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Mr Stuart Woodley
Committee Secretary
Standing Committee on Infrastructure and Communications
PO Box 6021
Parliament House
ACT 2600

By email: ic.reps@aph.gov.au

ACMA file reference: ACMA2014/674

Dear Mr ^{Stuart}Woodley

Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997

Thank you for your letter of 12 March 2015 seeking answers to several matters raised during the Standing Committee on Infrastructure and Communications' inquiry into the use of subsection 313(3) of the *Telecommunications Act 1997* (**the Inquiry**).

The Australian Communications and Media Authority (**ACMA**) is pleased to further contribute to the Inquiry by providing the following information in response to the questions raised.

1) *What is the ACMA's current role/power in terms of disrupting websites?*

The only direct power the ACMA has to 'disrupt' websites stems from its role administering the Online Content scheme under the *Broadcasting Services Act 1992*.

Under schedules 5 and 7 of the *Broadcasting Services Act 1992*, the ACMA may investigate valid complaints about online content that is 'prohibited' or 'potential prohibited'. In making assessments about whether content meets these thresholds, the ACMA is only able to apply the classification criteria set out in the National Classification Scheme, which also applies to film, video and computer games.

The action that the ACMA can take in relation to any particular item of prohibited or potential prohibited content depends on where the content is hosted. If content is hosted in Australia, the ACMA issues a notice to the content service provider to remove the content from their service. In all cases for Australian hosted content, the ACMA applies to the Classification Board for formal classification of the content before taking final action with respect to the content.

Where prohibited or potential prohibited content is hosted overseas, the ACMA notifies the content to the providers of optional end-user (PC-based) filters accredited by industry under an Industry Code of Practice. These Family Friendly Filters are made available on an opt-in basis to consumers, at or below cost, from internet service providers (**ISPs**).

Where the ACMA investigates content that is deemed to be 'sufficiently serious' (for example, child sexual abuse material or other potentially illegal content), the ACMA refers the content to an appropriate law enforcement agency such as the Australian Federal Police (AFP), or relevant state or territory police pursuant to memoranda of understanding with relevant agencies. If the content is child sexual abuse material and hosted in a country with International Association of Internet Hotlines (INHOPE) membership, under an agreement with the AFP the ACMA refers the content directly to the INHOPE member, who then directs it to the appropriate law enforcement body for follow up action.

In the *Enhancing Online Safety for Children* legislation recently passed (which has not yet commenced), responsibility for administering the Online Content Scheme will pass to the Children's E-safety Commissioner.

In relation to Questions 2) to 4), each question raises policy issues that would be more appropriately directed to the Department of Communications, given its responsibility for developing communications policy. In this regard, the ACMA notes that the Department of Communications has made a proposal that agencies should make public any instances where they have disrupted access to a service, providing doing so would not jeopardise any ongoing investigations.

However, I have provided some additional explanatory comments which might be of assistance to the Committee.

- 2) *Could/Should the ACMA be the reporting agency for activities undertaken by government agencies under section 313?*

The ACMA's existing annual reporting to the Minister could be expanded to include information relating to the use of section 313 to disrupt illegal online services¹. Such reporting would improve transparency around such disruptions but would be dependent on industry participants (such as carriage services providers (CSPs)) and/or agencies informing the ACMA of the use of section 313 notices about the disruption of access to online services.

- 3) *Would it be appropriate for the ACMA to be responsible for the regulatory oversight of the use of section 313 by government agencies?*

The ACMA already has a regulatory role in assessing and enforcing compliance by carriers and CSPs with section 313 notices more broadly. In practice this operates to give the ACMA an ability to consider a CSP's compliance or otherwise with its substantive obligations under section 313, or disputes under section 314 between agencies and CSPs about the terms and conditions on which reasonably necessary help is to be given by the CSP. The ACMA has not, in practice, been required to exercise its powers pursuant either to sections 313 or 314.

Whether these powers should be modified or broadened is a policy matter.

However, as a practical matter, should additional roles or powers be contemplated in relation to sections 313 and 314, then the interaction between any such new roles or functions would need to be considered, particularly if any kind of ex ante oversight role about actions by either agencies or CSPs were to be contemplated.

¹ The ACMA reports annually to the Minister on matters relating to industry's cooperation with law enforcement agencies in line with statutory reporting obligations under subsection 105(5A) of the *Telecommunications Act 1997*. The ACMA also provides an annual report to the Minister under section 57 of the *ACMA Act 2005*.

The ACMA notes that the Department of Communications' proposed whole-of-government guidelines does not expand the ACMA's role in this way. Moreover, this approach does appear likely to provide some non-regulatory incentives towards a more coordinated, transparent and accountable approach to the use of section 313 to disrupt online services by agencies and incentives for those agencies to put in place appropriate internal governance processes.

The ACMA also notes that there are existing mechanisms of oversight and review of agencies available through the offices of the Commonwealth and State Ombudsman and the Federal Court.

4) *Would it be appropriate for the ACMA to act as the central agency managing requests by government agencies to disrupt the operation of illegal online services?*

Please see 3) above for the ACMA's views on issues involved with expansion of its role in relation to section 313. This kind of ex ante intervention would almost certainly also raise:

- 'boundary' questions including about other section 313 related requests for assistance;
- potential resourcing issues; and
- concerns for the ACMA about acquiring a possible de facto role in terms of being required to make judgements about the merits of active investigations being conducted by other agencies including whether another agency's intended use of a section 313 request was warranted. These may raise issues about which the ACMA may have limited expertise.

In relation to technical oversight, the ACMA considers it is highly desirable to ensure that technical best practice is identified and followed in executing blocks, given the potential for poorly implemented blocks to inadvertently and inappropriately prevent access to legitimate content. But the ACMA notes that the Department of Communications' proposed guidelines proposes to address this by requiring agencies to consult across government and relevant stakeholders to ensure that the technical measures outlined in their services disruption policies are effective, responsible and appropriate. The ACMA considers that such a proposal would be workable in addressing the issue and the ACMA would be well placed to advise on technical issues relating to the blocking of URLs for inclusion in the proposed guidelines.

The ACMA looks forward to the release of the report of the Committee in due course.

In the meantime, if you would like any additional information from the ACMA, the ACMA would of course be happy to assist.

Yours sincerely

Chris Cheah
Authority Member