

Comments on IIA Draft Code of Practice Version 5.0

Below are comments by the Internet Society of Australia (ISOC-AU) on the IIA Draft Code of Practice, Version 5.0.

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30.09.99

In general this version of the Code is better than previous efforts, and obviously a lot of hard work has gone into it. There are still some areas that require revision.

A. Definition of ISP

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"ISP" stands for Internet Service Provider and includes:

- \* those providing connectivity to the Internet.
- \* "carriage service providers" within the meaning of the Telecommunications Act, 1997 who provide access to the Internet.
- \* those persons so defined by the Broadcasting Services Act, 1992 (as amended).

The line "those providing connectivity to the Internet" should be removed as it extends the definition of ISP from the legal terminology of the appropriate Acts to a far wider and potentially unconstrained population - "providing" and "connectivity" are completely undefined and have enormous latitude of interpretation.

"Carriage service" is defined in the Telecommunications Act in terms of "network units", distances, location and ownership of network links, etc. It's not simply a matter of "providing connectivity".

### B. Sections 12 and 13

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Despite the assurances of these sections, the phrase "significant or material technical, commercial or administrative impairment" is still undefined, and may have very different meaning to different-sized businesses. This urgently needs to be defined in real terms - is "significant" to be calculated as a percentage of revenue, or profit, or size of consumer base, or what? Without some metric in this area this assurance means nothing.

C. Content Blocking (Section 12B)

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This changes the blocking regime from ABA-specified take-down notices

based on complaints and rigorous classification by the OFLC, to other regimes, including client-side filtering schemes, yet to be fully or even partly declared (Schedule 1).

1) Schedule 1: The whole of section 12B depends upon it. It proposes:

- client-side filtering
- optional differentiated services
- password-controlled limited-access systems
- like products and services

\* When will Schedule 1 filtering schemes be declared? How can any organisation accept the Code without this fundamental information?

\* Without the schemes being declared how can ISPs provide for or analyse how the ABA will notify them of prohibited content?

\* "according to information provided in confidence to the suppliers of such measures by the ABA" - why are blacklists to be provided in confidence? These procedures must be as open, transparent and accountable as possible, otherwise there will be no way to know whether content is being blocked because it genuinely breaks the law, or because it has political, religious or social commentary that is being suppressed for some reason.

2) While this shift from ISP-blocking to systems like client-side filtering takes a load off the ISPs, and could provide greater flexibility to users in blocking options, on the other hand it:

\* transfers software costs directly from ISPs to the end-users

\* users will require additional expensive help-desk support from ISPs, who will have little alternative but to recover those costs in higher fees to users

\* Client-side filtering may offer greater choice and flexibility to end-users but it must not be forgotten that existing software is notoriously inaccurate, and imposes the religious, social and political prejudices of its originators. Many of the sites blocked under standard filtering software do not carry illegal content in terms of the BSA.

#### D. The Administrative Council

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The Administrative Council is to be made up of five members: an independent chair elected by the rest of the Council, two members from the IIA and two from the Australian CONSUMERS Association, who are to represent "users".

"Users" of what is undefined. In this context the meaning of "users" is usually "Internet users", and the only body in Australia that specifically represents Internet users is ISOC-AU, the Internet Society of Australia. With no disrespect to the work of the ACA, it is not the appropriate representative of users in this case.

This is a very small and unrepresentative council in any case, and despite the reassuring consultation provisions in 15.8, ultimately it concentrates essentially all of the power to change the code into the hands of IIA.

E. Unsolicited Email

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1) Sections 10.7, 10.8, (10.9 is missing), 10.10 all express obligations with "will not send Unsolicited Email", i.e. they are compulsory. Sections 10.11 (Acceptable Use Policies), 10.12 (abuse contact points) and 10.13 (anti-fraud measures such as relay protection) are modified to "are encouraged to provide" rather than "must provide".

Why are these not obligations as well? - any reasonable ISP should have these provisions anyway, and given that clause 60(f) of the BSA deals with industry providing information to content producers about their legal responsibilities, and clause 60(i) deals with procedures to assist customers in making complaints about unsolicited email, sections 10.11, 10.12 and 10.13 should become compulsory, not optional.

2) 10.13 Code Subscriber ISPs are encouraged to install relay protection on their mail servers, so that the senders of Unsolicited Email cannot disguise the origin of that email so as to escape detection or penalty where applicable.

In the case of 10.13, it is also not advisable to restrict the anti-fraud system to "relay protection on mail servers" - the technology and the its abuses will necessarily change over time - "relay or other appropriate protection on mail servers" should be substituted.

F. Copyright (Section 9.7)

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9.7 Code Subscriber Content Providers will not knowingly place on the Internet material which, if accessed, would infringe the copyright of another person.

This should be made clearer that the relevant knowledge of the ISP is that the material infringes copyright, rather than that the material is being placed on the Internet.
