



Executive Council of Australian Jewry Inc.

PROPOSAL TO EXTEND ACMA'S CURRENT REGULATORY POWERS OVER ON-LINE SERVICES TO HATEFUL OR RACIST MATERIALS ONLINE THAT ARE FOUND TO BE ILLEGAL UNDER THE RACIAL DISCRIMINATION ACT 1975

A The Current Regulatory Regime

1. Australian laws relating to the regulation and prohibition of offensive content are based on the powers delineated in the Australian Constitution, which gives the Parliament power to “make laws for the peace, order, and good government of the Commonwealth with respect to ...postal, telegraphic, telephonic, and other like services.”¹
2. The *Broadcasting Services Amendment (Online Services) Act* 1999, amended the *Broadcasting Services Act* 1992 (BSA) by adding section 216D that gives effect to BSA Schedule 7. Schedule 7 establishes the authority of the Australian Communications and Media Authority (ACMA)² to regulate on-line content that has an *Australian connection*. An *Australian connection* exists if any of the content provided by the content service is hosted in Australia or, in the case of a live content service, if the live content service is provided from Australia.³
3. The ACMA is required to look into complaints from Australians about *prohibited content*, or *potential prohibited content*, in relation to certain services,⁴ or it can conduct an investigation into such matters on its own initiative.⁵

¹ Australian Constitution, s 51(v).

² The Australian Communications and Media Authority was formed in July 2005, merging the Australian Broadcasting Authority and the Australian Communications Authority. See ACMA Overview, http://www.acma.gov.au/WEB/STANDARD/pc=ACMA_ORG_OVIEW.

³ Clause 3 of BSA Schedule 7.

⁴ Clause 43 of BSA Schedule 7.

⁵ Clause 44 of BSA Schedule 7.

4. Content (other than an eligible electronic publication, being an electronic or audio version of a book, magazine or newspaper) is *prohibited content* if the Classification Board established under section 45 of the *Commonwealth Classification (Publications, Films and Computer Games) Act 1995 (Classification Act)* finds that the content falls within certain categories as defined by the Classification Act. The levels and definitions of prohibited content are as follows:⁶
 - (a) the content has been classified RC (Refused Classification) or X 18+ by the Classification Board; or
 - (b) the content has been classified R 18+ by the Classification Board and access to the content is not subject to a restricted access system; or
 - (c) the content has been classified MA 15+ 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
 - (d) the content has been classified MA 15+ 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.
5. 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 (in each case as defined in the Classification Act) by the Classification Board.⁷
6. Generally, 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.⁸
7. The ACMA may take the following action to deal with prohibited content or potential prohibited content:
 - (a) in the case of a hosting service—issue, a final or interim take-down notice;⁹

⁶ Clause 20(1) of BSA Schedule 7

⁷ Clause 20(2) of BSA Schedule 7

⁸ Clause 21 of BSA Schedule 7.

⁹ Clause 47 of BSA Schedule 7

- (b) in the case of a live content service—issue, a final or interim service-cessation notice;¹⁰
 - (c) in the case of a links service—issue, a final or interim link-deletion notice.¹¹
8. These notices effectively require content service providers and hosting service providers to remove the prohibited content from public access.
 9. Bodies and associations that represent sections of the content industry may develop industry codes that are registered with the ACMA.¹² The ACMA has a reserve power to make an industry standard if there are no industry codes or if an industry code is deficient.¹³ Compliance with an industry code is voluntary unless the ACMA directs a particular participant in the content industry to comply with the code.¹⁴ Compliance with an industry standard is mandatory.¹⁵ The ACMA may also make determinations regulating certain content service providers and hosting service providers.¹⁶
 10. The *Broadcasting Services Amendment (Online Services) Act* 1999, also amended the (BSA) by adding section 216B that gives effect to BSA Schedule 5. Schedule 5 establishes the authority of the ACMA to regulate *Internet content hosted outside Australia*.¹⁷
 11. Bodies and associations that represent the Internet service provider section of the Internet industry may develop industry codes that may be registered with the ACMA under Part 5 of Schedule 5. Compliance with an industry code is voluntary unless the ACMA directs a particular participant in the Internet industry to comply with the code.¹⁸ The ACMA has a reserve power to make an industry standard if there are no industry codes or if an industry code is deficient.¹⁹ Compliance with industry standards is mandatory.²⁰
 12. The ACMA must look into complaints from Australians alleging that an internet service provider:
 - (a) has contravened a code registered under Part 5 of Schedule 5 that is applicable to the provider; or

¹⁰ Clause 56 of BSA Schedule 7

¹¹ Clause 62 of BSA Schedule 7.

¹² Part 4 of BSA Schedule 7.

¹³ Division 5 of Part 4 of BSA Schedule 7.

¹⁴ Clause 89 of BSA Schedule 7.

¹⁵ Clause 95 of BSA Schedule 7

¹⁶ Part 5 of BSA Schedule 7.

¹⁷ See simplified outline of BSA Schedule 5 as set out in Clause 2.

¹⁸ Clause 66 of Schedule 5.

¹⁹ Division 5 of Part 5 of Schedule 5

²⁰ Clause 72 of Schedule 5.

- (b) has contravened an online provider rule that is applicable to the provider;²¹
or, it can investigate a possible contravention on its own initiative.²²
13. The ACMA may issue standard access-prevention notices to internet service providers in relation to internet content hosted outside Australia²³ and special access prevention notices in respect of internet content that is the same as, or substantially similar to, the internet content identified in a standard access-prevention notice.²⁴ These notices direct the provider to take all reasonable steps to prevent end-users from accessing the internet content. An Internet service provider must comply with a standard or special access-prevention notice that applies to the provider as soon as practicable, and in any event by 6 pm on the next business day, after the notice was given to the provider.²⁵
14. For offensive content hosted from outside Australia, the ACMA itself determines whether content is prohibited and notifies a list of certified Web-filter manufacturers to include the prohibited sites in their filters.²⁶ To obtain certification, these certified “Family Friendly Filters” must agree to keep lists of prohibited sites confidential.²⁷ ISPs are then required to offer a Family Friendly Filter to all of their customers, though customers are not required to accept them.²⁸ As a result, content taken down in Australia could be posted outside of the country and still be accessible to the majority of Australian Internet users. Electronic Frontiers Australia reports that at least one site taken down has moved to the United States, even keeping its URL and “.au” domain. It is not known how many sites have moved overseas in this fashion.²⁹
15. States and territories have instituted a variety of laws that criminalize the downloading of illegal content and the distribution of content that is “objectionable” or “unsuitable for minors.”³⁰ There is not complete uniformity between the states, however.

²¹ Clause 26 of Schedule 5.

²² Clause 27 of Schedule 5.

²³ Clause 40 of Schedule 5.

²⁴ Clause 47 of Schedule 5.

²⁵ Clause 48 of Schedule 5.

²⁶ Australian Communications and Media Authority, “Internet regulation,” February 2007, http://www.acma.gov.au/web/STANDARD//pc%3DPC_90169

²⁷ Schedule 1, Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992), May 2005, http://www.acma.gov.au/acmainterwr/aba/contentreg/codes/internet/documents/iaa_code.pdf

²⁸ IIA Guide for ISPs, March 2006,

http://www.iaa.net.au/index.php?option=com_content&task=view&id=121&Itemid=33

²⁹ Electronic Frontiers Australia, “Internet censorship laws in Australia,” March 31, 2006,

<http://www.efa.org.au/Issues/Censor/cens1.html>.

³⁰ *Ibid*

B. Legal prohibition of racial vilification

16. Commonwealth law in Australia addresses hate speech through the *Racial Discrimination Act* 1975, Part IIA of which makes it “unlawful for a person to do an act, otherwise than in private, if: the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin of the other person, or of some or all of the people in the group.”³¹
17. The Federal Court of Australia applied this law to the Internet for the first time in October 2002 in *Jones v Toben* [2002] FCA 1150 (17 September 2002). Jeremy Jones for the Executive Council of Australian Jewry brought a lawsuit against Frederick Toben, the director of the Adelaide Institute, because of material on Toben’s Web site (www.adelaideinstitute.org) that denigrated Jews as a group and denied the Holocaust. The Federal Court, found that publication on the Internet without password protection is a “public act,” and that posting this material online was in direct violation of s.18C of the Racial Discrimination Act 1975. It ordered Toben to remove the material from the Internet.³² The Orders did not (and could not) apply to the relevant internet service provider which was not a party to the proceedings and not itself a publisher of the offending material.
18. Toben was subsequently found by the Federal Court to have breached the orders requiring him to remove the material from his website³³ and was gaoled for three months for contempt of court.³⁴ This was the culmination of litigation against him by a private individual over a period of 13 years. His web site is still on line, operated by another person. Only some of the offending material has been removed from the web site.
19. **Australian law and, in particular, the regulatory scheme of the BSA, does not at present give the ACMA authority to investigate complaints or issue take-down notices or standard or special access-prevention notices for hateful or racist materials online, even if they are found by the Federal Court of Australia to offend**

³¹ s 18C Racial Discrimination Act 1975.

³² Galexia, “Article: Jones v Toben: Racial discrimination on the Internet,” Oct 2002, http://www.galexia.com/public/research/articles/research_articles-art22.html#fn357

³³ *Jones v Toben* (Corrigendum dated 20 April 2009) [2009] FCA 354 (16 April 2009)

³⁴ *Jones v Toben* (No 2) [2009] FCA 477 (13 May 2009); upheld unanimously on appeal: *Toben v Jones* [2009] FCAFC 104 (13 August 2009).

against the Racial Discrimination Act 1975.³⁵ As a result, there appears to be no venue other than the courts in which to pursue complaints about hateful or racist materials online. Otherwise, the matter appears to be at the discretion of the service provider.

20. “Chilling Effects” reports that Google received a notice from a user on May 5, 2006 of a site in its search results that allegedly violated section 18C of the *Racial Discrimination Act 1975* and voluntarily removed it from the Google Australia site (www.google.com.au).³⁶ It received another “hate speech complaint” on 20 June 2009, alleging that material on another site in its search results “is pure anti-semitism and contravenes the law in most countries. In my opinion this should be removed and the poster banned for his constant incitement to hatred”³⁷ It is not clear whether reference to this site also was removed from the Google Australia site.

C. Proposal to extend the current regulatory regime of the BSA

21. It is proposed that the relevant statute law be amended so as to require the ACMA to issue an appropriate form of notice or notices under BSA Schedule 7 (in respect of content that has an Australian connection) or Schedule 5 (in respect of content that is hosted outside Australia) immediately upon the ACMA receiving either:

- (a) a formal notice from the President of the Australian Human Rights Commission (the President) that the President has issued an advisory opinion; or
- (b) a sealed copy of an order from either the Federal Court of Australia or the federal Magistrates Court,

to the effect that publication of the content is rendered unlawful by s.18C of the Racial Discrimination Act (RDA) and is not exempted by s.18D of that Act.

22. At present, a complaint alleging unlawful discrimination (which includes conduct made unlawful by Part IIA of the RDA³⁸) may be made in writing to the President of the Australian Human Rights Commission under subsection 46P(1) of the *Australian Human Rights Commission Act 1986* (AHRC Act). Under section 46PD of the AHRC Act, the

³⁵ Australian Department of Communications, Information Technology and the Arts, “Racism and the Internet,” November 2002, www.dcita.gov.au/_data/assets/word_doc/10892/Racism_and_the_Internet.doc/10892/

³⁶ Chilling Effects, “Google removal complaint: s.18C of Australia’s Racial Discrimination Act of 1975,” May 2006, <http://www.chillingeffects.org/international/notice.cgi?NoticeID=4266>

³⁷ <http://www.chillingeffects.org/international/notice.cgi?NoticeID=25762>

³⁸ See paragraph (c) of definition of “unlawful discrimination” in section 3, *Australian Human Rights Commission Act 1986*

Australian Human Rights Commission (the Commission) must refer the complaint to the President of the Commission (the President). Unless the President is satisfied that the complainant³⁹ does not want the President to inquire into the complaint or that the complaint has been settled or resolved, the President **must** conduct an Inquiry into the complaint in accordance with section 46PF of the AHRC Act and attempt to conciliate the complaint.

23. The President may terminate a complaint if satisfied that there is no reasonable prospect of the matter being settled by conciliation. Under section 46PO of the AHRC Act, the complainant may then make an application to the Federal Court or the Federal Magistrates Court to have the matter determined by the court. If the President decides to terminate a complaint, the President must notify the complainant in writing of that decision and of the reasons for that decision.⁴⁰

PROPOSED AMENDMENT TO THE AHRC ACT

24. It is proposed that the AHRC Act be amended so as to provide that:

1. **In respect of a complaint made under Part IIA of the RDA which in whole or in part concerns an alleged publication of material on the internet and which results in the holding of an Inquiry by the President pursuant to section 46PF of the AHRC Act, the complainant may, within 14 days after receipt of a notification from the President terminating the complaint, make a request in writing to the President that the President issue the complainant with an advisory opinion as to the merits of the complaint, and that the President must provide the complainant with such an advisory opinion within 28 days after receipt of the request.**
2. **The advisory opinion must describe and identify the material and expressly state (i) the President's opinion as to whether material has been published on the internet as alleged in the complaint (ii) the President's opinion as to whether the publication was unlawful under Part IIA of the RDA and (iii) if the President's opinion in respect of each of (i) and (ii) is in the affirmative, how and when the material was last accessed by the President (for example: set out a URL, a**

³⁹ The expression "complainant" in this section of the Paper includes an "affected person" within the meaning of the AHRC Act.

⁴⁰ Subsection 46PH(2) of the AHRC Act.

password, or the name of a newsgroup) and, if the material is “stored content” within the meaning of the BSA, the name of the country or countries in which the content is believed to be hosted.

3. If the President’s opinion in respect of each of (i) and (ii) in 2 above is in the affirmative then, at the time of issuing the advisory opinion (an “affirmative advisory opinion”) to the complainant, the President must also deliver a copy of it to the ACMA.

PROPOSED AMENDMENTS TO THE *FEDERAL COURT OF AUSTRALIA ACT 1976* AND THE *FEDERAL MAGISTRATES ACT 1999*

25. It is further proposed that the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* each be amended so as to provide that:

1. The amendment applies in respect of any application to the Court pursuant to subsection 46PO(1) of the *Australian Human Rights Commission Act 1986* in which the Applicant alleges:
 - (a) that material has been published on the internet; and
 - (b) the publication is unlawful under Part IIA of the RDA.
2. If the Court finds that the allegations are proved, the Court must include in any Orders it makes a schedule (an “internet hate site schedule”) in which:
 - (a) the material is described and identified; and
 - (b) there is a statement of how and when the material was last accessed on the internet by the Court (for example: by setting out a URL, a password, or the name of a newsgroup) and, if the material is “stored content” within the meaning of the BSA, there is a statement setting out the name of the country or countries in which the material is believed by the Court to be hosted.

PROPOSED AMENDMENT TO THE BSA

26. It is proposed that an amendment be made to the BSA so as to provide that upon receipt of either:
 1. a copy of an affirmative advisory opinion from the President; or

- 2 a sealed copy of an Order of either the Federal Court of Australia or the Federal Magistrates Court delivered to the ACMA by any party, being an Order that includes an internet hate site schedule;

the ACMA must determine which content providers have directly or indirectly facilitated the publication of the material identified therein and give them notice under BSA Schedule 7 or BSA Schedule 5, as may be appropriate, for the removal of the whole of the material from public access.

27. Further amendments would be needed to be made to the BSA for (i) the withdrawal by the ACMA of any notice it has issued in the event that it is established by a subsequent order of a court (including a court of appeal) that publication of the content identified in the notice is not rendered unlawful by s.18C of the Racial Discrimination Act; and (ii) the restoration of the notice if on appeal a superior court subsequently overturns an order referred to in (i).

28. The advantages of these amendments would be:

- (a) Neither the ACMA nor content service providers have the expertise to make an assessment of whether content offends against Part IIA of the Racial Discrimination Act. Under the proposed amendments they would not need to make any such assessment. Any assessment would be made by the AHRC which has the relevant expertise or, alternatively, the matter would be determined by a court.
- (b) The issuing of appropriate notices by the ACMA to content service providers would provide a just, quick and inexpensive alternative to litigation in dealing with the publication online of material that is rendered unlawful by the provisions of Part IIA of the Racial Discrimination Act

Peter Wertheim AM
Executive Director
Executive Council of Australian Jewry
14 September 2009