs are created every second, 10 hours of video are uploaded to YouTube every minute and 14 million photos are uploaded to Facebook every day. The emergence of real time social infrastructure is enabling ‘produsers’ to enjoy a media lifestyle that is ‘personal, participatory and pull driven’ and to collaborate with peers and create and share media in profoundly new ways. The dramatic uptake of social networking (there are now 67 million active Facebook users and there have been 250 thousand new registrations per day since 1 January 2007) is a testament to the scope and effect of this transformation.

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

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

The accessibility, interactivity, anonymity and mobility that have made the digitisation of content and online communications so attractive and innovative are the same features that are perceived to pose risks to users, and in particular, children. In its Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety report of February 2008, the ACMA categorises these risks as follows: content risks, which include exposure to illegal or inappropriate content (such as child pornography or other harmful material); communication risks, which arise from online interaction with other users (such as cyber-bullying and online stalking); and e-security risks, which arise when the means of access is compromised or personal information is released online (such as spam, viruses and online identity fraud).

The policy concerns informing online content regulation (as a means of eliminating or at least minimising content risks) vary across jurisdictions. In respect of political speech, Europe places an emphasis on eliminating hate websites, and China attempts to censor dissenting

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7 Australian Communications and Media Authority, ‘Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety: First annual report to the Minister for Broadband, Communications and the Digital Economy’, February 2008, pp3, 12. Although each of these risks are to a certain extent interrelated, this article focuses on content risks.
commentary. Conversely, the approach taken by the USA is informed by its constitutional protection of the freedom of speech. The one commonality across jurisdictions however, has been a desire to protect children from exposure to harmful or inappropriate content and it is this rationale for content regulation that has traditionally been given in Australia. Indeed it has been argued that in Australia, the ‘symbolic and political value’ of this rationale has been used to ‘stifle debate and ensure greater cross party support than the problem actually justifies’ because ‘opposition to these policies which are advanced on ‘motherhood’ grounds is portrayed as a dereliction of duty to children’.  

At its most basic, any discussion around online content regulation will ultimately be centred around three fundamental questions: whether digital content should be regulated at all, whether it can be, and who should bear the responsibility for regulation. Each of these questions inform the other and require examination in light of the fact that, according to Lessig, in the digital environment there are 4 modalities of control – law, architecture, social norms and markets.

In the offline environment, it has generally been accepted that broadcasters or editors – usually large corporations – have a substantial degree of control over the content made available to the public. In effect, they are the responsible entities and can therefore be censored or at least regulated accordingly. However in the online realm, much, if not most of the content made available is user generated. The anonymity afforded by the internet is such that identification of perpetrators is difficult, particularly in light of the privacy regulations imposed on those gathering personal identification information (for example, internet service providers and content service providers). Furthermore, there is an inherent tension between the desire to protect children and the desire to encourage user-led innovation and preserve the free flow of information that has traditionally been associated with the internet. As demonstrated below, the ad hoc policy amendments that comprise the Australian regulatory framework reflect the attempts made to overcome some of these challenges. Not all of these attempts have been successful.

The Australian regulatory framework

The framework

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

It is also a regime in transition, as policy makers come to terms with rapidly changing technologies and the convergence of platforms that had previously been treated as distinct areas of regulation.

The current regulatory framework has, to a certain extent, been challenged and shaped by the age-old tension between legislating in a technologically neutral way whilst ensuring that the...
legislation is not so broad that it impedes innovation. However the framework is also a product of the legal architecture, which has the Constitution as its foundation. This architecture presents challenges of its own.

Constitutional issues

It is now generally accepted that the control of broadcasting is within the power of the Commonwealth Parliament.\(^{13}\) Under section 51(v) of the Constitution, the Commonwealth has the power to legislate in relation to ‘postal, telegraphic, telephonic, and other like services’. It is significant that none of the other powers in s51 of the Constitution contain the phrase ‘and other like services’, and the wide interpretation given to s51(v) therefore appears to be an ‘attempt to cover unknown and unforeseen developments’.\(^{14}\) The power itself appears to relate to the means of delivery rather than the content of delivery. Indeed it was arguable after Brislan’s case that ‘although the Commonwealth was entitled to regulate the flow of communications as a traffic policeman under s51(v), it was not entitled to control the actual content of the communications.’\(^{15}\) However the High Court in *Jones v Commonwealth (No 2)* took a broader interpretation of the power, suggesting that it:

is not confined to providing for the establishment, maintenance and operation of telegraphic, telephonic or other like services, but extends to the choice of the persons who may make use of such a service either to send or to receive communications, to the conditions upon which persons may so use it, and to every aspect of the use and advantage they may have from it.\(^{16}\)

In that case, the court ultimately held that the provisions of the *Broadcasting Act* which empowered the ABC to prepare programmes and present them for transmission, did come within s51(v).\(^{17}\) Given this, it would seem that although content service providers do not of themselves provide the means of delivering content, they nonetheless are sufficiently incidental to the delivery of content to enable regulation under s51(v). Whether this interpretation is tested in light of recent amendments to the online content regime remains to be seen.

Background to the legislative regime

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

… to address the publication of illegal and offensive material online, while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy.\(^{18}\)

Acknowledging that ‘there are technical difficulties with blocking all illegal and offensive material that is hosted overseas’, the Government nonetheless argued that ‘it is not acceptable to make no attempt at all on the basis that it may be difficult’.\(^{19}\) The result – despite staunch

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\(^{13}\) The Commonwealth’s power over the broadcasting system generally under s51(v) of the Constitution was confirmed by the High Court in *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 274, 283–4, 286–7, 294.

\(^{14}\) *R v Brislan* at 283 per Rich and Evatt JJ.


\(^{16}\) *Jones v Commonwealth (No 2)* [1965] HCA 6, para 8.

\(^{17}\) Armstrong, M. Communications Law and Policy in Australia, p1206.

\(^{18}\) The Senate, Broadcasting Services Amendment (Online Services) Bill 1999 Explanatory Memorandum, p1.

\(^{19}\) ibid.
resistance from industry and suggestions that the proposed amendments would make Australia the ‘global village idiot’ or the ‘dunce of the networked world’—was a co-regulatory, complaint-based, take-down regime regulating internet content hosts and internet service providers that made available stored content over the internet.

In 2004, a highly publicised incident exposed a gap in the regulatory framework. Sexually explicit content unable to be shown on commercial television was nonetheless able to be streamed live from the Big Brother website and accessed as part of a premium mobile service. As the framework established by the 1999 amendments did not extend to ephemeral content such as live streamed audiovisual services, nor to services over other types of networks such as the mobile telephone network, the material on the website and on the premium mobile service could not be required to be removed. Public outrage ensued, followed by new calls for the overhaul of the legislation.

The April 2006 Department of Communications, Information Technologies and the Arts review of the regulation of content delivered over convergent devices (‘the DCITA Convergence Report’) made recommendations to overcome these challenges. The primary recommendation was that:

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

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

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

The online content regime

(a) The jurisdictional reach

One of the greatest challenges faced by policy makers attempting to regulate online content, is how to frame laws in a way that captures the maximum amount of content accessible by Australians but that is also enforceable and within Australia’s jurisdictional reach. Schedule 7 to the BSA regulates content service providers, specifically, live content service providers who provide access to live content; hosting service providers who provide stored content to the public; links service providers who provide access to content via links; and commercial content service providers who provide access to content for a fee. The only qualification is that to fall within the Schedule 7 content regime, these service providers must have an ‘Australian connection’, that is, they must host content in Australia (this includes hosting a link in Australia which provides access to content that may or may not be hosted in Australia) or provide live content from a server in Australia.

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21 McGill, I and Bloch, V. ‘Focus: internet content services regulation’.
22 Department of Communications, Information Technology and the Arts, Review of the Regulation of Content Delivered Over Convergent Devices, April 2006, pv.
23 Ibid, pvi.
24 Clause 3, Schedule 7, BSA.
At first glance, the Australian connection test appears to limit the jurisdictional reach of the Australian regulatory regime to content service providers that have servers located in Australia. Given the accessibility of content hosted overseas, the Australian connection test would therefore seem to have only limited effect. However the operation of the test when viewed in light of the relevant definitions and the technical characteristics of content service provision, creates uncertainty as to the true scope envisaged by the Australian connection test. For example, many content service providers make content available to Australians from servers located overseas, but cache content on temporary storage areas (‘caching servers’) located in Australia. The purpose of these caching servers is to enable rapid access to frequently accessed digital data (in particular large files like video and graphics). The caching servers automatically overwrite data that is no longer frequently accessed with more recent data that is. As such, the hosting service provider has limited, if any, control over the data temporarily stored on those caching servers. Furthermore, in some cases the caching servers themselves are provided by third parties such as Akamai Technologies Inc, who enter into agreements with the hosting service providers to deliver the content over their secure content delivery network.

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

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

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

(b) User generated content

Twenty years ago, those responsible for the ‘content of communications’ – generally, broadcasters and newspaper owners – could be easily identified. However in the current digital environment, user generated content comprises the bulk of available content and even

traditional media services have enabled interactivity as part of their content offerings. This transition has two major implications. The first is that user-generated content is substantially more difficult to monitor, classify and regulate than traditional content broadcast over television or radio. The second is that the enforcement of regulations in relation to user generated content is made difficult by the anonymity afforded by the internet. The online regulatory regime has undoubtedly taken into account some of the challenges posed by the internet generally. However it does not always deal with these challenges in a way that recognises that there are different types of content and that some of these types, for example user-generated and interactive content, are inherently resistant to traditional forms of content regulation.

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

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

It is also worth noting that the notion of prohibited or potential prohibited content is underpinned by the same classification regime used in relation to content made available over

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

Content that consists of an eligible electronic publication is prohibited content if the content has been classified RC, Category 2 Restricted or Category 1 Restricted by the Classification Board. Clause 20, 21, Schedule 7, BSA.

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

28 Clause 8, Content Services Code. Note that under the BSA, an industry code or industry standard is required to be registered to give effect to certain content service provider obligations and in particular commercial content service provider obligations. The ACMA registered the Code on 16 July 2008, making it legally enforceable.
traditional platforms like film and television. The aim in using this regime was to ensure consistency in the treatment of the same content made available across various platforms. Furthermore, Schedule 7 employs the concept of ‘potential prohibited content’ in recognition of the fact that it would be impractical, even impossible, to require the classification of all content available online. Whilst these accommodations do attempt to simplify content regulation, they beg the question as to whether online content should necessarily be classified in the same way as, for example, content broadcast into the lounge room.

The formulation of Schedule 5 to the BSA also has implications for user-generated content. As amended by the Content Services Act, Schedule 5 now regulates internet content hosts (‘ICHs’) and ISPs, although it does so only in relation to content hosted outside of Australia. There is a safe harbour for ICHs and ISPs from State, Territory and common law that would otherwise impose liability in respect of the hosting or carrying of internet content where the ICH or ISP was not aware of that content. Notably, this safe harbour does not extend to the obligation under section 474.25 of the Criminal Code which provides that if an ICH is aware that the service it is providing can be used to access material that it has reasonable grounds to believe is child pornography material or child abuse material, the ICH is required to refer details of the material to the Australian Federal Police within a reasonable time after becoming aware of the existence of the material. Failure to do so is an offence.

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

As the current IIA Code relating to ISPs has not yet been updated or replaced in accordance with the amendments made by the Content Services Act, the approach taken in relation to access prevention remains uncertain. In any event, if a content service provider provides prohibited or potential prohibited user-generated content, there is a risk that an entire site could be blocked under the Schedule 5 regime.

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30 Underpinning this framework is the classification regime, a co-regulatory regime which provides the yardstick by which harmful or inappropriate content is measured. Prohibited and potential prohibited content is determine by reference to the Classification (Publications, Films and Computer Games) Act 1995 (Cth), the National Classification Code, the Guidelines for the Classification of Films and Computer Games and the Guidelines for the Classification of Publications.

31 Content is potential prohibited content if the content has not been classified by the Classification Board, but if it were to be classified, there is a substantial likelihood that the content would be prohibited content.

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

33 Clause 91, Schedule 5, BSA.

34 Clause 40, Schedule 5, BSA.
Mobile

At present, there are approximately 3.3 billion mobile phone subscribers and 1.3 billion internet users worldwide. At first glance, these statistics may not be surprising given that consumers have traditionally spent far more on connectivity via telephone than they have on content. However the point is that the technical convergence of platforms (as demonstrated by the advent of the iPhone, the 3 Skype Phone and the Google Android) has given content service providers the opportunity to leverage the market share enjoyed by mobile carriers and in doing so, distribute their content to a far wider audience than was previously possible. At the same time, mobile carriers are now increasingly using content services (including more recently, killer apps like social networking, Presence and video) to sell connectivity. In fact, broadband experts are predicting that in as little as two years the mobile phone network may replace the copper wire as the principal method by which people connect to the internet.

The high uptake of mobile phones by youth has increased concern about mobile content because it is more accessible by children and because ‘mobile filters are not amenable to filtering at the device level’. Furthermore, mobiles now have the capability to offer a range of content services including: mobile premium services like adult text message ‘chat,’ or video downloads which consumers access through dedicated phone numbers (‘mobile premium services’); mobile proprietary portal services offered by mobile carriers (such as Vodafone or 3) for their own customers (‘walled garden services’); access to the open internet through mobile devices (‘mobile open internet services’); and mobile television or digital video broadcasting delivered or broadcast to, and watched on, mobile devices (‘broadcast mobile television services’).

Content regulation in Australia as it applies to mobile content, has sought to overcome some of these challenges, however it is still a regime in transition. Prior to 2007, each of these services (which were traditionally made available over different platforms) were regulated (if at all) under separate platform-specific regulatory regimes. However the convergence of platforms and services has posed challenges to this siloed regulatory approach. The regulation of mobile services was consequently earmarked for reform by the DCITA Convergence Report and the integration of the premium mobile service regime into the BSA in 2007 was one of the most integral changes introduced by the 2007 amendments.

36 ibid.
37 Odlyzkco notes that the postal system alone collects about as much money as the entire movie industry, even though the latter benefits from large foreign sales. Household spending on telephone services dwarfs the amount spent on television content. Most of the traffic occurring on the web comes from email communications rather than from accessing content. Similarly, the slow uptake of Wireless Application Protocol (WAP), designed to deliver content to wireless devices, has been disappointing, whereas the Short Message System (SMS) providing low bandwidth digital messaging (or connectivity) between users has surprised the industry with its success. Odlyzko, A. ‘Finding a voice: learning from history in Connected Homes – Thought Leaders: Essays from innovators, Fernando Gil de Bernabe y Varela (ed), Cisco Systems, Premium Publishing, 2004, pp58, 59.
40 Goggin, G. ‘Regulating Mobile Content: Convergences and citizenship’ in International Journal of Communications Law & Policy, No. 12, 2008, p142.
Although the approach now taken by Schedule 7 is a predominantly platform neutral one, it does make specific reference to mobile premium services in order to bring mobile phone based services within the online regulatory regime. In relation to the provision of mobile open internet services, the regime does not discriminate on the basis of the delivery platform. Content service providers are regulated in the same way, irrespective of whether their internet content has been accessed via a mobile handset or via a PC.

Mobile premium services are regarded in Schedule 7 as a subset of commercial content services and are regulated in the same way. As such, they are required to put in place restricted access systems if they make available content classified MA15+ or R18+ and they are also required to engage trained content assessors. However regulation of mobile premium services does not end there. The IIA Content Services Code deals with the engagement of trained content assessors by commercial content service providers and provides guidance for commercial content service providers as to when trained content assessors must assess relevant content for the purposes of categorising that content as RC, X18+, R18+ or MA15+ or (in the case of an eligible electronic publication) as RC or category 2 restricted. Furthermore, the Restricted Access Systems Declaration 2007 sets out age verification requirements for both commercial content services and restricted content made available by mobile handsets. In addition, the Mobile Premium Services Determination 2005 still applies to premium mobile services, although as of 1 January 2008, it exists in a significantly pared back form. It now regulates chat services and provides for the implementation of self regulatory schemes. It is envisaged that these residual parts of the MPS Determination will ultimately be made into a Part 6 Code under the Telecommunications Act (Cth) 1997.

Walled garden services are also caught by the 2007 amendments. If an Australian mobile carrier offers a content service as part of an ‘on-deck’ or walled garden service, the mobile carrier will at the very least be considered a links service provider with an Australian connection. If they provide this service for a fee, they will be a commercial content service provider and subject to obligations under the draft Content Services Code and the Restricted Access Systems Declaration 2007 as is the case with mobile premium services (see above). That mobile carrier can therefore be issued with a take-down, link-deletion or service-cessation notice from ACMA. Australian mobile carriers that enter into agreements with hosting service providers to enable those carriers to provide relevant content (or links to that content) ‘on-deck’, need to be aware that even if the hosting service provider does not satisfy the Australian connection test, the relevant content will still fall within the Schedule 7 regime if the ‘walled garden’ itself is hosted within Australia.

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41 Mobile premium service means a commercial content service [own emphasis] where:
(a) a charge for the supply of the commercial content service is expected to be included in a bill sent by or on behalf of a mobile carriage service provider to the relevant customer; or
(b) a charge for the supply of the commercial content service is payable:
   (i) in advance; or
   (ii) in any other manner;
by the relevant customer to a mobile carriage service provider or a person acting on behalf of a mobile carriage service provider.

42 Clause 81, Schedule 7, BSA.

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

44 The Telecommunications Service Provider (Mobile Premium Services) Determination (No.1) 2005 (‘MPS Determination’) which was introduced as an interim measure, covered mobile premium services, including both ‘walled garden’ services and premium rate SMS and MMS services.
Although to date, broadcast mobile television services have not yet been successfully implemented in Australia, they would be regulated as a type of broadcasting service and subject to applicable licence conditions, self-regulatory codes and standards in accordance with the BSA.

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

**Conclusion**

The digitization of content, the internet and rapid technological change have radically transformed the ways in which content is produced and consumed. In doing so, they have also fundamentally challenged the way in which online content regulation in Australia is conceived, implemented and enforced. Australian policy makers have made it clear that their ultimate goal in regulating online content is to ensure that society, and in particular children, are protected from exposure to content that is harmful or inappropriate. However providing adequate protection in a marketplace where so much content is produced by so many users and delivered via so many platforms is becoming increasingly difficult. Although the solution in Australia to date has been to introduce ad hoc legislative amendments as problems arise, this model has not always been successful in overcoming the challenges presented by the digital environment. As an increasing number of parties begin to participate in the production and consumption of content, it seems that the greatest challenge and the most hopeful solution for online content regulation in Australia going forward, may well be to find ways to raise awareness of the inherent risks and to empower stakeholders to cooperate in order to overcome them.

**B I B L I O G R A P H Y**


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